LEGAL BURDEN FOR TERMINATION CASES

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1

Today we are diving into the legal mechanics of termination of parental rights trials.

Understand the high legal standard DFPS must meet to terminate parental rights.

Identify the exact statutory elements required under the Texas Family Code.

Learn how CASA's unique role directly supports or challenges the fulfillment of this burden.

While DFPS carries the legal burden of proof, CASA plays a vital role in ensuring the court has the factual, verifiable evidence required to make the right decision for the child.

2

Burden of Proof

Burden of Proof	Approximate Meaning	Common Texas Application	Who Bears the Burden?
Beyond a Reasonable Doubt	Highest standard; evidence must establish guilt to the level constitutionally required in a criminal prosecution	**Criminal cases**	State/Prosecution
Clear and Convincing Evidence	Evidence that produces a **firm belief or conviction** as to the truth of the allegations	**Termination of parental rights**; certain civil commitment proceedings; other proceedings where statute requires it	Party with statutory burden—often CPS/State
Preponderance of the Evidence	More likely than not; **greater than 50%**	Ordinary civil cases; many Family Code issues; most civil claims unless another standard applies	Party asserting the claim/defense
Reasonable Suspicion	Specific, articulable basis for suspecting that criminal activity or another legally relevant circumstance may be occurring	Investigatory stops and certain preliminary law-enforcement actions	Government/law enforcement

3

Burden of Proof at Each Stage

Stage	Approximate Timing	Primary Issue	DFPS Burden
Investigation	Day 0 → closure/removal	Is intervention necessary?	Investigative standard/policy
Emergency removal	Day 0	Immediate protection	Statutory removal showing
Adversary	≤14 days	Should child remain removed?	**Ordinary prudence and caution**
Status hearing	~60 days	Is case progressing?	**Preponderance**
Permanency hearings	~6 months and thereafter	Permanency/progress	**Preponderance**
Final permanency decision	~12 months	Permanent outcome	Depends on relief requested
Termination trial	Generally within statutory timeline	Terminate parental rights?	**Clear and convincing**
Adoption	After termination	Adoption/permanency	Generally **preponderance**

4

BENCH OR JURY TRIAL

5

Jury or Bench?

Bench Trial	Jury Trial
Persuade one judge	Persuade the jury
Judge understands CPS terminology	Jury may have no CPS experience
Less need to explain basic legal concepts	Must make complicated facts understandable
Legal arguments are often more prominent	Storytelling and presentation become particularly important
Judge determines credibility	Jury determines credibility
Judge applies the law to the facts	Judge gives the law; jury answers submitted questions
Counsel can focus heavily on legal sufficiency	Counsel must translate evidence into persuasive factual answers

THE BIG DIFFERENCE FOR TRIAL COUNSEL ⚖️ SAME BURDEN — DIFFERENT AUDIENCE

6

TRIAL
FINAL RESOLUTION

7

Termination: Two Questions, Not One

QUESTION 1 — Has CPS proved at least one statutory predicate ground?

QUESTION 2 — Has CPS proved that termination is in the child's best interest?

Both questions require legally sufficient evidence.

Termination requires **clear and convincing** evidence.

The attorney must present evidence that addresses the statutory requirements—not simply evidence that the parent has problems.

8

What is Clear and Convincing Evidence?

9

Termination is the "civil death penalty" in Texas law.

The burden is **Clear and Convincing Evidence**, meaning the measure or degree of proof that will produce in the mind of the trier of fact a **firm belief or conviction** as to the truth of the allegations.

This is a much higher standard than a standard civil lawsuit (preponderance) but lower than a criminal case (beyond a reasonable doubt).

Because parental rights are constitutionally protected, the State cannot just show that a parent is 'imperfect.' DFPS must present evidence that creates a 'firm belief or conviction' in the judge or jury's mind. If the evidence is shaky or vague, the State loses.

10

Termination Grounds

11

Constitutional Context

Parental rights are fundamental interests protected by the Constitution.

Termination is permanent and carries heightened procedural protections.

Due process requires heightened proof and meaningful procedural safeguards.

Trial practice should therefore be element-specific, evidence-driven, and precise.

