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SECTION 5 TERMINATION GROUNDS

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The Family Code provides twenty-five (25) grounds for termination. *See* TEX. FAM. CODE § 161.001 *et seq.* (Lexis 2007). Only one of these grounds is necessary, together with a finding of best interest, to support termination. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Selected cases construing and/or applying the statutory termination grounds and best interest are set forth below. This article provides the most salient, seminal cases for each statutory termination ground. However, it is important that you review the relevant law from your jurisdiction, including any memorandum opinions, for variations from the representative cases below. Remember that unpublished memorandum opinions released after January 1, 2003, can be cited as precedent. An opinion from the court of appeals with jurisdiction over a particular county is controlling authority for the trial judge. Such opinions are persuasive authority for courts in other jurisdictions.

Burden of Proof

Transp. Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994) (Clear and convincing evidence is the degree of proof which 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)

In re G.M., 596 S.W.2d 846 (Tex. 1980) (To terminate parental rights, the Department must prove by clear and convincing evidence that a parent has committed one or more of the acts and/or omissions listed in Family Code section 161.001(1), and that termination is in the child's best interest)

Termination Grounds

TEX. FAM. CODE § 161.001(1)

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return

In re R.M., 180 S.W.3d 874 (Tex. App.–Texarkana 2005, no pet.) (evidence demonstrating an affirmative expression of “intent not to return” under (A) is required)

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)

(B) 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 month

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”)

(C) 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

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 T.B.D., 223 S.W.3d 515 (Tex. App.–Amarillo 2006, no pet.) (the six-month time period referred to in (C) must be a period of at least six consecutive months; evidence supporting termination under (C) insufficient where incarcerated father attempted to make contact with child therefore negating the “remaining away requirement” of (C))

In re D.J.J., 178 S.W.3d 424 (Tex. App.–Fort Worth 2005, no pet.) (evidence supporting termination under (C) insufficient where father’s incarceration prior to child’s birth negated the “voluntary” requirement of (C))

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 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 Depart-

ment to obtain visitation after child's removal from mother evidence to support termination under (C) ground)

In re B.T., 954 S.W.2d 44 (Tex. App.–San Antonio 1997, pet. denied) (father's occasional "small gifts" to child were insufficient to meet his support obligation considering father worked two jobs during the period he was out of jail)

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

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

Subsections (D) and (E) Generally

In re J.O.A., T.J.A.M., T.J.M., and C.T.M., 283 S.W.2d 336 (Tex. 2009) (endangering conduct is not limited to actions directed towards the child; it necessarily follows that the endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug usage – reaffirming *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531 (Tex. 1987))

In re M.C., 917 S.W.2d 268 (Tex. 1996) (failure to attend to a child's medical needs or to seek appropriate medical treatment for a child constitutes conduct that endangers the child)

Tex. Dep't of Human Servs. 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 the Department's custody is "evidence of endangerment")

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)

Leal v. Tex. Dep't of Protective and Regulatory Servs., 25 S.W.3d 315 (Tex. App.–Austin 2000, no pet.) (an attempt to commit suicide and/or suicidal ideation is evidence to be

considered with other factors to support a finding that the parent has engaged in conduct that endangers the well-being of a child under subsections (D) and (E))

In re S.D. and K.D., 980 S.W.2d 758 (Tex. App.–San Antonio 1998, pet. denied) (an “environment which routinely subjects a child to the probability that [he or she] will be left alone because her parents are once again jailed” endangers the physical and emotional well-being of a child under subsections (D) and (E))

In re H.C. and S.C., 942 S.W.2d 661 (Tex. App.–San Antonio 1997, no writ) (allowing a child to remain in an abusive home environment is sufficient evidence to support termination of parental rights under both subsections (D) and (E))

E.L.B. v. Tex. Dep’t of Hum. Servs., 732 S.W.2d 785 (Tex. App.–Corpus Christi 1987, no writ) (a parent’s limited mental capacity does not, as a matter of law, negate her ability to knowingly neglect her children; courts should not assume that a parent with the mental capacity of an eight year old is incapable of knowledge or awareness that her children’s physical or emotional well-being was being endangered)

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

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)

In re R.D., 955 S.W.2d 364 (Tex. App.–San Antonio 1997, pet. denied) (subsection (D) permits termination “because of a single act or omission”)

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)

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 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)

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)

Environment/Living Conditions

In re W.R.E., 167 S.W.3d 636 (Tex. App.–Dallas 2005, pet. denied) (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 uncleanness, 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))

In re J.R., and C.T., 991 S.W.2d 318 (Tex. App.–Fort Worth 1999, no pet.) (allowing a child to be exposed to domestic violence is sufficient evidence to support termination under subsection (D))

