

MEMORANDUM

TO: Texas Supreme Court Advisory Committee

FROM: TEX. R. CIV. P. 216-299a Subcommittee
Professor Elaine A. Carlson, Chair
Judge David Peeples
Alistair Dawson
Bobby Meadows
Tom Riney
Kent Sullivan
Kennon Wooten
Justice Tracy Christopher
Justice Bill Boyce

RE: Jury Charge in Parental Termination Cases

DATE: September 25, 2018

In his letter of July 28, 2018, Chief Justice Hecht asked the SCAC Subcommittee to study and make recommendations as to:

Jury Questions in Parental Termination Cases.

HB 7, passed by the 85th Legislature, directs the Department of Family and Protective Services and the Children's Commission to consider whether broad-form or specific jury questions should be required in Suits Affecting the Parent Child Relationship filed by the Department. In the attached report,¹ the HB 7 Task Force recommends amending Texas Rule of Civil Procedure 277 to require specific jury questions in parental termination cases and proposes a pattern jury charge. Please consider both the proposed rule amendments and the pattern jury charge.

¹ See Exhibit A: HB 7 Task Force Report

The Task Force report (i) submits several specimen jury questions² and (ii) recommends amending Rule 277 by adding the following sentence and comment:

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.

Comment: 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.

Section 161.001(b)(1) of the Family Code states twenty-one grounds for terminating parental rights (subsections A through U).³ To terminate a parent's rights to a child, the court or jury must find that:

- (1) one or more grounds (A through U) have been proved;⁴ *and*
- (2) termination is in the child's best interest.⁵

In 1990 the Texas Supreme Court held in *E.B.*⁶ that two termination *grounds* and *best interest* were properly submitted in one broad-form jury question as instructions coupled with a jury question on the ultimate issue asking whether parental rights should be terminated between child and parent.⁷ The court also stressed that Rule 277 *mandates* broad-form questions whenever feasible.⁸ In *E.B.*

² See Exhibit D: Task Force Questions.

³ See Exhibit B: Tex. Fam. Code § 16.001.

⁴ Tex. Fam. Code § 161.001(b)(1)(A)–(U).

⁵ Tex. Fam. Code § 161.001(b)(2).

⁶ *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990).

⁷ See Exhibit C: Actual Question in *E.B.*

⁸ The *E.B.* court said: "In the 1988 amendments to Rule 277 this court said broad-form submission 'shall' be used 'whenever feasible' and *eliminated trial court discretion* to submit separate questions with respect to each element of a case. Rule 277 mandates broad-form submissions 'whenever feasible,' that is, *in any or every instance in which it is capable of being accomplished*. . . . Unless

the two grounds were submitted disjunctively in the instruction, making a ten-juror “yes” answer possible even if no ten jurors agreed that either individual ground was proved. Of course, ten jurors agreed to the ultimate question of termination.

In *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 on a 2-1 vote that due process required separate submissions. The concern was that a “yes” answer could conceal that groups of perhaps 5 + 5 or 7 + 3 answered “yes” to the individual grounds. The Supreme Court held that charge error had not been preserved.

I. THE TASK FORCE REPORT.

The HB 7 Task Force has recommended that the court abrogate *E.B.* by amending Rule 277 of the Texas Rules of Civil Procedure. The Task Force’s recommended jury questions would effectuate three changes in the *E.B.* approach to submitting termination questions. These changes are explained below.

(1) Separate submission of each termination ground (i.e. not disjunctive).

Task Force recommendation: When the Department⁹ produces evidence of two or more termination grounds and asks that those grounds be submitted, the trial court must submit each ground in a separate stand-alone question (instead of one broad-form question with the grounds submitted disjunctively as in *E.B.*).

Subcommittee recommendation: Concur with the recommendation. If the choice is between (i) *E.B.* (many different grounds submitted disjunctively) and (ii) separate submission of different grounds mandated, a majority of the subcommittee recommends that each termination ground should be submitted separately.

