

CENTER ON HEALTH AND FAMILIES

THE CIVIL DEATH PENALTY: REFORMING STANDARDS FOR TERMINATION OF PARENTAL RIGHTS IN TEXAS

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October 2024



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THE CIVIL DEATH PENALTY: REFORMING STANDARDS FOR TERMINATION OF PARENTAL RIGHTS IN TEXAS

WRITTEN BY **Andrew C. Brown, J.D.**

KEY POINTS

- **Both the United States and Texas Supreme Courts** have long recognized that the parent-child relationship is a fundamental Constitutional right with expansive protections against government interference with private familial relations.
- **Severing the legal relationship** between a parent and their child is a “devastatingly adverse action” that is among the most “severe and irreversible” powers the state can exercise against a family.
- **During fiscal year 2022**, there were 64,561 children in the U.S. foster care system for whom parental rights had been terminated. 7,198 of these children lived in Texas.
- **There is considerable inconsistency** in and disagreement over the application of the grounds for terminating parental rights contained in the Texas Family Code, which can result in unequal and unjust outcomes.

EXECUTIVE SUMMARY

One of the most devastating and irrevocable powers the state possesses is the power to sever the legal relationship between a parent and child. Termination of the parent-child relationship (also known as “termination of parental rights”) is so severe that it has often been referred to as “the ‘death penalty’ of civil cases” (*In re D.T.*, 2021, p. 69; *In re K.M.L.*, 2014, p. 121). Due to the severity of this remedy, which results in the deprivation of fundamental Constitutional rights, Texas law requires the state to prove by clear and convincing evidence—one of the highest evidentiary standards in our justice system—that grounds for termination exist and that termination is in the best interest of the child. [Texas Family Code Section 161.001\(b\)\(1\)](#) outlines 22 unique grounds by which the state may terminate parental rights.¹ Recent litigation and decisions of the Supreme Court of Texas have raised concerns over ambiguity in statutory language that has resulted in inconsistent and potentially unjust application of certain grounds for termination by Texas courts. This paper examines the grounds for termination of parental rights provided in the Texas Family Code, analyzes cases highlighting flaws in the statutory grounds for termination, and makes recommendations for the Texas Legislature to address these flaws and provide greater clarity to courts that reduce the risk of unnecessary and unjust outcomes.

INTRODUCTION

A parent’s right to the “[...] companionship, care, custody, and management of his or her children is an interest far more precious than any property right [...]” (*Santosky v. Kramer*, 1982, pp. 758-59; quoting *Lassiter v. Department of Social Svcs.*, 1981, p. 27). For this reason, both the United States and Texas Supreme Courts have long recognized that the parent-child relationship is a fundamental Constitutional right with expansive protections against government

¹ The full text of the Texas Termination of Parental Rights Statute (Texas Family Code § 161.001(a) – (b)) is included as Appendix 1.

interference into private familial relations (*Troxell v. Granville*, 2000, p. 65; *Wiley v. Spratlan*, 1976, p. 352). These protections ensure that both children and parents benefit from the “emotional attachments that derive from the intimacy of daily association” with one another (*Smith v. Organization of Foster Families for Equality and Reform*, 1977, p. 844).

Tragically, there are children in Texas who suffer harm through abuse or neglect at the hands of their parents, which necessitates a limited role of the state to step in to protect these children. Intervention may include the removal of the child from their parents for a period while the state provides parents with the opportunity and services to address the conditions that led to the removal of the child. It is the policy of the State of Texas to pursue reunification of the child with their parents as the top priority (*Department of Family and Protective Services*, 2017). However, reunification may not always be in the best interest of the child[ren], and the state may petition a court to order the “termination of parental rights,” which, if granted, permanently ends the legal relationship between the parent and child.

Severing the legal relationship between a parent and their child is a “devastatingly adverse action” that is among the most “severe and irreversible” powers the state can exercise against a family (*M.L.B. v. S.L.J.*, 1996, p. 125; *Santosky v. Kramer*, 1982, p. 759). The Supreme Court of Texas has emphasized the severity of termination of parental rights by calling it “the ‘death penalty’ of civil cases” (*In re D.T.*, 2021, p. 69; *In re K.M.L.*, 2014, p. 121). Accordingly, the Court has long held that any state action “which break[s] the ties between a parent and child ‘can never be justified without the most solid and substantial reasons,’” and requires that any action that “permanently sunder[s] those ties, [...] be strictly scrutinized” (*Wiley v. Spratlan*, 1976, p. 352).

