Children's Commission®

SUPREME COURT OF TEXAS PERMANENT JUDICIAL COMMISSION FOR CHILDREN, YOUTH AND FAMILIES

HOUSE BILL 7 TASK FORCE

REPORT TO THE 85TH LEGISLATURE ON JURY SUBMISSIONS IN SUITS AFFECTING THE PARENT CHILD RELATIONSHIP FILED BY THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

December 15, 2017

I. INTRODUCTION

The 85th Legislature enacted House Bill 7 (Act of May 26, 2017, 85th Leg., R.S., ch. 317), effective September 1, 2017. Section 6 of House Bill 7 added Section 105.002(d) of the Texas Family Code (hereinafter "Family Code"), directing the Department of Family and Protective Services ("Department"), in collaboration with interested parties, including the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families ("Children's Commission") to review the form of jury submissions in this state and make recommendations to the Legislature not later than December 31, 2017, regarding whether broad-form or specific jury questions should be required in suits affecting the parent-child relationship filed by the Department.

Section 6 of House Bill 7, as enacted by the 85th Texas Legislature is attached as Appendix A.

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

Supreme Court of Texas Misc. Order 17-9070 directs the HB 7 Task Force to advise the Court on the rules required by House Bill 7 as well as other recommendations deemed appropriate to expedite and improve the trial and appeal of cases governed by Family Code Chapter 263 no later than December 1, 2017. The Order states that in formulating the recommendations, the HB 7 Task Force is to be guided by the principle that proceedings under Chapter 263 should be expedited to minimize disruption and confusion in the lives of children and parents without precluding full consideration of the issues and their just and fair resolution.

The Supreme Court appointed a diverse group of appellate court justices, trial court judges, the former Commissioner of the Department of Family and Protective Services, attorneys representing the Department, former parents and children involved in child protection cases filed by the Department, and other legal professionals involved in child welfare.

Misc. Order 17-9070, appointed the following persons:

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

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

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

Mark Briggs, Attorney, El Paso

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

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

William B. Connolly, Attorney, Houston

Lawrence M. Doss, Attorney, Lubbock

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

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

Lisa Bowlin Hobbs, Attorney, Austin

Anissa Johnson, Attorney, Office of Court Administration, Austin

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

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

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

Richard R. Orsinger, Attorney, San Antonio

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

Georganna L. Simpson, Attorney, Dallas

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

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

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

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

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

II. PROCESS OF REVIEW

The HB 7 Task Force held one in-person meeting on August 18, 2017. Additional teleconferences were held on September 18th, October 11th, and October 18th.

This report is solely on the issue of jury submission as directed by Section 6 of House Bill 7. For recommendations related to Section 263.4055 of the Texas Family Code directing the Supreme Court

to establish procedures to address the conflict between the filing of a motion for new trial and the filing of an appeal of a final order rendered under Chapter 263 of the Family Code, as well as the period of time, including an extension of at least 20 days, for a court reporter to submit the reporter's record of a trial to an appellate court following a final order rendered under Chapter 263, please link here to read the full report of the House Bill 7 Task Force: http://texaschildrenscommission.gov/media/83668/final-hb7-task-force-report-to-sct.pdf.

III. RECOMMENDATIONS

The HB 7 Task Force recommends that the Supreme Court, as an exercise of its rulemaking authority, require granulated charges in parental termination cases and that Texas Rule of Civil Procedure (Tex. R. Civ. P.) 277 should be amended to eliminate the use of broad-form jury questions in termination of parental rights cases.

IV. DISCUSSION: BROAD-FORM JURY CHARGE IN PARENTAL TERMINATION CASES

At the August 18, 2017 in-person meeting, the discussion on broad-form submission centered on the case law in this area, the history of broad-form submission, the reasoning for the practice, and the problems presented by the use of broad-form submission. In particular, the inability to determine precisely which grounds form the basis of a termination presents a burden on the appellate courts because a challenge to the sufficiency of the evidence must address each and every alleged termination ground rather than being confined to those grounds actually found by a jury. The HB 7 Task Force also discussed the movement among parent advocates to require the jury to address each ground as to each parent, due process concerns, and whether changes to Rule 277 should apply to private termination cases.

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

The Task Force also discussed whether the Supreme Court set precedent for granulated questions when in 2012 the Court amended Tex. R. Civ. P. 306 (Rule 306) to require that in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. Thus, amended Rule 306 may support that broad-form submission is no longer "feasible" under Rule 277.

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

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

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

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

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

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

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

V. CONCLUSION

The goal of the House Bill 7 Task Force was to review the appropriateness, efficiency and fairness of broad-form jury submission in child protection cases. After engaging in several thorough discussions of the issues, the Task Force recommends that the Supreme Court of Texas should amend Rule 277 of the Texas Rules of Civil Procedure to eliminate the use of broad-form jury questions in suits in which termination of parental rights is requested.

DEAN RUCKER
Chair of the HB 7 Task Force

APPENDIX A

SECTION 6. Section 105.002, Family Code, is amended by adding Subsection (d) to read as follows:

(d) The Department of Family and Protective Services in collaboration with interested parties, including the Permanent Judicial Commission for Children, Youth and Families, shall review the form of jury submissions in this state and make recommendations to the legislature not later than December 31, 2017, regarding whether broad-form or specific jury questions should be required in suits affecting the parent-child relationship filed by the department. This subsection expires September 1, 2019.

APPENDIX B

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

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

> and that a workable jury system demands strict adherence to simplicity in jury charges.

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

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

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

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

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

> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.
>
> Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

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

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

APPENDIX C

Rule 277. Submission to the Jury

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

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

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

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

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

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

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

Comment to 2017 Change:

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

Recommended Pattern Jury Charge

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

Question No. 1

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

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 2

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

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 3

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

maintained significant contact with the child[ren]; and (iii) the parent has demonstrated as inability to provide the child[ren] with a safe environment.

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 4

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

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

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

CHILD 1. Answer: _____

CHILD 2. Answer: _____

APPENDIX D

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

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

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

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

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

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

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

> [L]ast year we noted that the Supreme Court has held that a trial court does not abuse its discretion by submitting a broad-form jury charge in a termination case.

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