NO. 03-98-00201-CV

IN THE

COURT OF APPEALS

OF THE

THIRD SUPREME JUDICIAL DISTRICT

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Third Court of Appeals
Diane O'Neal, Clerk

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THOMAS RETZLAFF,
APPELLANT

V.

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES,
APPELLEE

---

On Appeal from the 146th Judicial District Court
of Bell County, Texas

---

# BRIEF OF APPELLEE

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TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Come now the Texas Department of Regulatory Services, hereinafter referred to as Appellee, and submits this brief in reply to the Appellant in this matter, pursuant to the provisions of the Texas Rules of Appellate Procedure, requesting that the relief prayed for by Appellant be denied.

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## IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all parties to the trial court's final judgment, a well as the names and addresses of all trial and appellate counsel.

| PARTIES | COUNSEL |
|---|---|
| Petitioner:<br><br>Denise A. Retzlaff | Michael White<br>106 W. Central Ave.<br>Belton, Texas 76513 |
| Respondent/Appellant:<br><br>Thomas C. Retzlaff | Trial Counsel for Respondent:<br><br>Paul LePak<br>106 N. East St.<br>Belton, Texas 76513<br><br>Appellate Counsel for Appellant:<br>Michael J. Nelson<br>P. O. Box 2699<br>Harker Heights, Texas 76548 |
| Intervenor:<br><br>Texas Department of Protective and Regulatory Services | Edith A. Strickland<br>Assistant Bell County Attorney<br>Richard J. Miller,<br>Bell County Attorney<br>P. O. Box 1127<br>Belton, Texas 76513 |
| Attorney ad litem:<br><br>Neale Potts<br>P. O. Box 969<br>Belton, Texas 76513 | Guardian ad litem:<br><br>Carey Casey<br>P. O. Box 351<br>Belton, Texas 76513 |

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## STATEMENT OF THE CASE

Appellant's Statement of the Case is substantially correct, except for the error that Petitioner, ██████ Retzlaff filed the original divorce action on March 11, 1997. Appellant admitted under oath that he was the one who actually paid Ted Potter, his criminal attorney, for filing the divorce, even though his wife, ██████ Retzlaff, was listed as the petitioner for the divorce [RR III:38]. The Texas Department of Protective and Regulatory Services sought to terminate the parent-child relationship between Appellant and the children, but did not seek to terminate the parent-child relationship between Petitioner, ██████ Retzlaff, and the children. The case went to a jury trial on the merits on January 12, 1998. A unanimous verdict was returned by the jury on January 16, 1998 that Appellant had committed at least one of the grounds for involuntary termination, and further, that it was in the best interest of the children that the parent-child relationship between Appellant and the children be terminated. The Texas Department of Protective and Regulatory Services was continued as temporary managing conservator of the children at that time. A decree of termination was signed by the judge on January 22, 1998.

## GENERAL OBJECTION

Inadequately Briefed

The Appellant has inadequately briefed each point in his brief. The Appellant has not applied the authorities he cites to the facts as required under Tex. R. App. Pro. 38.1 (h). Appellant fails to refer the Court to specific places in the record in support of his authorities, and he fails to argue applying the law to the facts in this case. Appellant merely makes proclamations without any support. The Appellant has the burden to show that the record supports his contentions and to point out where in the record the matters complained of are shown. ***Brandon v. American Sterilizer Co.*** 880 S.W.2d 488 (Tex.App.--Austin 1994, no writ); *See* ***Babcock & Wilcox Co. V. PMAC, Ltd.***, 863 S.W.2d 225, 234 (Tex.App.–Houston [14th District]1993, writ denied) and ***Most Worshipful Prince Hall***, 732 S.W.2d 299, 412 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). Appellant has failed to meet this burden.

## APPELLEE'S STATEMENT OF POINTS

### REPLY POINT NO. 1

THE TRIAL COURT PROPERLY ADMITTED THE VIDEOTAPE AND THE PHOTOGRAPHS OF MAGAZINES FOUND IN APPELLANT'S HOME.

### STATEMENT OF FACTS

During the course of Appellant's ten-year marriage to ████ Retzlaff, Petitioner, Appellant participated in several extra-marital affairs which his wife learned about, as well as his children did in the latter part of the marriage [RR VIII:6,7]. He also owned a collection of pornographic books,