In re B.R., J.L.R., D.R., R.R., C.R., and L.J.R., 822 S.W.2d 103 (Tex. App.–Tyler 1992, writ denied) (Inappropriate, abusive, or unlawful conduct by persons who live in the home of a child or with the child is compelled to associate on a regular basis in the child’s home inherently is a part of the “conditions or surroundings” of the child’s home under subsection (D); abusive or violent conduct by a parent or other resident of a child’s home can produce an environment that endangers the physical or emotional well-being of a child within the ambit of subsection (D))

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)

Medical Neglect

In re A.P. and I.P., 42 S.W.3d 248 (Tex. App.–Waco 2001, no pet.) (evidence that a child’s medical needs have been neglected support a finding of termination under subsection (D))

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

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 U.P., 105 S.W.3d 222 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (scienter is not required for a parent’s own conduct under subsection (E))

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

Dupree v. Tex. Dep't of Protective and Regulatory Servs., 907 S.W.2d 81 (Tex. App.–Dallas 1995, no writ) (a parent's conduct both before and after the child was born is relevant to the issue of endangerment)

Domestic Violence

In re T.L.S. and R.L.P., 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 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

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 732 (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 Serv., 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; mother's engaging in illegal drug activity after agreeing not to commit such acts in the service plan established clear and convincing proof that she engaged in conduct that endangered the well-being of her children)

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 Servs., 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)

In re C.R., No. 05-07-00503-CV, 2008 Tex. App. LEXIS 3269 (Tex. App.–Dallas May 7, 2008, no pet.) (mem. op.) (trial court admitted drug test results for the limited purpose of establishing mother's and the Department's state of mind; not error as the record did not reflect the trial court relied on the test results to establish that mother failed the test or was using drugs)

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 inference from mother's invocation of her right against self-incrimination when asked questions regarding her drug use)

Environment

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))

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 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)

Inability to Parent/Failure to Protect

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

In re J.L.S., 793 S.W.2d 79 (Tex. App.–Corpus Christi 1990, no writ) (a parent’s failure to properly protect a child from the known misconduct of others is sufficient to constitute conduct that justifies termination of the parent’s rights)

In re C.D., 664 S.W.2d 851 (Tex. 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)

Instability

In re R.W., 129 S.W.3d 732 (Tex. App.–Fort Worth 2004, pet. denied) (conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child)

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 S.F., 141 S.W.3d 774 (Tex. App.–Texarkana 2004, no pet.) (evidence of criminal conduct prior to the birth of a child supports a finding that a parent has engaged in a course of conduct that endangered the well-being of the child)

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) (continuing criminal behavior that results in incarceration knowing one's parental rights are at stake is conduct that constitutes endangerment; parent's "consistent inability to avoid criminal activity implies a conscious disregard for [his] parental responsibilities")

In re W.A.B., 979 S.W.2d 804 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (evidence of frequent arrests and incarceration may constitute grounds for termination)

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)

Hutson v. Haggard, 475 S.W.2d 330 (Tex. Civ. App.–Beaumont 1971, no writ) (Texas courts have expressly rejected the argument that a non-custodial parent cannot voluntarily leave a child; "we reject the contention that imprisonment does not constitute voluntary abandonment")

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)

Parent's Bad Acts Directed Toward Another Child

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

Lucas v. Tex. Dep't of Protective and Regulatory Servs., 949 S.W.2d 500 (Tex. App.–Waco 1997, writ 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)

Trevino v. Tex. Dept. of Protective and Regulatory Servs., 893 S.W.2d 243 (Tex. App.–Austin 1995, no writ) (acts of misconduct directed toward another child, a sibling, or even an unrelated child, can be a course of conduct from which danger to one’s own child can be inferred)

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)

Subia v. Tex. Dep’t of Hum. Servs., 750 S.W.2d 827 (Tex. App.–El Paso 1988, no writ) (evidence that one child died and another child suffered severe injuries while in the care of the parent tended to support termination of parental rights to the parent’s other children)

Ziegler v. Tarrant County Child Welfare Unit, 680 S.W.2d 674 (Tex. App.–Fort Worth 1984, writ ref’d n.r.e.) (repeated abuse of one child sufficient to terminate parental rights to parent’s other children)

In re E.S.C. and L.M.M., 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)

Physical/Sexual Abuse

In re J.A.J., 225 S.W.3d 621 (Tex. App.–Houston [14th Dist.] 2006, rev’d in part) (“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 R.G. and M.M., 61 S.W.3d 661 (Tex. App.–Waco 2001, no pet.) (it is “beyond question” that sexual abuse constitutes conduct that endangers a child's physical or emotional well-being; a parent's refusal to leave a situation that exposes a child to the risk of sexual abuse constitutes conduct that supports termination under subsection (E))