(2) Separate submission of “best interest” in a stand-alone question.

extraordinary circumstances exist, a court *must* submit such broad-form questions.” *Id.* at 649 (emphasis added).

⁹ The Texas Department of Family and Protective Services.

Task Force recommendation: The Task Force’s proposed jury questions would submit the best-interest element in a stand-alone question, separately from the termination grounds.

Subcommittee recommendation: Concur with the recommendation but would require the “best interest” question to be predicated on a “yes” answer to *one or more* of the termination grounds asked in the charge.

The subcommittee discussed two alternatives for submitting the element of best-interest: (i) each termination ground accompanied by its own best-interest question (either in one broad-form question per ground¹⁰ or in separate predicated questions for each ground), or (ii) one best-interest question predicated on a “yes” answer to *one or more* of the several stand-alone questions addressing the grounds for termination.¹¹ A majority of the subcommittee supported the Task Force recommendation of a single best-interest question but predicated on a “yes” answer to one or more of the questions inquiring as to the termination grounds. Arguably, this would not present a *Casteel* problem as an appellate court would have the benefit of the jury’s finding as to each distinct ground. Further, “best-interest” need not be tied to a specific termination ground but rather involves the totality of the evidence and application of the “Holley factors”—provided the jury found at least one of § 161.001’s statutory termination grounds.¹²

(3) Ultimate question for the court or the jury?

Task Force recommendation: It is unclear whether the Task Force’s proposed jury questions would expressly ask the *jury* whether parental rights *should* be terminated. The Task Force’s proposed jury question 4 inquires:

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?

¹⁰ Exhibit E.

¹¹ Exhibit F.

¹² The statute provides that a “court *may* order termination” based on a finding that any of the grounds set forth in subsections A through U have been established “*and . . . that termination is in the best interest of the child.*” Tex. Fam. Code § 161.001(b)(1)–(2) (emphasis added). See *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976), and *Texas Pattern Jury Charge* 218.1A (stating the *Holley* considerations for deciding a child’s best interest).

Subcommittee recommendation: The subcommittee was concerned that Question 4 as worded might appear to give the *judge* the discretion *not* to terminate parental rights, *even if* the jury finds that one or more grounds have been proved *and* that it is in the child’s best interest that the parent’s rights be terminated. A majority of the subcommittee recommends that the ultimate question must be answered by the jury, not the court and suggests incorporating that inquiry in the best-interest question:

As to those children named below, do you find by clear and convincing evidence that terminating the parent-child relationship is in the child’s best interest **and that the parent-child relationship with Parent should be terminated?**¹³

II. OTHER CONSIDERATIONS

The subcommittee notes the following issues for consideration.

(1) The “ten jurors” requirement. Should the rules forbid disjunctive submission of different termination grounds because it is unfair or because it violates due process. The ten-juror and *Crown Life v. Casteel*¹⁴ issues are analytically different. The ten-juror problem in termination cases is whether each statutory ground must be submitted in its own stand-alone question so we can be sure that ten jurors voted for a “yes” answer to any one ground. The *Casteel* problem, in contrast, is about submission of invalid theories (no law or no evidence). *Casteel* is not about how many jurors voted for different factual theories. Needless to say, a ground that is not raised by the evidence should not be submitted at all, whether in a separate stand-alone question or in a broad-form disjunctive question.

The ten-juror issue arises from criminal case law and juror unanimity. *Compare Jefferson v. State*, 189 S.W.3d 305 (Tex. Crim. App. 2006) (juror unanimity is not required for the different modes or means by the which the offense of injury to a child was committed.), *with Pizzo v. State*, 235 S.W.3d 711 (Tex. Crim. App. 2007) (juror unanimity is required for the crime of indecency with a child by contact as to the particular contact).

(2) Texas Rule of Civil Procedure 306 Requiring Recitation

¹³ See Exhibits E and F respectively, for examples of these submissions.

¹⁴ *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

of Specific Grounds in Judgment.