magazines, and videotapes which were often left in areas of the home accessible to the children, including an end table in the living room [RR V:3,44]. He kept these materials for the purpose of masturbation [RR V:64]. Appellant often masturbated in the living room using a can of Crisco while the children were home and able to observe him [RR IV:138,139; V:65,66; and VIII:6]. Appellant owned video equipment consisting of a camcorder and two video cassette recorders [RR V:67, 144,145]. He would use the equipment to videotape himself and his wife, or his girlfriend, having sex [RR IV:103,104]. On at least one occasion, he videotaped himself and his girlfriend having sex in the living room naked, while his children were at home in their bedrooms [RR IV:128-131]. ██ Retzlaff witnessed Appellant videotaping himself and his girlfriend having sex in the living room [RR VIII:6]. On another occasion, Appellant videotaped himself forcibly sodomizing his wife in the living room while the children were in their bedrooms. Towards the end of the videotaped scene, his wife is screaming in pain [RRV:55,56,61]. Appellant used his video equipment to transfer the 8 millimeter tape onto a VHS tape and splice it into other scenes [RR IV:62-65]. This VHS tape was kept in the living room on the entertainment center, and was recovered by Temple Police Department in a consent search in March of 1997 [RR V:26-29, 44]. The videotape was then given to the Bell County District Attorney's office, the videotape secured from changes by popping out the tab and kept in the evidence vault until the time of trial [RR V:22,23]. An extrapolation of the scene showing Appellant sodomizing his wife was made for the purposes of trial and was entered into evidence as Petitioner's Exhibit No. 46 [RR IV:62,63].

During the consent search, Temple Police Department also located a number of books and magazines of a pornographic nature in the end table in the living room. They were taken out of the end table and placed on the floor and photographed [RR V:30,44,45]. These photographs were

entered into evidence as Intervenor's Nos. 37 and 38 [RR IX:210-215].

## SUMMARY OF APPELLEE'S ARGUMENT

Appellant's point of error regarding his Rule 403 objection that the danger of unfair prejudice outweighed the probative value of the admission of the videotape and the photographs was not preserved for review on appeal. Appellant's attorney failed to make a Rule 403 objection at the time of the trial on the merits. Appellant's attorney had initially made a Rule 403 objection to the videotape during a pre-trial hearing, but a ruling on his Rule 403 objection had been expressly reserved by the trial court for the admission of the videotape at the time of trial. The trial court never made a ruling on the Rule 403 objection to the videotape.

Further, even if a Rule 403 objection had been properly made by Appellant's attorney and error preserved for review on appeal, there would be no error, because any potential for prejudice regarding the videotape is outweighed by its probative value. The videotape is relevant evidence on the issue of the children's exposure to the father's inappropriate sexual conduct, family violence, and the environment in which the children were knowingly placed by their father and in which they were knowingly allowed to remain.

The videotape was properly authenticated by [redacted] Retzlaff in that she testified that it was an accurate representation of the scene it purported to depict and that she was personally familiar with the scene. Appellant's argument that the videotape was not authenticated because it did not include scenes which occurred after the fifteen minute scene is an argument wholly without merit. Any error would have been cured, because Appellant testified to what his version of the events were that took place after the end of the fifteen minute scene.

As with the videotape, no Rule 403 argument was made as to the photographs entered into evidence, therefore no error was preserved for review on appeal. Even if error had been properly preserved for review on appeal to a denied Rule 403 objection, the photographs were relevant to the fact issue of the accessibility of the pornographic materials to the children.

## ARGUMENT AND AUTHORITIES

I. Multifarious Points

Appellant has addressed more than one legal issue involving more than one ruling of the trial court in this point of error. Appellant in his summary argues that the trial court erred in denying Appellant's Motions in Limine Nos. 6, 7, 8, 9, 10, and 11; Appellant's objections to the use of the term "rape"; and admission of the video tape and other (unspecified) sexually explicit materials. Appellant, in his argument and authorities, addresses only the points that the trial court erred in the admission of the videotape and the photographs of the pornographic materials taken by Temple Police Department based on Texas Rules of Civil Evidence 403, and that the videotape was not properly authenticated [AB 11]. Appellee will address only the two points that Appellant addressed in his argument and authorities.

II. Prejudicial versus Probative Value

The rule of evidence pertaining to the exclusion of otherwise relevant evidence on special grounds, reads in pertinent part:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." ***Vernon's Texas Rules of Evid., rule 403.***

A. Error not preserved

Although Appellant's trial counsel did make a Rule 403 objection during pre-trial testimony regarding the admissibility of the videotape, and the trial court overruled Appellant's arguments as to authentication, the trial court reserved his ruling on the Rule 403 objection until the time the video tape was offered [RR XII:81,82]. Appellant's trial counsel failed to renew his Rule 403 objection during the trial on the merits [RR XII:59,60].

The rule of evidence pertaining to the preserving of error for review on appeal as applies to the exclusion of evidence reads as follows: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected", and "(i)n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." ***Vernon's Texas Rules of Evid., rule 103(a) and (a)(1).*** The question of whether or not a substantial right of the Appellant was affected is not reached because Appellant's attorney failed to renew his Rule 403 objection during the trial on the merits and failed to obtain a ruling from the trial court, thereby failing to preserve error for review on appeal.