Recognizing the “constitutional dimensions” of the natural right of parents and children in their relationship with one another and the devastating, lifelong impact termination has on families, the Texas Legislature and state courts have attempted

to establish legal standards and guardrails to the process. In recent years, the termination process has come under increased scrutiny from attorneys who represent parents involved with child protective services, as well as the Supreme Court of Texas. This paper will provide background on the current legal standards and procedural guidelines governing terminations of parental rights in Texas, highlight concerns that have been raised with specific grounds for termination provided in the Texas Family Code, and propose recommendations for addressing these concerns.

IMPACT OF TERMINATION OF PARENTAL RIGHTS

During the fiscal year 2022 (the most recent year for which federal data is available), there were 64,561 children in the U.S. foster care system for whom parental rights had been terminated (*Children’s Bureau*, 2024). Of these, 7,198 children lived in Texas.

Research shows that the act of separating a child from his or her family is a traumatic event that increases the risk that children will experience a number of long-term negative outcomes, including substance abuse, mental and physical health challenges, poor educational performance, and incarceration (*Brown & Huntzinger*, 2019, p. 2). Children who enter foster care and later have their legal relationship with their parents severed through termination of parental rights face additional trauma due to the “ambiguous loss” associated with losing all connection to their birth parents (*Sankaran & Church*, 2023, p. 12). First proposed in the 1970s by family therapist and University of Minnesota researcher Dr. Pauline Boss, ambiguous loss describes the psychological impact characterized by a “lack of clarity about a loved one’s physical and/or psychological presence” (*Mitchell*, 2016, p. 361). Ambiguous loss can be seen in situations where a family member is physically present but psychologically absent, such as in cases of Alzheimer’s, or when a loved one is physically absent from an individual’s life, such as in cases of divorce. Ambiguous loss is experienced by children in foster care due to the sudden loss of the physical and emotional connection with parents or

siblings caused by forced separation. For a child in foster care, the trauma of ambiguous loss differs from the death of a parent in that it carries with it an “inability to resolve the situation” and achieve closure (unlike death), which if left unaddressed can result in chronic negative emotional, behavioral, psychological, and physical outcomes (p. 362). Parents who have their parental rights terminated by the state likewise experience ambiguous loss, often resulting in mental health disorders, substance abuse, economic insecurity, and antisocial behaviors that emerge or are intensified post-termination (Sankaran & Church, 2023, p. 14). Therefore, the decision by the state to take the drastic step of terminating parental rights is not a neutral act and carries significant long-term ramifications for all members of the family impacted by it.

TERMINATION OF PARENTAL RIGHTS IN TEXAS

Texas Family Code Section 161.001(b) outlines the circumstances under which a court may order the termination of the parent-child relationship. The Code requires that the state prove “by clear and convincing evidence” that a parent’s conduct falls under one of 22 distinct factual grounds and that termination is in the best interest of the child. Note that even if the state meets the burden for termination of parental rights under Section 161.001(b), the court retains the discretion to not order termination.

Basic Overview of CPS Case Process

In the context of Child Protective Services (CPS) cases, termination of parental rights generally occurs at the end of the lifecycle of a case. A CPS case begins with a report of suspected child abuse or neglect made directly to the Department of Family and Protective Services (DFPS) or another state agency. Upon receipt of the report, a Statewide Intake (SWI) Specialist conducts an initial assessment of the report and the risk associated with the allegation and may assign it for investigation (Department of Family and Protective Services, 2019a). If a report is assigned for investigation, it is referred to CPS to determine its validity and whether further action is necessary to protect the child. At this stage, the CPS investigator

If the investigator determines that the child is in immediate danger and cannot remain safely in the home, DFPS will file an original suit requesting a court order to take possession of the child and place him or her in foster care

will assign one of five possible dispositions to the allegation (Department of Family and Protective Services, 2019b). A disposition of “reason to believe” is assigned when the investigator believes there is sufficient evidence to support the conclusion that the alleged abuse or neglect occurred and that the alleged perpetrator committed it.

If the investigator determines that the child is in immediate danger and cannot remain safely in the home, DFPS will file an original suit requesting a court order to take possession of the child and place him or her in foster care (Texas Family Code Sec. 262.101). In most cases, DFPS will also request termination of parental rights in this original petition as an alternative to the primary goal of reunification (Department of Family and Protective Services, 2018). Although it is highly unlikely that DFPS will have sufficient evidence to support termination of parental rights or that the necessary components of specific grounds for termination will have been met at the time of filing an original suit, the practice of requesting termination at the start of a case is done for the sake of administrative efficiency and to “put[s] the parents on notice from the beginning of the case that if the problems that lead [sic] to removal are not resolved, DFPS may ask the court to terminate parental rights” (Department of Family and Protective Services, 2018). If the court grants the request for removal of the child, DFPS will take possession of the child, and a hearing (known as the “Adversary Hearing”) will be held “not later than the 14th day after the date the child was taken into possession” by DFPS (Texas Family Code Sec. 262.201). The Adversary Hearing is the first meaningful opportunity for the court to review evidence and determine whether the