12

Most Common Termination Grounds
Texas Family Code 161.001(b)(1)

Ground		Description	Typical Evidence
Endangering conditions	**(D)**	Knowingly placed or allowed the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being	Unsafe home, domestic violence, drug environment, dangerous people in the home
Endangering conduct	**(E)**	Engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the child's physical or emotional well-being	Drug use, violence, criminal activity, repeated dangerous conduct
Constructive abandonment	**(N)**	Voluntarily abandoned the child and, despite substantial efforts by DFPS, failed to maintain significant contact or demonstrate adequate ability to provide a safe environment	Minimal contact, failure to visit, failure to demonstrate ability to care for child
Substance abuse	**(O)**	Used a controlled substance in a manner that endangered the child's health or safety and failed to complete required treatment or continued abuse after treatment	Positive tests, admissions, drug-related conduct, treatment history
Incarceration	**(P)**	Knowingly engaged in criminal conduct that has resulted in the parent's conviction of an offense; and confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition	Certified copies of the judgments establishing length of sentence.

13

D & E Sound like the same thing!!

The difference between an **endangering environment** and **endangering conduct**.

For a endangering environment, we're focused on the conditions or surroundings.

For a endangering conduct, we're focused on the parent's conduct or knowingly placing the child with someone whose conduct endangered the child.

"The parent has problems" is not a legal ground for termination.

The question is whether the evidence establishes a statutory ground and best interest by clear and convincing evidence.

14

D Ground: Conditions or Surroundings

Question: Did the parent knowingly place or knowingly allow the child to remain in conditions or surroundings that endangered physical or emotional well-being?

Evidence may include the home environment, violence, substance-related hazards, dangerous individuals, unsafe supervision, or other circumstances depending on the record.

Endangerment requires a connection between the conditions and danger to the child's physical or emotional well-being.

Build the evidence around what the parent knew, what the child was exposed to, and why the circumstances created the required danger.

15

E Ground: Course of Conduct

Question: Did the parent engage in conduct—or knowingly place the child with persons who engaged in conduct—that endangered the child?

Endangerment can be established by a pattern or course of conduct.

Actual injury is not required; the issue is exposure to a substantial risk of harm.

Evidence before or after removal may be relevant when it illuminates the parent's course of conduct.

Build a chronology that connects the conduct to this child.

16

What “Knowing” Requires

Identify the parent's knowledge of the circumstances or conduct at issue.

Use direct evidence where available: admissions, messages, records, observations, warnings, and service history.

Use circumstantial evidence when appropriate, but make the inference explicit.

Separate knowledge from mere occurrence: prove why the evidence supports the inference that the parent knew or knowingly allowed the circumstance.

17

Past Conduct, Future Risk and Remedial Evidence

Past conduct can be probative of future conduct in similar circumstances.

Completion of services is evidence—but it is not itself the statutory question.

Failure to complete a service is not automatically a separate termination ground.

Use post-removal evidence to show changed circumstances, continuing risk, protective capacity, or absence of meaningful change.

18

How CASA Helps Meet the Burden - Grounds

Be Specific on Service Plans: Instead of reporting 'Father is uncooperative,' document: 'Father missed 4 out of 6 drug screens on [Dates], and failed to attend therapy sessions from October to December.'

Chronological Endangerment Log (Grounds D/E): Document exact dates, statements, or observable physical conditions that showcase environmental or behavioral hazards.

Attorneys cannot introduce hearsay or vague generalities as clear and convincing evidence. If you testify or write a report, provide hard dates, direct quotes, and exact timelines. Your specific notes provide the bricks the DFPS attorney needs to build their case.

19

Best Interest: Separate, But Interconnected

DFPS must prove best interest by clear and convincing evidence.

The same evidence may be considered on both the predicate ground and best interest.

But the court must make a distinct best-interest determination.

Do not assume proving D or E automatically proves best interest.

Build a best-interest record addressing the child, parent, placement, risks, and realistic alternatives.

20

Holley Factors

Desires of the child.
Emotional and physical needs now and in the future.
Emotional and physical danger now and in the future.
Parental abilities of the individuals seeking custody.
Programs available to assist the parent.
Plans for the child or by the individuals/agency seeking custody.
Stability of the proposed placement or home.
Acts or omissions indicating the existing parent-child relationship is not proper.
Any excuse for the acts or omissions.

Holley v. Adams, 544 S.W.2d 367 (Tex. 1976); In re C.H., 89 S.W.3d 17

21

Holley Is Not a Checklist

No requirement to prove every Holley factor.

Absence of evidence on a factor does not automatically defeat best interest.

Conversely, absence of evidence cannot itself be treated as affirmative proof supporting termination.

Look at the entire record and totality of circumstances.

Strong evidence on a small number of factors may be enough in one case; sparse evidence across the board may not be.

In re C.H., 89 S.W.3d 17; Texas appellate authorities applying Holley

22

§263.307: Safe Environment Factors

The prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

§263.307 identifies circumstances relevant to whether the child's parents are willing and able to provide a safe environment.