B. No Error

Appellant admits that the trial court has broad discretion in allowing photographs into evidence, citing ***Fibreboard Corp. v. Pool***, 813 S.W. 2d 658 (Tex. App.--Texarkana 1991, writ denied),but relies on ***Heddin v. Delhi Gas Pipeline Co.***, 522 S.W. 2d 886 (Tex. 1975)[photographs of dead animals] for the propositioin that photographic reproductions that are merely calculated to arouse the sympathy, prejudice or passion of the jury should not be admitted. The Supreme Court in ***Heddin*** found that "(t)he photographs of the dead animals introduced on behalf of the landowners here had no relevance to the disputed issues; they were not calculated to

aid the jury in its understanding of the case." ***Heddin***, supra at 890. The Court held that the "(a)dmission of these highly inflammatory and irrelevant photographs was such error as was reasonably calculated to cause and probably did cause the rendition of an improper judgment."

The admissibility of photographs generally is set out in ***Fibreboard Corp.:***

> The general rule is that pictures or photographs that are relevant to any issue in the case are admissible. *Texas Employers Ins. Ass'n v. Agan*, 252 S.W. 2d 743 (Tex. Civ. App. – Eastland 1952, writ ref'd). When a photograph is a proper representation of an important fact issue, the admission or rejection of it is a matter which rests largely within the discretion of the trial judge, and that decision will not be disturbed on appeal unless an abuse of discretion is shown. *Richardson v. Missouri-K.-T.R. Co. of Texas*, 205 S.W. 2d 819, 824 (Tex. Civ. App. – Fort Worth 1947, writ dism'd). Relevant evidence will not be excluded simply on the ground that it would create prejudice if permitted. *Sherwin-Williams Co. v. Perry Co.*, 424 S.W. 2d 940 (Tex.Civ. App. – Austin 1979. Writ ref'd n.r.e.). The fact that the photographs are gruesome does not render them inadmissible. *Texas Employers Ins. Ass'n v. Crow*, 218 S.W. 2d 230 (Tex. Civ. App. – Eastland 1949), aff'd, 148 Tex. 113, 221 S.W. 2d 235 (1949). Therefore the question in the present case is whether the pictures were relevant and otherwise admissible." ***Fibreboard Corp., id at 671.***

If a proper objection had been made and properly preserved for consideration on appeal, the question to be considered at this point is whether or not the videotape was relevant and otherwise admissible. The actions on the videotape, and the videotape itself in its presence in areas accessible to the children, are relevant to the grounds for involuntary termination of the parent-child relationship, i.e., (1) whether or not Appellant knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangers the physical or emotional well-being of the children, and (2) whether or not Appellant engaged in conduct which endangers the physical or emotional well-being of the children. The videotape is also relevant to the issue as to what is in the best interest of the children. The videotape depicts the forcible sodomy of [redacted] Retzlaff by Appellant against her will. The fact that Appellant chose to videotape the sodomy of

his wife in the living room while his children were at home is highly relevant to the issues in this trial.

Appellant argues that the videotape was inadmissible because there was no evidence that the children were ever exposed to the acts depicted on the videotape, and therefore the videotape was not relevant, relying on ***Wolfe v. Wolfe***, 918 S.W.2d 533 (Tex.App.--El Paso, 1996, writ denied). However, there is evidence that the children were exposed to the acts depicted on the videotape. Even Appellant admits that the children were in their bedrooms when the events exposed on the videotape took place. The testimony established that the apartment was approximately 1600 square feet and that all bedrooms were on a hallway leading from the liiving room, where the assault occurred. Appellant testified that the bedrooms were twenty or thiry feet off of the living room [RR IV:65,66]. The son's bedroom was where the patio door was - the closest to the living room [RR V:84]. As indicated by the questions of the Attorney for Petitioner, and the videotape itself, ███ Retzlaff screamed loudly during the assault, and it is reasonable to draw the conclusion that the children could not have ignored the activity in the living room [RR IV:65,66]. Further, Detective Price testified that a search of the Retzlaff home resulted in this videotape being found in the entertainment center next to the television in the living room, which was easily accessible to the children [RR V:26-29, 44]. It is clear that the children were exposed to the events depicted on the videotape at the time they occurred and had access to the vido tape itself as well.

Appellant argues that ***Wolfe*** is on point. However, ***Wolfe*** is easily distinguished in that the trial court "clearly was of the opinion that Marta failed to make a threshold showing that Freddy was exposed to Robert's sexual practices, and that therefore the demonstrative evidence of those

practices ws irrelevant," and that "(a)s such, the trial court's ruling does not constitute an abuse of discretion." ***Wolfe***, supra at 540. It is clear in this case that the children were exposed, over and over again, to Appellant's sexual practices, and that the trial court was of that opinion. The videotape is relevant in the instant case.

Even if the children had not been exposed to the videotape, it would be admissible as evidence of Appellant's propensity for family violence. Steve Hughes testified that in his opinion the conduct he observed in his review of the videotape, coupled with the sworn statement he had from Mrs. Retzlaff, constituted the offense of sexual assault. [RR V:22].