If at the Adversary Hearing the court renders a temporary order granting DFPS conservatorship of the child, then DFPS will work with the child's parents to develop a service plan detailing the steps the parents must take to address the safety concerns that led to the removal and enable the return of the child.

child should remain in foster care or return home to their family ([Children's Commission, 2015, p. 64](#)). It is also the first opportunity for the parents of the child to present evidence countering the allegations and regain custody. At the conclusion of the Adversary Hearing, the court is required to order the return of the child unless it finds "sufficient evidence to satisfy a person of ordinary prudence and caution" that, despite reasonable efforts being made by CPS to prevent the removal of the child, a substantial risk of continuing danger to the child exists, necessitating that the child remain in DFPS conservatorship ([Texas Family Code Sec. 262.201\(g\)](#)).

If at the Adversary Hearing the court renders a temporary order granting DFPS conservatorship of the child, then DFPS will work with the child's parents to develop a service plan detailing the steps the parents must take to address the safety concerns that led to the removal and enable the return of the child ([Texas Family Code Sec. 263.101 – 102](#)). The service plan must be filed with the court within 45 days after the conclusion of the Adversary Hearing. At this point, the family will begin working on the service plan with the goal of reuniting with their child. Within 60 days following the removal of the child, the court will convene a Status Hearing to review the service plan and assess the parents' progress ([Texas Family Code Sec. 263.201](#)). The court may order modifications to the service plan during this hearing and, at the conclusion of the hearing,

will incorporate the plan into its orders ([Texas Family Code Sec. 263.202](#)).

Permanency hearings are intended to provide the court with updates on the child's status in the care of DFPS and the family's progress toward completing the service plan, as well as determine the return of the child to their family. A minimum of two permanency hearings will be held while the family is working on the service plan. The initial permanency hearing is held no later than 180 days after the conclusion of the Adversary Hearing ([Texas Family Code Sec. 263.304](#)). A second permanency hearing occurs no later than 120 days after the initial hearing ([Texas Family Code 263.305](#)). The court may (but is not required to) order additional permanency hearings for good cause or of its own initiative.

Texas law places a 12-month time limit on CPS to conclude cases and either reunite the family or move to terminate parental rights. Under [Texas Family Code Section 263.401](#), the court with jurisdiction over the case of a child in DFPS custody is required to hold a final trial on the merits by the "first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator of the child." It is during this final trial on the merits that a court may issue a final order for termination of parental rights. As discussed above, termination may only be ordered if the state is able to prove one of the 22 grounds for termination by "clear and convincing evidence" that termination is in the best interest of the child. If the court does not order termination of parental rights, it may (1) order the return of the child to their parents or (2) appoint either DFPS or a nonparent as the permanent managing conservator of the child without ordering termination ([Brown, 2020, pp. 9-10](#)).

Due to the severity of termination of parental rights as a legal remedy, it is essential that strict procedural guardrails govern its application by courts. The Supreme Court of Texas has consistently emphasized that both the United States and Texas Constitutions provide extensive "due process rights

as to the care, custody, and control of their children” (*In re N.G.*, 2019, p. 234). These rights guarantee “‘more than fair process’ and ‘provide[s] heightened protection against government interference with certain fundamental rights and liberty interests’” (*In re N.G.*, 2019, p. 234, quoting *Troxel v. Granville*, 2000, p. 65). Accordingly, a “parent may be denied the fundamental liberty interest in parenting only after they have been provided due process,” which requires the court to balance “‘three distinct factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the [s]tate’s chosen procedure; and (3) the countervailing governmental interest supporting the use of the challenged procedure’” (*In re N.G.*, 2019, pp. 235–236, quoting *In re J.F.C.*, 2003, pp. 272–273). During a final trial on the merits, a court must employ this balancing test when weighing the decision to terminate parental rights on one of the 22 grounds provided under [Texas Family Code Section 161.001\(b\)](#).