Relevant circumstances can include age, vulnerabilities, history of abuse/neglect, substance use, domestic violence, criminal history, and protective capacity.

Tex. Fam. Code §263.307

23

How CASA Helps Meet the Burden – Best Interests

Interview Aggressively: Talk to teachers, therapists, foster parents, and medical professionals to document the child's progress or regression.

Contrast Placements: Document the child's behavioral improvements in a stable foster home compared to their distress or behavioral spikes around parental visits.

Capture the Child's Voice: Clearly document the child's explicit wishes, or if they are non-verbal, their attachment behaviors.

To satisfy the Holley factors, we need comparative evidence. Show the court the contrast between the chaos of the past and the stability of the child's current or proposed permanent placement. Get reports from therapists—expert opinions carry massive weight under the clear and convincing standard.

24

How CASA Helps Meet the Burden – Best Interests Cont.

Avoid emotional summaries: "The mother doesn't seem to care.“

Instead use objective statements: "During the 1-hour visit on 11/12, the mother spent 45 minutes on her phone and did not interact with the child despite the child crying."

Do not rely on the caseworker's notes—verify documentation independently.

If a parent's attorney cross-examines you, generalities will crumble. Stick to the facts. What did you see? What did you hear? When did it happen? Objective facts survive legal scrutiny; emotional opinions do not.

25

Placement Evidence: Safety, Permanence, and Reality

Identify where the child is placed and who provides daily care.

Establish stability: school, medical care, relationships, routines, and developmental needs.

Establish permanence: proposed plan, caregiver commitment, and ability to meet needs.

Address the parent's realistic plan—not merely whether the parent loves the child.

Compare risks and protective capacity without turning the case into a popularity contest.

26

A Practical CASA Checklist

Before recommending termination, ask:

1. **What specific evidence supports termination?**
2. **What statutory ground has been established?**
3. **What evidence supports best interest?**
4. **Am I describing the child's needs—or comparing adults?**
5. **Have I considered culture and family connections?**
6. **Am I distinguishing safety concerns from placement preference?**
7. **Have I accurately considered the parent's progress and relationship with the child?**

27

A Placement and Parent are Different Questions

Is the current placement safe, stable, loving, and meeting the child's needs?

AND

Has DFPS proven the statutory requirements necessary to terminate the parent's rights?

A "yes" to the first question does not automatically answer the second.

28

“Better Placement” Is Not a Termination Ground

A child may be thriving with grandparents, relatives, or fictive kin.

The placement may provide excellent care, stability, resources, and cultural connections.

Those facts are important—but they do not, standing alone, establish a statutory ground for termination.

The court must evaluate the entire record.

29

Cultural Identity Is Part of the Child’s Best Interest

What is this child’s cultural identity?

What family relationships and traditions matter?

Does the placement support language, culture, religion, traditions, and community connections?

What does the child say about his or her identity?

What relationships can safely be preserved?

Cultural considerations inform the analysis; they do not replace the legal standard.

30

Avoid the "Good Family vs. Bad Parent" Comparison

Be careful with comparisons such as:

"The foster family is more stable."

"The foster parents have more resources."

"The foster parents understand the child's culture better."

Instead ask: What does the evidence show about the parent's ability to safely parent this child?

31

CASA's Role: Observe, Report, Advocate

CASA can provide valuable information about:

- The child's adjustment to placement
- The child's expressed wishes
- Family relationships and cultural connections
- School, developmental, and emotional needs
- The child's relationship with the parent

Distinguish observations from legal conclusions.

32

Is the Concern About Safety or Preference?

SAFETY

- Specific risk to the child
- Evidence of harm or danger
- Parent's ability to protect the child

PREFERENCE

- More resources or stability
- Shared culture
- Child likes the placement
- Placement is willing to adopt

The distinction matters.

33

The Takeaway

A GREAT PLACEMENT IS NOT THE SAME THING AS A LEGAL BASIS FOR TERMINATION.

See the whole child.

Understand the child's identity.

Preserve safe family connections.

Recognize the value of the placement.

Keep the legal question separate.

"Where should this child live?" is not automatically the same question as "Should this parent's rights be terminated?"

34

Personal Knowledge vs. Hearsay

'How do you know that?'

Separate what the witness personally saw/heard/did from what someone reported.

Do not use the CPS referral as a substitute for proving the underlying event.

Identify the actual source of important information when possible.

Use a hearsay exception or other admissible mechanism when applicable.

35

Testimony: What Makes It Persuasive?

Chronology: what happened, when, and what changed.

Specificity: concrete observations instead of conclusions.

Corroboration: records, photographs, tests, messages, school/medical evidence, and other admissible proof.
Follow-up: what the parent did after the concern was identified.