Even if the videotape is inherently prejudicial, the danger of unfair prejudice does not substantially outweigh the probative value of the videotape, and the trial court did not abuse its discretion in allowing the admission of the videotape. As set out in ***Fibreboard Corp., id.***, the fact that a photograph, or as in the instant case, the videotape, is gruesome does not render it inadmissible, nor will relevant evidence be excluded simply on the ground that it would create prejudice if admitted. As such, the trial court's ruling does not constitute an abuse of discretion.

B. If Error, Harmless

Even if one were to assume that the danger of unfair prejudicial value of the videotape substantially outweighed its probative value, it was not an error such that probably caused the rendition of an improper judgment. Reversible error does not usually occur in connection wtih rulings on questions of evidence unless the appellant can demonstrate that the whole case turns on the particular evidence that was admitted or excluded. ***Litton v. Hanley***, 823 S.W.2d 428, 430 (Tex.App.--Houston[1st Dist.] 1992, no writ). Also, the exclusion of evidence is harmless if it is cumulative of other evidence that was admitted on the same issue. ***Gee v. Liberty***

***Mut. Fire Ins. Co.,*** 765 S.W.2d 394, 396 (Tex.1989). *See Reply to Point of Error No. 6* for a discussion of the evidence that was admitted on the issue of Appellant's exposure to the children of his inappropriate sexual activities, as well as his tendency towards family violence.

II. Authentication of Videotape

A. No Error

To prevail on this point of error, Appellant must show that the trial court abused its discretion and that any error was reversible error. ***Syndex Corp. v. Dean***, 820 S.W. 2d 869, 873 (Tex. App. -- Austin 1991,writ denied); ***Texas Department of Human Services v. Green***, 855 S.W. 2d 136, 148 (Tex. App. -- Austin 1993, no writ).

Appellant argues that the admission of the videotape of the Appellant and his wife was an abuse of discretion by the trial court because it violated the premise that it was a true and complete depiction of the event as it took place.

***Quinonez-Saa v. State***, 860 S.W. 2d 704,706 (Tex.App.--Houston[1st Dist.],1993, writ refused), stands for the proposition that the only identification or authentication required for photographs is that the offered evidence properly represents the person, object, or scene in question, and can be testified to not only by the photographer, but by any other witness who knows the facts, even though the witness did not take the photograph himself or see it taken. Videotapes are authenticated in the same manner as photographs. Under ***Texas Rules of Evidence***, rule 1001, the definition of photographs includes videotapes. As it pertains to this case, ***Texas Rules of Evidence***, rule 1003, allows the admissibility of a duplicate the same as if it were the original unless a question is raised as to the authenticity of the original. The videotape was properly authenticated in a pre-trial hearing held on December 31, 1997 [RR XII:59-82].

Although there is some discussion on the record of a truck briefly appearing during the videotaped scene in the Retzlaff's living room [RR XI:59-82], there is no argument that the scene depicted on the videotaped failed to properly represent the scene in question. As a matter of fact, Appellant's Attorney made it quite clear that Appellant was not denying that the scene took place, but merely the characterization of it as rape [RR XII:59,60]. The argument by Appellant that the entire episode was not contained within the fifteen minute segment, and therefore was not a complete and accurate depiction of that episode, is fallacious. It is indisputable that whether it is a photograph that has been taken or a videotape which has been filmed, other events occur after the shutter closes and the camcorder shuts off; events don't freeze in time and space with a void taking the place of reality. This is not the plain meaning of the requirement that the videotape fairly and accurately depict what it purports to represent. What happens on the videotape is clear, no matter what happened after it ended. There was no error in the admission of the videotape

B. If error, waived.

Appellant would have the jury as well as the Appellate Court believe that "the depiction of the situation" had been edited from approximately two hours to fifteen minutes [AB 13]. The pre-trial hearings show that the original videotape identified as Petitioner's Exhibit No. 47 was several hours in length, as many as five hour [RR XI:13,14), consisting of several different scenes before and after the excerpt, and that Petitioner's Exhibit No. 46 was an excerpt of one scene from the original video tape [RR XIII:9-12). Appellant was given access to the video tape and could have offered under the rule of optional completeness any additional portion of Exhibit No. 47 which he felt would have "completed" the scenes contained in Petitioner's Exhibit No. 46[RR XIII:18]. Further, Appellant could have listed Petitioner's Exhibit No 47 as his own exhibit,

and offered it into evidence if he felt it would support his contentions. Appellant failed to do either of these things.

Appellant further argues in support of his argument that the video tape was not properly authenticated that "(t)he fifteen minute segment was designed to show Appellant in an extremely harsh manner while minimizing any detrimental effect to Appellee"[AB 13]. The evidence produced at trial does not support Appellant's contentions. Although Appellant denied copying the original taping from the eight-millimeter film to Exhibit 46, he admits that Exhibit 46 is an excerpt of a tape that "my wife and I made" [RR IV:63] and admitted to splicing "adult movies"[RR IV:64, 65]. Although in reference to a momentary glimpse on the videotape of a truck, Appellant denies knowing "where that came from" [RR IV:78], although he previously failed to deny taping trucks [RR IV:62]. [redacted] Retzlaff testified during the trial on the merits that Appellant would hook up two VCR's and record videotapes that he had rented in order to keep copies for himself, as well as recording programs on television, such as the "Miss U.S.A. Pageant" and "Miss Teen Pageant" [RR V:6]. The evidence indicates that Appellant spliced and edited the original videotape himself, and therefore he has no room to complain about the point where the videotape ends.