GROUNDINGS FOR TERMINATION OF PARENTAL RIGHTS

The grounds for termination of parental rights enumerated in [Texas Family Code Section 161.001\(b\)](#) (1) cover a wide array of possible situations. Some factual grounds supporting termination are based on conduct by a parent that either causes harm to a child or places the child in danger of harm. For instance, subsections (A), (B), (C), and (G) of Section 161.001(b)(1) authorize termination of parental rights where clear and convincing evidence shows that the parent has actually abandoned the child without the intent to return and resume parental responsibilities. Subsection (L) of Section 161.001(b)(1) authorizes termination where the parent has been found to have been criminally responsible for the death or serious injury of a child in connection with the commission of one of 16 specifically enumerated violent or sexual crimes, including murder, aggravated sexual assault, or human trafficking. The conduct described by these grounds provides strong evidence that the parent is unwilling to fulfil his or her duty to protect, nurture, and care for the child, or that the parent poses a clear danger to the health and safety of

the child. Other grounds, however, present a more tenuous link between the conduct of the parent and a danger to the child.

Subsection (O)

Subsection (O) is one such ground that is often criticized for the manner in which it is applied. [Texas Family Code Section 161.001\(b\)\(1\)\(O\)](#) states that a court may order the termination of parental rights if the court finds by clear and convincing evidence that the parent:

failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of 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.

According to the Supreme Court of Texas, Subsection (O) is unique among the grounds for termination because it “permits termination if a parent fails to comply with a family service plan, which, in lay terms, is a list of tasks the DFPS requires—and the trial court orders—the parent to perform to obtain the return of a child following removal” (*In re R.J.G.*, 2023, p. 373). The (O) ground has become the subject of increasing scrutiny from both attorneys who represent parents involved with CPS as well as the Supreme Court of Texas due to how it has been interpreted and used to effectuate terminations of parental rights.

In *R.J.G.*, the Texas Supreme Court reversed a lower court’s decision to terminate a mother’s parental rights based solely on the (O) ground. The mother in this case had her children removed from her custody by DFPS for an allegation of “neglectful supervision” after she failed to pick her children up from daycare before it closed at midnight (*In re R.J.G.*, 2023, p. 373). Consistent with the standard practice discussed above, DFPS filed a petition seeking termination of parental rights at the time of

the removal of the children. The trial court appointed DFPS temporary managing conservator of the children and incorporated the family service plan into its orders. Under the terms of the service plan, the mother was required to maintain a stable home and employment, receive treatment for substance abuse, enroll in parenting classes, resolve any pending legal matters, and undergo a mental health evaluation (p. 374). Despite some initial challenges enrolling in substance abuse classes due to the COVID-19 pandemic, the record indicates that the mother worked diligently to complete the requirements of her service plan and even sought out additional counseling after she was successfully discharged by the therapist to whom she was referred by DFPS (p. 375). In its opinion, the Supreme Court of Texas found that mother engaged in “sustained efforts to complete the plan and demonstrate her desire and ability to parent, such as by seeking counseling, staying drug-free, visiting with her children, and maintaining employment and stable housing” (p. 376). These efforts, however, were not enough to satisfy the subjective expectations of DFPS. At the mother’s termination trial, the caseworker assigned to the case testified that the mother did not comply with her plan requirements—a key fact supporting a termination under Subsection (O). However, on cross-examination, the caseworker “conceded that Mother *had* complied, just not in the way she needed to or was ordered to” (p. 376). In ordering termination of parental rights, the trial court rejected the mother’s argument that she had substantially complied with the service plan. The court of appeals affirmed, finding that the mother had failed to complete the service plan and noting that “substantial compliance with a family service plan is not the same as complete compliance” (p. 376).

The Supreme Court of Texas expressly rejected the reasoning of the lower courts, ruling that “strict or complete compliance” with a service plan is not “always necessary to avoid a judgment of termination under (O)” (*In re R.J.G.*, 2023, p. 383). In its analysis, the Court distinguishes service plan requirements that are “material” and those that are “too trivial, in the larger context of the plan and the

parent’s overall performance, to have their breach give rise to termination” (p. 382). It cautioned that trial courts “should not reflexively order termination when the evidence demonstrates noncompliance with a plan requirement,” but should instead “consider whether the nature and degree of the asserted noncompliance justifies termination under the totality of the circumstances” (pp. 373–374). Thus, the Court held that termination under Subsection (O) requires clear and convincing evidence of a violation with the material requirements of a service plan (p. 379).