Child-centered evidence: how the conduct affected or threatened the child.

Credibility: consistency, documentation, and acknowledgment of favorable evidence.

36

Parent Progress: Develop the Whole Record

Document meaningful improvements—not only failures.

Identify whether improvements are sustained.

Ask whether improvement addresses the original safety concern.

Distinguish compliance from capacity: attending counseling is different from demonstrating changed behavior.

Address setbacks fairly; credibility improves when the record acknowledges favorable evidence.

37

CASA: Role in the Litigation

CASA volunteers may serve as guardians ad litem/child advocates pursuant to court appointment and applicable law.

Legal advocacy can include court reports, participation in hearings, testimony and oral recommendations, and communication with counsel.

The CASA role is child-centered: safety, well-being, permanency, and best interest.

CASA advocacy should be grounded in observations, investigation, and trauma-informed assessment—not speculation.

38

CASA Evidence: Strengths and Boundaries

Direct observations of the child and placement can be highly informative.

CASA can identify unmet needs, placement issues, family connections, and practical barriers.

Recommendations should distinguish observation from information received from others.

Reports and testimony remain subject to governing evidentiary rules and court procedures.

CASA's recommendation does not replace DFPS's burden to prove statutory grounds and best interest.

39

ETHICAL CONSIDERATIONS:

Risk of Placing Adult Decisions on the Child

One of the primary concerns is that directly asking a child to choose between parents can create emotional distress, guilt, and loyalty conflicts. Children often feel they are betraying one parent by expressing a preference for the other.

Ethically, many child advocates prefer questions such as:

"Tell me about your life with Mom."
"Tell me about your life with Dad."
"What makes you feel safe and happy?"
"What would you like the judge to know?"

These approaches gather information without forcing the child into a perceived choice.

40

ETHICAL CONSIDERATIONS:

Child's Voice vs. Child's Best Interests

Texas law recognizes that a child's preferences may be relevant, particularly for older children, but a child's wishes are not the sole factor in custody decisions.

A GAL has a duty to:

Investigate the child's circumstances.
Consider the child's expressed desires.
Evaluate safety, stability, emotional needs, and developmental factors.
Recommend what the GAL believes is in the child's best interests, even if it differs from the child's preference.

41

ETHICAL CONSIDERATIONS:

Age and Developmental Capacity

A teenager's expressed preference may carry more weight than that of a younger child. However, even older children can be influenced by parental pressure, fear, promises, or manipulation.

An ethical GAL should assess:

Whether the preference is genuinely the child's.
Whether the child understands the implications of the preference.
Whether the child is experiencing coercion or alienation.

42

ETHICAL CONSIDERATIONS:

Avoiding Suggestive or Leading Questions

Professional standards generally require GALs to avoid questions that:

Suggest a desired answer.
Pressure the child to take sides.
Imply responsibility for the outcome.

For example, asking "You'd rather live with your father, wouldn't you?" would raise significant ethical concerns.

43

ETHICAL CONSIDERATIONS:

Trauma-Informed Practice

Children involved in custody disputes are often under considerable stress. Ethical practice encourages minimizing further emotional harm. A GAL should be careful not to make the child feel responsible for determining where they will live.

44

ETHICAL CONSIDERATIONS:

Texas-Specific Context

In Texas custody proceedings, a judge may interview a child who is 12 or older regarding their wishes, but the child's preference does not control the outcome.

A GAL may gather information about the child's wishes as part of their investigation, but the GAL's role remains focused on best interests rather than simply reporting the child's choice.

45

ETHICAL CONSIDERATIONS:

Placement Is Not a Contest

A child’s placement cannot be judged by which home has more money, more resources, or the ability to provide a more enjoyable lifestyle.

This is not a contest between the parent and the placement.

The question is not whether another placement can provide a bigger house, more activities, more material opportunities, or a different standard of living.

The question is whether the parent-child relationship can be **safe, stable, and protective**.

46

ETHICAL CONSIDERATIONS:

Parents have a fundamental constitutional interest in maintaining their relationship with their children, and children have an important interest in maintaining that relationship as well.

Poverty is not neglect. A different lifestyle is not neglect. And a placement having more resources is not, by itself, a basis for severing a family relationship.

When considering termination, the focus must remain on the evidence:

Is the parent-child relationship safe? Is it stable? Is the parent addressing the issues that place the child at risk? Is the child protected from violence, substance abuse, and other dangers?

We do not terminate parental rights because someone else can give a child a better lifestyle. We terminate only when the statutory grounds are proven and termination is in the child's best interest.

47

QUESTIONS?

48