C. If Error, Harmless

Further, if there was any harm in admitting the videotape with it ending abruptly, the harm was cured when Appellant was allowed to testify as to his recollection of events that occurred after the end of the videotape. [RR IV:61,77].

III. Admission of Photographs

The only argument Appellant makes regarding Intervenor's Exhibit 37 and 38 was that they

were photos of adult magazines in the Appellant's home that were "arranged by parties unknown", but not Appellant [AB 15]. There appears to be some reference to ***Wolfe***, supra, and a Rule 403 argument, so Appellee will attempt to answer the inferential arguments by Appellant.

Lila Price, investigator for Temple Police Department, testified that Intervenor's No. 37 and No. 38 are photographs that were taken in the living room at the Retzlaff apartment; that she was present when the photos were taken; and that the items displayed in the photos had been in the end table and were pulled out so that the photographs could be taken of them [RR VII:43-45]. The only objections made by Appellant's counsel at the time of their offer at trial was that the proper foundation was not laid and that the evidence was cumulative [RR VII:44]. Again, as there was no Rule 403 objection made at the time of the trial on the merits, this point was not preserved for review on appeal.

Even if the point had been preserved for review on appeal, this case is easily distinguished from ***Wolfe***, supra, in that the children were exposed to the items displayed in the photographs in that those items were kept in an unlocked table in a common room of the apartment, easily accessible to the children, and there is a plethora of evidence tending to show that the children were repeatedly exposed to their father's sexual practices. Therefore, the evidence was highly relevant to the issues to be decided by the jury.

## REPLY POINT NO. 2

THERE WAS NO ERROR IN THE SUBMISSION OF DR. PUGLIESE'S TESTIMONY AS AN EXPERT WITNESS AT TRIAL DUE TO A LACK OF RELIABILITY AND RELEVANCE. THERE WAS NO FAILURE TO SUPPLEMENT DISCOVERY BY APPELLEES.

## STATEMENT OF FACTS

Failure to Disclose and Supplement

Several requests were made for discovery by Appellant while he represented himself pro-se. In Appellant's First Set of Interrogatories to Retzlaff, petitioner, Appellant requested in his number 3, "(p)lease identify the names and locations of all expert witnesses that may be used" [CR 164]. In Appellant's First Set of Interrogatories to the Texas Department of Protective and Regulatory Services, Appellee, Appellant had an identical request to the number 3 above [CR 167]. Appellant, in his "Respondent's Second Set of Interrogatories" filed with the clerk on August 12, 1997, requested that Retzlaff, Petitioner "...please tell me what the subject matter of your expert witness will be (Dr. Frank Pugliese, the doctor who has been treating you), along with his mental impressions and opinions held and the facts known to him which relate to or form the basis of these opinions or impressions"[CR 214].

On August 26, 1997, Petitioner filed her "Answers to Respondent's Second Set of Interrogatories". Petitioner stated in answer, "Psychological and mental status of Respondent."[CR 246]. Appellee and Petitioner answered in their respective "Supplement(s) to Respondent's First Set of Interrogatories and Intervenor's List of Direct Witnesses,"filed November

14, 1997 the information that Frank Pugliese would testify as a fact witness concerning "Thomas C. Retzlaff's psychological examination, mental state, and suitability as a father", and that as an expert witness he would also testify to "post-traumatic stress syndrome, and battered-wife syndrome"[CR 406, 422].

The only motion filed in response to Appellee's responses was Appellant's "Respondent's Second Motion to Compel Production of Documents and Motion for Sanctions under rule 215 TRCP", filed August 12, 1997, in which he demanded under his 'III' "that the Court order the production of all tangible reports, physical models, notes, data compilations and other material prepared by the Expert witness, Dr. Frank Pugliese, that was identified by the Petitioner as her Expert witness." He further demanded that the Court order that these matters be reduced to tangible form within the next five days, "regarding his treatment and/or evaluation of the Petitioner" [CR228, 229].

SUMMARY OF APPELLEE'S ARGUMENT

Appellant never objected to the form or substance of the response given to Appellant's discovery requests, only one of which requested the subject matter of Dr. Pugliese's testimony. Petitioner listed the subject matter of Dr. Pugliese's testimony as the mental status of the Respondent. Both Petitioner and Appellee, Intervenor, without request from Appellant further describe the subject matter of Dr. Pugliese's testimony, including the mental status of Respondent, as well as the psychological evaluation of Respondent, and also listed various other matters to which Dr. Pugliese would testify. Because there was no request for the subject matter of Dr. Pugliese's testimony to be listed in discovery requests to Intervenor, there was no obligation to

supplement. Further, there should have been no surprise on the part of Appellant, because the mental status of Respondent was listed as the subject matter, the subject of Respondent's interest in children was discussed in Dr. Pugliese's second psychological examination of Respondent, which was both disclosed to Respondent and listed as an exhibit. Further, Appellant had the right and opportunity to depose Dr. Pugliese, which he failed to do, if he wanted the specifics of his testimony as to his mental status.