Rule 306 addresses the recitation of judgment and provides:

The entry of the judgment shall contain the full names of the parties . . . for and against whom the judgment is rendered. *In a suit for termination of the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination . . .*¹⁵

The concern is that a judgment cannot fairly "state the specific grounds for termination" when two or more grounds were submitted disjunctively and the jury gave one blanket "yes" answer. Trial courts often respond to Rule 306 by simply reciting that the jury found all the disjunctive grounds. Requiring separate questions for the grounds would solve this problem. The Task Force opines that the Rule 306 requirement that a parental termination judgment must state the specific grounds arguably makes broad-form submission not feasible in parental-termination cases.

(3) Potential Appellate Consequences.

A. Because of *Casteel*, appellate courts must assess the sufficiency of the evidence supporting each of the disjunctive grounds, where challenged. But if the rules are changed and each ground is submitted separately, then whenever one ground is sufficient the opinion could discuss and affirm on that ground alone. Requiring separate submission would simplify the appellate task.

B. Section 161.001(b)(1)(M) provides that an abuse or neglect termination as to *Child A* can be the basis, without more, for losing parental rights to another child (*Child B*) in a subsequent proceeding. As a result of these collateral consequences, parents who suffer an adverse abuse or neglect termination as to *Child A* can insist that the appellate courts review all such findings in that case, before *Child B* is even born even if another ground would support termination as to *Child A*.¹⁶

¹⁵ Tex. R. Civ. P. 306 (emphasis added).

¹⁶ See, e.g., *In re K.A.F.*, No. 05-12-01582-CV, 2013 WL 3024864, at *9 (Tex. App.—Dallas June 14, 2013, no pet.). ("Because an affirmative finding that Mother's rights should be terminated based on her placing the children in dangerous conditions or engaging in endangering conduct could be used to support termination of her parental rights with respect to any future child she may have, we continue our review."); *In re J.E.M.M.*, 532 S.W.3d 874, 885 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (reviewing sufficiency of the evidence to support predicate findings under

(4) Burden on Appellants and Courts of Appeal

Appeals in parental termination cases are accelerated¹⁷ and Texas appellate courts are told to complete their review within 180 days. When faced with an Anders brief filed by a parent's counsel, their review requires enhanced efforts. From the appealing parent's perspective, a jury charge that potentially narrows the grounds found in support of termination allows for a fairer and more focused appeal.

(5) Impact of Parental Rights Decision on Jury Charge Rules for other Cases.

The Supreme Court in *E.B.* said, "The charge in parental rights cases should be the same as in other civil cases."¹⁸ The court may want some thoughtful SCAC discussion of reasons why a retreat from broad form and "disjunctiveness" in parental-termination cases should or should not apply to other kinds of civil cases.

sections 161.001(b)(1)(D)&(N) of the Family Code, despite the conclusion that sufficient evidence supported court's finding under section 161.001(b)(1)(O) because the (D) and (N) finding could impact the best-interest analysis and have collateral consequences in future cases); *In re L.D.*, No. 01-17-00471-CV, 2017 WL 6374663, at *4 (Tex. App.—Houston [1st Dist.] Dec. 14, 2017, pet. denied) ("The mother's brief argues that unchallenged predicate findings can be used to support a finding that termination is in the best interest of the child, and they also can have collateral consequences in subsequent termination proceedings involving other children. . . . Accordingly, despite the fact that other predicate findings have been conceded by both parents, we will analyze the sufficiency of the evidence of endangerment grounds to support termination under subsections D or E.); *In re C.M.C.*, __ S.W.3d __, __, No. 09-18-00074-CV, 2018 WL 3387248, at *4 (Tex. App.—Beaumont July 12, 2018, no pet. h.) ("Because this is the only possible appeal of those findings, which would be binding in a future proceeding, we will address Mother's arguments" on these subsections.).

¹⁷ See Tex. R. App. P. 28.

¹⁸ 802 S.W.2d at 648.