Beyond providing guidance on how trial courts should apply the requirements of Subsection (O), the Court went on to discuss its concerns with how lower courts apply (O) and misuses of the ground in termination proceedings. As discussed above, the Court sought to dispel a widely held belief that strict compliance with the service plan was required to avoid termination of parental rights. In this case, the Court found that the trial court applied an erroneous interpretation of Section 161.001(b)(1) (O) that “termination was mandatory if Mother’s compliance fell short of perfect in the Department’s eyes” (*In re R.J.G.*, 2023, p. 374). As a result of this error in interpretation, the trial court failed to “consider the plan’s specificity or lack thereof, nor [...] the nature or degree of the asserted noncompliance or Mother’s commendable progress toward satisfying the numerous plan provisions that were more central to achieving the Department’s goal of family reunification” (p. 374). This failure by the trial court reveals a more grievous and dangerous flaw in Subsection (O) that undermines the fundamental rights of families—the widespread perception that termination under (O) is “‘easier to prove’ because ‘court-ordered service plans can be long and detailed’ and ‘[t]hese plans can be difficult—perhaps impossible—to comply with fully’” (*In re R.J.G.*, 2023, p. 379, quoting *In re A.A.*, 2023, p. 531).

The Supreme Court of Texas decided *In re A.A.* less than one year prior to *In re R.J.G.*, and the proximity of these two cases in which the Court expresses concern with “potential misuses of (O)” indicates significant flaws in both the application

and nature of this termination ground (*In re A.A.*, 2023, p. 531). Although the Court upheld the lower court's decision to terminate parental rights in this case, both the majority and dissenting opinions devoted significant time to addressing growing concerns with how both DFPS and lower courts utilize Subsection (O) to secure termination. In addition to concerns discussed above that DFPS is over reliant on Subsection (O) to secure termination due to the perception that it is "easier to prove" than other more detailed grounds enumerated in Section 161.001(b) (1), the Court noted that the requirements of service plans are often "vague and subjective" (p. 531). In constitutional law, the "vagueness doctrine" refers to the idea that the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution requires that statutes, particularly penal statutes, "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" (*Connally v. General Construction Co.*, 1926, p. 391). Under this doctrine, any "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law" (p. 391). Examining both the wording and application of Subsection (O) in this context indicates that this ground for termination of parental rights may be unconstitutional.

A dissenting opinion in *In re A.A.* filed by Justices Young, Blacklock, and Boyd provides further reasoning for the assertion that Subsection (O) fails to pass constitutional muster. After criticizing the majority opinion for "weaken[ing] paragraph O's requirements" by applying it to the parent who did not commit the abuse or neglect that led to the removal of the child by DFPS, the dissent notes that the growing ubiquity of terminations secured under Subsection (O) derives from the fact that its use is "just so easy for the State that there is often little incentive to go beyond it" (*In re A.A.*, 2023, pp. 535-536). The dissent goes on to touch on the vagueness flaw inherent in Subsection (O) by stating that its "textual limitations represent an unsuccessful legislative attempt to confine that provision's use," which has

Taken together, the opinions filed in both R.J.G and A.A. suggest that the constitutionality of Subsection (O) is suspect. The Texas Legislature would do well to heed the concerns raised by the Supreme Court of Texas and consider the full repeal of Subsection (O), otherwise the court might strike it down itself.

"allowed it to proliferate" (p. 536). Taken together, the opinions filed in both *R.J.G* and *A.A.* suggest that the constitutionality of Subsection (O) is suspect. The Texas Legislature would do well to heed the concerns raised by the Supreme Court of Texas and consider the full repeal of Subsection (O), otherwise the court might strike it down itself.

Subsections (D) and (P) and the Meaning of "Endangerment"

Texas Family Code Section 161.001(b)(1)(D) allows for termination of parental rights if clear and convincing evidence shows that the parent has "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." Similarly, Subsection (P) permits termination on a showing that a parent "used a controlled substance [...] in a manner that endangered the child" and either failed to complete a court-ordered treatment program or continued to use the controlled substance following the completion of a treatment program (Texas Family Code Section 161.001(b)(1) (P)). Although these grounds for termination seem to be straightforward in their requirements, they have been the subject of litigation concerning what conduct by a parent is "sufficiently endangering to the children to warrant termination" (*In re R.R.A.*, 2024, p. 283 (Blacklock, J., dissenting)).

The Supreme Court of Texas took up the issue in the case *In re R.R.A.* In this case, the Court reversed a decision of the Court of Appeals for the Fourteenth District of Texas that had overturned the termination

of a father's parental rights by the trial court under Subsections (D), (E), and (P) (pp. 274-275). In overturning the termination of father's parental rights, the Court of Appeals "concluded that the Department of Family and Protective Services had failed to prove harm to the children as a direct result of their father's methamphetamine use" (p. 271). The majority opinion argued that the court of appeals "failed to apply the meaning of 'endanger,' which involves a 'substantial risk of harm to the child' and 'improperly disregarded evidence supporting the trial court's finding that the father used illegal drugs in a manner that created a substantial risk of harm to his children'" (pp. 271-272). The debate between the majority and dissenting opinions reveals that the application of Subsection (D) carries a measure of subjectivity in determining whether a parent's actions create an environment that poses a substantial risk of harm to the safety and well-being of the parent's children. It also shows that reasonable, learned minds can disagree as to the severity of conduct required to clear the high bar required for termination of parental rights.