## ARGUMENT AND AUTHORITIES

Appellant argues that "(t)he trial court erred in overruling Appellant's objections to the speculative testimony of Dr. Pugliese as to possible future acts and that these tendencies had actually occurred, citing the Reporters Record, Vol. 6, Pages 37-39 [AB 16]. Appellant makes two arguments: first, that it was an abuse of discretion to allow Dr. Pugliese's testimony on areas not previously disclosed; second, that "Dr. Pugliese's testimony should not have been allowed due to the fact that his 'expert' speculation of Appellant's future behavior was not scientific and unreliable" [AB 18].

### I. Failure to Disclose and Supplement

#### A. Error Not Preserved for Review on Appeal

Appellant claims that subject matter of Dr. Pugliese's testimony was not disclosed in discovery, either initially or by supplementation. Rule 166b(2)(e)(1) of the ***Texas Rules of Civil Procedure*** provides that (a) party may obtain discovery of the identity and location(name, address and telephone number) of an expert who may be called as an expert witness, the subject matter on which the witness is expected to testify, the mental impressions and opinions held by the experts,

and the facts known to the expert (regardless of when the factual information was acquired) which relate to or form the basis of the mental impressions and opinions held by the expert. Rule 166b(6)(a) requires that a party is under a duty to reasonably supplement his response if he obtains information upon the basis of which he knows that the response was incorrect or incomplete when made, or, though correct and complete when made, is no longer true and complete, and the circumstances are such that failure to amend the answer is in substance misleading. Further, under Rule 166b(6)(b),if the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty days prior to the beginning of trial except on leave of court. Under the ***Texas Rules of Civil Procedure,*** rule 215, a party may apply for sanctions or an order compelling discovery by motion, after notice and hearing, to the court. Under Rule 215(5) "(a) party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record."

It is clear from the record, including the language of the Respondent's Motion itself, that Respondent's "Second Motion to Compel Production of Documents and Motion for Sanctions under rule 215 TRCP" which was filed August 12, 1997 was the first time that Respondent had

requested by Appellant. It is also clear from a perusal of the record that Appellant failed to have the matter heard and ruled on by the trial court. Therefore, Appellant failed to preserve this point of error for review on appeal. Appellant filed a number of motions and participated in numerous hearings in which Appellant could have addressed his motion, but he failed to do so. In ***Remington Arms Company, inc., v. Caldwell***, 850 S.W. 2d 167, 170 (Tex. 1993), the court held "that the failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct."

B. No Error

Appellee and Petitioner listed the subject matter of Dr. Pugliese's testimony as the mental state of Respondent and suitability as a father, psychological and mental status of Respondent, as well as the psychological examination of the Respondent. Appellant never complained as to the sufficiency of the answer. Further, Appellant had the right to depose Dr. Pugliese in order to discover in detail his testimony as to the psychological and mental status of Appellant, as well as Dr. Pugliese's testimony as to his suitability as a father, and he did not do so. He also could have requested the production of documents from Dr. Pugliese in connection with a deposition, and he did not take advantage of this tool of discovery. Appellant merely argues that Dr. Pugliese should not have been allowed to testify to anything that was not contained in his evaluation [AB 16]. Appellee and Petitioner properly disclosed that matters outside of the evaluation would be the subject matter of Dr. Pugliese's testimony, that Appellant's mental status and suitability as a father would also be testified to.

In ***Texas Department of Human Services v. Green***, 855 S.W. 2d 136, at 149, (Tex. App.–Austin 1993, writ denied), the Court relying on ***City of Houston v.Leach***, 819 S.W. 2d 185,

190, (Tex.App.–Houston,1991, no writ), restated the proposition that "(t)he trial court has broad discretion in determining whether to allow expert testimony and the court's action will not be disturbed absent a clear abuse of discretion." In ***Texas Department of Human Services v. Green***, an expert witness was allowed to give his opinion about retaliation which was not timely objected to and thus any complaint on appeal was waived. *See **Tex.R.App.P. 33(a)***; and ***Tex.R.Civ.Evid. 103(a)***. As to the production of Dr. Pugliese's notes, etc., in spite of numerous pre-trial hearings, this motion was never heard, nor argued by counsel, and the trial court never made a ruling on it. Appellant never objected to Dr. Pugliese's testimony on the subject of pedophilia, the use of the word "pedophilia", or the risk of danger to [redacted] if contact were continued with Appellant. There was clearly no surprise on the part of Appellant during trial, shown by a lack of any objection to the testimony. Only after the recess until the next day did Appellant claim surprise. Appellant was very dilatory in claiming surprise. Appellant has failed to make a showing of a clear abuse of discretion on the part of the trial court.