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)

In re M.D.S., 1 S.W.3d 190 (Tex. App.–Amarillo 1999, no pet.) (a man who has sex with a minor engages in conduct that could endanger the emotional or physical well-being of a child)

(F) 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

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 Servs., 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)

Djeto v. Tex. Dep't of Protective and Regulatory Servs., 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)

R.W. v. Tex. Dep't of Protective and Regulatory Servs., 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)

Yepma v. Stephens, 779 S.W.2d 511 (Tex. App.–Austin 1989, no writ) (without evidence of a parent's ability to support the child during the statutory period, termination of parental rights cannot be supported under (F))

(G) 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

No cases on point.

(H) 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

In re T.B.D., 223 S.W.3d 515 (Tex. App.–Amarillo 2006, no pet.) (Evidence supporting termination under (H) insufficient where mother testified that she terminated her relationship with father during the pregnancy due to his violent tendencies and had her telephone number changed to stop father from contacting her)

In re C.H., 25 S.W.3d 38 (Tex. App.–El Paso 2000, rev'd on other grounds) (evidence sufficient to support termination under (H) where father admitted that he knew mother was pregnant but never provided her with any medical care during the pregnancy, had no contact with mother or child prior to trial, and was unable to provide support due to incarceration)

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261

No cases on point.

(J) been the major cause of:

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

Yonko v. Dep't of Family and Protective Servs., 196 S.W.3d 236 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (Mother's argument that she was molested in school, did not "settle" enough to enroll the child in school, and that she was never a resident of Texas for any relevant period of time under the statute disregarded; "The compulsory education statute does not state a residency requirement, and the caselaw indicates that moving frequently does not exempt a parent from the requirement of enrolling a child in school or otherwise providing for his education.")

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

In re L.M.I. and J.A.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.2d 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. S.B., T.B., A.B., and J.B., 225 S.W.3d 798 (Tex. App.–Fort Worth 2007, pet. granted) (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 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 Servs. Unit of the Tex. Dep't of Protective and Regulatory Servs., 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 re-trial)

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)

Jones v. Tex. Dep’t of Protective and Regulatory Servs., 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 its duty to mother, based on its prior relationship with her as former foster child, to tell “whole truth” to her; such failure amounted to prima facie proof that relinquishment was involuntary)

Lumbis v. Tex. Dep’t of Protective and Regulatory Servs., 65 S.W.3d 844 (Tex. App.–Austin 2002, pet. denied) (no improper inducement to sign relinquishment where mother was represented by counsel and understood that agreement to try to arrange an 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)

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)

(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

- (i) Section 19.02 (murder);
- (ii) Section 19.03 (capital murder);
- (iii) Section 19.04 (manslaughter);
- (iv) Section 21.11 (indecentcy with a child);

- (v) Section 22.01 (assault);
- (vi) Section 22.011 (sexual assault);
- (vii) Section 22.02 (aggravated assault);
- (viii) Section 22.021 (aggravated sexual assault);
- (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
- (x) Section 22.041 (abandoning or endangering child);
- (xi) Section 25.02 (prohibited sexual conduct);
- (xii) Section 43.25 (sexual performance by a child);
- (xiii) Section 43.26 (possession or promotion of child pornography); and
- (xiv) Section 21.02 (continuous sexual abuse of young child or children)

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 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))

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)

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”))

Segovia v. Tex. Dep’t of Protective and Regulatory Servs., 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)

(M) 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) or substantially equivalent provisions of the law of another state

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 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)

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

- (N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months, and:
- (i) the department or authorized agency has made reasonable efforts to return the child to the parent;
 - (ii) the parent has not regularly visited or maintained significant contact with the child;
- and
- (iii) the parent has demonstrated an inability to provide the child with a safe environment

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 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 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)

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

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; “[Father] presents no authority for his novel excuse argument, and the statute itself does not make a provision for excuses”)

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 contemptor 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)

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”)

(P) used a controlled substance, as defined by Chapter 481, 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

In re D.J.J., 178 S.W.3d 424 (Tex. App.–Fort Worth 2005, no pet.) (evidence supporting termination under (P) insufficient where there is no evidence that father’s conduct in taking the methamphetamines that resulted in his arrest and imprisonment endangered the child’s physical or emotion well being; father, on his own initiative, successfully completed a thirty-hour substance abuse program while he was in prison and he joined/participated in NA)

In re L.C., L.C., et al, 145 S.W.3d 790 (Tex. App.–Texarkana 2004, no pet.) (mother admitted to using marihuana and cocaine; mother made two attempts at mandatory rehabilitation; “while we note that [mother] was attempting to go through rehabilitation, we also point out it was her drug use that caused her to have to leave the children in order to attend the program. Because she had to attend the rehabilitation program, she had to leave the children in unsafe surroundings.”)