Both the majority and dissent agree that the father in *R.R.A.* struggled with numerous issues, including addiction, anxiety, depression, homelessness, and a lack of stable employment (pp. 275, 282-283). The opinions diverge, however, on whether these issues placed the children in danger of harm. The majority opinion recounts "a damning litany of the father's sins," including ongoing use of methamphetamine and marijuana, a period of homelessness during which the family lived in the father's car, the father's failure to adequately comply with his drug treatment plan, an incident of the father threatening self-harm, and the presence of a visitor at the father's house who had methamphetamine and drug paraphernalia in her purse (pp. 272-273, 283). It should be noted that the majority acknowledges that the father "initially followed the family service plan," successfully completed outpatient drug treatment, and tested negative for drugs on numerous occasions (p. 272).

Although the dissenting opinion acknowledges these issues and concedes that the father was not

a "model father," it takes issue with the majority's determination that the father's struggles placed his children in danger of harm or subjected the children to abuse or neglect (pp. 282-283). According to the majority, termination of father's parental rights, even in the absence of evidence showing direct harm to his children, was proper because "a parent's endangering conduct need not 'be directed at the child or that the child actually suffers injury'" (*In re R.R.A.*, 2024, p. 277, quoting *Texas Department of Human Services v. Boyd*, 1987, p. 533). Thus, endangerment may be found in a "larger array of conduct that 'expos[es a child] to loss or injury,'" or "presents substantial risks" to a child's physical or emotional well-being, health, or safety (p. 277).

However, the Court's earlier decision in *Boyd* places an important limitation on the meaning of "endanger" by clarifying that it "means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment" (*Texas Department of Human Services v. Boyd*, 1987, p. 533). For the dissent, this limitation exposes a critical flaw in the majority's reasoning—a failure to recognize that termination under Subsections (D) and (P) requires more than "suspicion and inference about the generalized dangers associated with parental addiction and instability" or "concerns that drug addiction is incompatible with good parenting" (*In re R.R.A.*, 2024, p. 283).

The dissent goes to great lengths to emphasize that its objection to termination of father's rights in this case is not to excuse or endorse the father's bad behavior, but rather a statement about the seriousness of termination as a remedy and the need for strong guardrails to govern its application. Employing the "extraordinary remedy of termination," the dissent argues, requires "clear and convincing evidence showing how and when *this father* endangered *these children* to a degree that warrants judicial termination of his legal fatherhood" (p. 283). At minimum, this requires a showing that "the children have actually suffered significant harm or have blessedly avoided significant harm despite being exposed to extraordinarily dangerous conditions by their parents" (p. 284). The dissent points out that

such evidence is lacking in this case as the record reflected that the children were “clean, healthy, and well-fed,” the father frequently received help caring for his children from his mother, and DFPS found “no clear signs of abuse or neglect” during its visits (p. 282). Accordingly, the dissent argued that growing up in a “non-ideal family situation,” while certainly higher risk than more idyllic environments, is not sufficiently endangering to children as to justify termination of parental rights (p. 284).

The key issue identified in the dissent is whether the mere fact of children growing up in a “non-ideal family situation—whether poverty, homelessness, drugs, living in a rough neighborhood, etc.” warrants “the extraordinary remedy of termination” (p. 284). For the dissent, the answer in this case was “no” because the “awesome remedy of parental termination” must be based on clear and convincing evidence rather than “the ‘inferences’ upon which the majority relies” (p. 284).

The dialogue between the majority and dissenting opinions in *R.R.A.* shows just how difficult termination decisions are for courts. It is also a case that emphasizes the importance of clarity of legislative language for the application of the law to “marginal cases—in which a troubled family has thus far cared adequately for its children but the government suspects this may not continue” (p. 282). If the state is to possess the power “to forcibly sever the legal bond between a parent and child,” then the Legislature, in drafting laws to be applied by courts, must take care to clearly articulate the standards governing the application of this most devastating penalty in a manner that minimizes confusion, subjectivity, and the risk of unnecessary harm to families.