C. If Error, Waived

Even if the admission of Dr. Pugliese's testimony was error, Appellant waived error. Appellant was willing to stipulate to Dr. Pugliese's qualifications as an expert [RR VI:26], and the second psychological evaluation of Appellant by Dr. Pugliese was entered **without objection** by Appellant's attorney as Petitioner's Exhibit No. 16 [RR VI:35]. Further, when Appellant questioned Dr. Pugliese on the issue of pedophilia, he waived any complaint as to the use of that term and Dr. Pugliese's expert qualifications on the subject.

D. If Error, Harmless

Even if the trial court clearly abused its discretion and should have invoked the

mandatory sanction of excluding Dr. Pugliese's testimony, any error was not reversible error. Under Tex.R.App.P. Rule 44, no judgment may be reversed unless the court of appeals concludes that the error probably caused the rendition of an improper judgment. Dr. Pugliese's testimony was merely cumulative of the other evidence of Appellant's unnatural interest in children and the admission of the testimony by Dr. Pugliese did not cause the rendition of an improper judgment. *See* Appellee's Reply Points No. 3 and No. 6 for a discussion of the evidence which was not objected to by Appellant, and often admitted to by Appellant, clearly showing the Appellant's sexual interest in children. Even totally disregarding Dr. Pugliese's testimony, the evidence was clear that Appellant had an unnatural interest in young female children, and that there was a high probability of risk to his daughter if she remained in contact with him.

II Not Scientific and Unreliable

A. Error Not Preserved for Appeal

At the time of the examination of Dr. Pugliese, no objection was made by Appellant based on ***Daubert v. Merrell Dow Pharmaceuticals, Inc***. 113 S. Ct. 2786 (1993), to challenge Dr. Pugliese's testimony as unscientific and unreliable. As a matter of fact, Appellant's attorney stipulated to the qualifications of Dr. Pugliese as an expert and did not raise a ***Daubert*** objection to any of the evidence presented by Dr. Pugliese [RR VI:26].

B. No Error

A ruling on the admissibility of evidence is within the discretion of the trial court, and only on a showing of a clear abuse of discretion will the decision be reversed. Appellant has made no showing that the admission of Dr. Pugliese's testimony was not scientific and unreliable and Appellant further failed to show that it was a clear abuse of discretion on the part of the trial

court to admit his testimony, therefore there is no reversible error.

## REPLY POINT NO. 3

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S REQUESTS FOR ANOTHER COURT-APPOINTED PSYCHOLOGIST, FOR A MISTRIAL, OR TO ALLOW APPELLANT ADDITIONAL TIME TO REVIEW DR. PUGLIESE'S TESTIMONY

### STATEMENT OF FACTS

In the first pre-trial hearing on December 10, 1997, the attorney ad litem for the children, in the hearing on his motion for a protective order requiring the children's testimony to be taken only by deposition, indicated that, "I feel that with the allegations of the fondling of [redacted] by Mr. Retzlaff, the additional evidence of -- - that is -- being found to have been in Mr. Retzlaff's possession, various magazines that tend to show that he has an interest in -- sexual interest in children..that the children can only be additionally harmed ... by ... Mr. Retzlaff being allowed to call them and give testimony in front of a jury"[RR X:9]. Appellant's attorney, himself, referred to Dr. Pugliese's evaluation as disclosing allegations of "abuse and fondling" [RR X:11]. In previous discovery disclosures, the evidence held by Temple Police Department was listed as potential exhibits for trial. That evidence included a number of photos, magazines, and books which either had incest and sex with young girls as its subject matter, or were photos of young girls in provocative poses, or were photos of young girls cut out of catalogs in bras and panties or bathing suits, mixed in with cut outs of nude, exposed women.

Dr. Pugliese's report on his second court-ordered evaluation of Appellant was filed with the

Clerk of the Court on December 8, 1997 and was marked for evidence as Petitioner's Exhibit No. 16 on December 16, 1997 [RR VIII:3]. There are numerous references to Appellant having a sexual interest in children in the report including that [redacted] Retzlaff reported that his father would say "nasty stuff to my sister's friend", "acted weird" in front of his sister's friends, and "acted like they were cute or something"[RR VIII:6]. [redacted] also "indicated that she often felt uncomfortable when her father kissed her and said he routinely 'put his hands inside my shirt and held me close to him.' Although she noted he never rubbed her breasts or genital area, she made it clear she felt very uneasy when he placed his hands inside her shirt and 'rubbed my back'." [RR VIII:7].

Additionally, Petitioner's opening statement included such statements as, "The evidence will show that the perversion and pedophilia involves girls [redacted] age," and "(T)hose children will be the victims of Thomas C. Retzlaff's power, perversion, and pedophilia"[RR II:12,13].