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))

In re M.J. and A.M., 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. 04-00586-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)

- (Q) 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

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)

(R) 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 Section 261.001

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 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)

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child

No cases on point.

(T) 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

In re E.M.N., 221 S.W.3d 815 (Tex. App.–Fort Worth 2007, no pet.) (Subsection (T) is not to enhance the punishment of a parent who is convicted of a crime, but rather to remedy the conditions of the children, and their caregivers, in the aftermath of a parent’s conviction for the murder of the other parent; mother’s rights not violated by retroactive application of (T))

TEX. FAM. CODE § 161.002

Termination of the parental rights of alleged biological father based on admission of paternity or paternity registry

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 (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 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 Servs., 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)

In re G.A.G., III, No. 04-07-00243-CV, 2007 Tex. App. LEXIS 8960 (Tex. App.–San Antonio Nov. 14, 2007, no pet.) (mem. op.) (no formalities that must be observed for an admission of paternity; when alleged father admitted paternity, he prevented summary termination of his rights; Department was required to meet the high burden of proof found in §§ 161.001 and 161.002(a))

In re E.A.W.S., No. 2-06-00031-CV, 2006 Tex. App. LEXIS 10515 (Tex. App.–Fort Worth Dec. 7, 2006, pet. denied) (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)

TEX. FAM. CODE § 161.003

Termination of parental rights based on the parent's inability to care for the child, because of the parent's mental or emotional illness or mental deficiency

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 Servs., 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)

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 may be terminated under either §§ 161.001 or 161.003 in cases in which a parent's mental illness or deficiency is relevant)

BEST INTEREST – TEX. FAM. CODE § 161.001(2)

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence of one of the previously mentioned grounds in §§ 161.001, 161.002, or 161.003 and that termination is in the child's 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. L.L.T., A.C., and W.L.C., Jr., 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)

In re J.M. and L.M., 156 S.W.3d 696 (Tex. App.–Dallas 2005, no pet.) (father's belief that 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 of work schedule indicated lack of stability in home)

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 D.C., 128 S.W.3d 707 (Tex. App.–Fort Worth 2004, no pet.) (mother’s inability to provide stable home and remain gainfully employed and her 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 A.I.G. and J.A.M., 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 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”)

D.O. v. Tex. Dep’t of Hum. Servs., 851 S.W.2d 351 (Tex. App.–Austin 1993, no writ) (*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 may properly determine that the impermanent foster care arrangement that would result if a parent retained any parental rights is 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 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 N.H. B.H., J.H., P.H., E.C., and A.D.C., 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 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 and there was no proof of mother’s lack of parenting ability, nor of the Department’s plan for child’s future)

Edwards v. Tex. Dep’t of Protective and Regulatory Servs., 946 S.W.2d 130 (Tex. App.–El Paso 1997, no writ) (when considering best interest, need for permanence is 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)

In re 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

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. and D.R.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 [his or her] future uncertain”)

In re J.S., M.N.S.C., and T.S., No. 2-07-279-CV, 2008 Tex. App. LEXIS 4149 (Tex. App.–Fort Worth June 5, 2008, pet. denied) (mem. op.). (evidence sufficient to support best interest finding despite the fact that mother: 1) completed all of her services; 2) maintained steady housing and employment; 3) had made significant progress according to her therapist; and 4) stated that she did not know who harmed her child and offered multiple explanations for the severe injuries, because of the severity of [the child’s] injury, TDFPS’s uncertainty as to the identity of the person or persons who inflicted the injuries, her denial of the intent and nature of

the injuries, her failure to inform TDFPS of her new boyfriend, and intentional neglect of the children)

In re V.A. V.A., and 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 re 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)

Desires of Child

In re J.M. and L.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 *Holley* factor)

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 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 M.D.S., 1 S.W.3d 190 (Tex. App.—Amarillo 1999, no pet.) (child just over a year old 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

Horvatic v. Tex. Dep't of Protective and Regulatory Servs., 78 S.W.3d 594 (Tex. App.–Austin 2002, no pet.) (mere opinion of guardian ad litem without supporting facts insufficient evidence to support best interest finding; 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)

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 *Horvatic* (above)– "the primary reason we reversed the decree [in *Horvatic*] 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.")

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 re M.T. and A.A., 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. and L.P.M., 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 732 (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. and B.L.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., K.A.C., L.C.D., D.J.D., and S.T.D.*, 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., K.A.C., L.C.D., D.J.D., and S.T.D., 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)