CONCLUSION AND RECOMMENDATIONS FOR REFORM

Justice Antonin Scalia observed, “rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes” (Scalia, 1989, p. 1179). Uncertainty as to the requirements of a law begets unpredictability in its application to the individual citizen, which, in turn, subverts the rule of law

If the state is to possess the power “to forcibly sever the legal bond between a parent and child,” then the Legislature, in drafting laws to be applied by courts, must take care to clearly articulate the standards governing the application of this most devastating penalty in a manner that minimizes confusion, subjectivity, and the risk of unnecessary harm to families.

and erodes liberty. There are few areas where the dangers of unpredictability and uncertainty in law are more pronounced than when the state seeks to exercise its power to legally terminate the relationship between a parent and child. As the cases discussed in this paper have illustrated, there is considerable inconsistency in and disagreement over the application of the grounds for terminating parental rights contained in the Texas Family Code. Much of this controversy is rooted in overly broad and ill-defined statutory language that leaves the door open for a wide variety of interpretations. Given the gravity of terminating the relationship between a parent and child and the trauma resulting from this drastic intervention, the Texas Legislature should reexamine the termination grounds articulated in [Texas Family Code Section 161.001\(b\)\(1\)](#) and amend the code to provide greater clarity to courts and reduce the risk of unnecessary and unjust outcomes. In doing so, the Legislature should aim to eliminate ambiguity in statutory language, ensure that the grounds for termination of parental rights are narrowly tailored and focused on the most severe cases, and repeal overly broad grounds that may be misused. Doing so will not only safeguard the fundamental Constitutional rights parents and children are guaranteed in their relationship with one another, but will also ensure that the Texas child protection system is properly oriented toward protecting those children who are in the most immediate danger of harm. ■

REFERENCES

- Brown, A., & Huntzinger, C. (2019). *Let my people go home: Reducing foster care trauma by prioritizing the use of monitored Return*. Texas Public Policy Foundation. <https://www.texaspolicy.com/wp-content/uploads/2019/04/Brown-Huntzinger-Monitored-Return.pdf>
- Brown, A. (2020). *The long and winding road: Improving outcomes for children through CPS court reform*. Texas Public Policy Foundation. <https://www.texaspolicy.com/wp-content/uploads/2020/10/2020-10-RR-Brown-CPS-Court-Reform.pdf>
- Children's Bureau. (2024). *Trends in foster care and adoption: FY 2013 – 2022*. U.S. Department of Health & Human Services. <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption>.
- Connally v. General Construction Co.*, 269 U.S. 385 (1926). <https://supreme.justia.com/cases/federal/us/269/385/>
- In re A.A.*, 670 S.W.3d 520 (Tex. 2023). <https://casetext.com/case/in-re-aa-2104>
- In re D.T.*, 625 S.W.3d 62 (Tex. 2021). <https://casetext.com/case/in-re-interest-of-dt-11>
- In the Interest of J.F.C.*, 96 S.W.3d 256 (Tex. 2003). <https://casetext.com/case/in-the-interest-of-jfc>
- In re Interest of K.M.L.*, 443 S.W.3d 101, 57 Tex. Sup. Ct. J. 1357 (Tex. 2014). <https://casetext.com/case/in-re-interest-of-kml>
- In re N.G.*, 577 S.W.3d 230 (Tex. 2019). <https://casetext.com/case/in-re-interest-of-ng-3>
- In re R.R.A.*, 687 S.W.3d 269 (Tex. 2024). <https://casetext.com/case/in-re-rra-11>
- In re R.J.G.*, 681 S.W.3d 370 (Tex. 2023). <https://casetext.com/case/in-re-rjg-15>
- Lassiter v. Department of Social Svcs.*, 452 U.S. 18 (1981). <https://supreme.justia.com/cases/federal/us/452/18>.
- Mitchell, M. (2016). The family dance: Ambiguous loss, meaning making, and the psychological family in foster care. *Journal of Family Theory & Review*, 8(3), 360–72. <https://onlinelibrary.wiley.com/doi/abs/10.1111/jftr.12151>
- M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). <https://supreme.justia.com/cases/federal/us/519/102/#tab-opinion-1959945>
- Sankaran, V., & Church, C. (2023). The ties that bind us: An empirical, clinical, and constitutional argument against terminating parental rights. *Family Court Review*, 1–19. <https://familyjusticeinitiative.org/wp-content/uploads/sites/48/2023/10/Ties-That-Bind-Us.pdf>
- Santosky v. Kramer*, 455 U.S. 745 (1982). <https://supreme.justia.com/cases/federal/us/455/745/>
- Scalia, A. (1989). The rule of law as a law of rules. *The University of Chicago Law Review*, 56(4), 1175–1188. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4632&context=uclrev>
- Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). <https://supreme.justia.com/cases/federal/us/431/816/>

- The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. (2015). *Parent Resource Guide*. <https://texaschildrenscommission.gov/media/2zrd0zxl/parent-resource-guide-2020-online.pdf>.
- Texas Department of Family and Protective Services. (2017). *Child Protective Services handbook: 6234 prioritizing permanency goals*. https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_6200.asp.
- Texas Department of Family and Protective Services. (2018). *Child Protective Services handbook: 5560 involuntary and voluntary termination of parental rights*. https://www.dfps.texas.gov/handbooks/cps/files/CPS_pg_5560.asp
- Texas Department of Family and Protective Services. (2019a). *Statewide intake & policy procedures: 1610 intake specialists*. https://www.dfps.texas.gov/handbooks/SWI_Procedures/Files/SWP_pg_1000.asp#SWP_1610
- Texas Department of Family and Protective Services. (2019b). *Child Protective Services handbook: 2281 reaching dispositions for the allegations*. https://www.dfps.texas.gov/handbooks/CPS/Files/CPS_pg_2200.asp#CPS_2280
- Texas Department of Human Services v. Boyd*, 727 S.W.2d 531 (Tex. 1987). <https://www.courtlistener.com/opinion/2430956/texas-dept-of-human-services-v-boyd/>
- Tex. Family Code § 161.001(b)(1) (2005 & rev. 2023). <https://statutes.capitol.texas.gov/Docs/FA/htm/FA.161.htm>
- Tex. Family Code § 262.101-201(g). <https://statutes.capitol.texas.gov/Docs/FA/htm/FA.262.htm>
- Tex. Family Code § 263.101-401. <https://statutes.capitol.texas.gov/Docs/FA/htm/FA.263.htm>
- Troxel v. Granville*, 530 U.S. 57 (2000). <https://supreme.justia.com/cases/federal/us/530/57/>
- Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976). <https://law.justia.com/cases/texas/supreme-court/1976/b-5707-0.html>

APPENDIX 1 – TEXT OF TEXAS FAMILY CODE TERMINATION OF PARENTAL RIGHTS STATUTE

FAMILY CODE

TITLE 5. THE PARENT-CHILD RELATIONSHIP AND THE SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

SUBTITLE B. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

CHAPTER 161. TERMINATION OF THE PARENT-CHILD RELATIONSHIP

SUBCHAPTER A. GROUNDS

Sec. 161.001. INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP.

(a) In this section, "born addicted to alcohol or a controlled substance" means a child:

- (1) who is born to a mother who during the pregnancy used a controlled substance, as defined by Chapter [481](#), Health and Safety Code, other than a controlled substance legally obtained by prescription, or alcohol; and
- (2) who, after birth as a result of the mother's use of the controlled substance or alcohol:

- (A) experiences observable withdrawal from the alcohol or controlled substance;

- (B) exhibits observable or harmful effects in the child's physical appearance or functioning; or

- (C) exhibits the demonstrable presence of alcohol or a controlled substance in the child's bodily fluids.

(b) The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

- (1) 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;

- (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 months;

- (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;

- (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;

- (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;

(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;

(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;

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

(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;

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

(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 under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, 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](#) (indecent 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 a child, elderly individual, or disabled individual);

(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);

(xiv) Section [21.02](#) (continuous sexual abuse of young child or disabled individual);

(xv) Section [20A.02](#)(a)(7) or (8) (trafficking of persons); and

(xvi) Section [43.05](#)(a)(2) (compelling prostitution);

(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;

(N) constructively abandoned the child who has 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 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;

(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;

(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;

(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;

(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;

(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;

(T) been convicted of:

(i) 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;

(ii) criminal attempt under Section [15.01](#), 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 [15.01](#), Penal Code, to commit the offense described by Subparagraph (i);

(iii) criminal solicitation under Section [15.03](#), 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 [15.03](#), Penal Code, of the offense described by Subparagraph (i); or

(iv) the sexual assault of the other parent of the child under Section [22.011](#) or [22.021](#), Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section [22.011](#) or [22.021](#), Penal Code;

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section [22.011](#) or [22.021](#), Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section [22.011](#) or [22.021](#), Penal Code; or

(V) been convicted of:

(i) criminal solicitation of a minor under Section [15.031](#), 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 [15.031](#), Penal Code; or

(ii) online solicitation of a minor under Section [33.021](#), 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 [33.021](#), Penal Code; and

(2) that termination is in the best interest of the child.

ABOUT THE AUTHOR



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Brown has dedicated his career to serving vulnerable children and strengthening families through community-focused, liberty-minded solutions. As an attorney, he has represented children in the child welfare system, advocated for the rights of parents, and helped build families through

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Andrew earned his BA magna cum laude in political science from Baylor University and his JD from Southern Methodist University Dedman School of Law. He is licensed to practice law in Texas and Virginia. His work on international adoption law and other child welfare issues has been published in leading legal journals and respected media outlets.