Appellant's attorney discussed pedophilia in his cross-examination of Dr. Pugliese and made it clear that Appellant had not been diagnosed as a pedophile, but that persons with pedophiliac tendencies can function adequately in society [RR VI:64,65]. And on his re-cross examination of Dr. Pugliese, Appellant's Attorney further questions Dr. Pugliese as to how to minimize the risk of the children being exploited by Appellant [RR VI: 90]. The next day at trial that Appellant's attorney requested that the court appoint an expert to test Appellant on the issue of pedophilia and to declare a mistrial, both of which motions were denied by the court [RR VII:3,4].

SUMMARY OF APPELLEE'S ARGUMENT

The evidence revealing Appellant's interest in young girls was disclosed more than thirty

days prior to trial. Appellant's attorney was well aware that Appellant's unnatural interest in young girls would be an issue at trial, and specifically, the issue of his possibly fondling [redacted] would be addressed. Appellant had proper discovery prior to trial. Appellant further had no objection to Petitioner's use of the term "pedophilia" twice during opening statement and claimed no surprise at that time. Appellant further stipulated to Dr. Pugliese's qualifications, did not object to the use of the term "pedophile" or "pedophilia" in the direct and cross examination of Dr. Pugliese, used the term "pedophilia" himself in his cross examination of Dr. Pugliese, and even asked Dr. Pugliese how risk might be reduced to the children in their contact with Appellant. Appellant then claimed surprise the next day, requesting a court-appointed expert, and when that was denied, requesting a mistrial. Appellant has failed to show that the trial court abused its discretion. Further, Appellant has failed to show that if the admission of Dr. Pugliese's testimony was error, that it resulted in an improper judgment.

## ARGUMENT AND AUTHORITIES

Appellant cites ***Pitman v. Lightfoot***, 937 S.W.2d 496, 537 (Tex.App.–San Antonio 1996, writ denied), for its review of the authorities in the standard for review of the granting or denying of a motion for mistrial.

> "Generally, the granting or denying of a motion for mistrial is reviewed under an abuse of discretion standard. *See Ussery v. Gray*, 804 S.W.2d 232, 237 (Tex.App. - - Fort Worth 1991, no writ) (disqualification of attorney); *Mendoza v. Ranger Ins. Co.*, 753 S.W.2d 779, 781 (Tex. App. - - Fort Worth 1988, writ denied) (jury selection). In addition to showing an abuse of discretion, appellants must also show that the trial court's error, if indeed there was error, 'was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case.' *See* Tex.R.App.P. 81(b)(1)."

## I. No Error

Appellant refers the Court to Point of Error 3 (which one must assume Appellant means Point of Error 2) for a discussion of the improper admission of testimony by Dr. Pugliese. Other than that, there are no references to the record in his argument and no **argument** applying authorities to the facts. Appellant simply assumes in his argument that the testing is prejudicial [AB 20,21]. Appellant has failed to show that the trial court has abused its discretion and that the error was such that it was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case.

Appellant indicates that the trial court failed to set forth its guiding rules [AB 20]. There is no requirement that a Court set forth its guiding rules, just that it be apparent that the Court acted without reference to any guiding rules and principles. ***Downer v. Aquamarine Operators, Inc.***, 701 S.W.2d 238, 241-42, (Tex.1985)cert. denied, 106 S. Ct. 2279 (1986).

In the direct examination of Dr. Frank Pugliese, a number of questions leading up to the sexual exploitation of children were all asked without objection by Appellant [RR VI:38-41]. Further, when Dr. Pugliese testified that his expert opinion about someone who has books about incest, sex with children, or a person who collects, pastes and is diligent about cutting and pasting collages such as in Intervenor's Exhibit No.37 [RR IX:190-209] and Petitioner's Exhibit Nol 64 [RR VIII:91-210] would give him some concern that the individual may have some pedophilia tendencies, there was no objection by Appellant either to the question or to the answer [RR VI:40] Appellant also did **not** object to Attorney for petitioner's questions, "What is pedophilia ?" and "Does Thomas C. Retzlaff fit that profile of being a pedophile?" As a matter of fact, although Appellant's argument is that he should have been appointed a court-appointed expert to counter the

label of a pedophile, Dr. Pugliese did not label Thomas Retzlaff as a pedophile, but said that he had some pedophiliac tendencies, all without objection from Appellant [RR VI:41].

The issue of pedophilia was clearly raised early on in the trial. In the first pre-trial hearing, when the children's attorney ad litem was concerned about the issue that Appellant had a sexual interest in children [RR X:9]. What else is "a sexual interest in children", other than pedophilia? The argument that Appellant was surprised by the issue of pedophilia is wholly without merit.

II. <u>If Error, Waived</u>

Any error was waived when Appellant failed to object to Dr. Pugliese's qualifications and to the nature of his testimony. Appellant never objected to the use of the term "pedophilia" during trial, from Petitioner's opening statement to the questions asked of Dr. Pugliese. Appellant's Attorney himself, waived any error when he further asked Dr. Pugliese about pedophilia. Appellant's Attorney never questioned Dr. Pugliese's qualifications to answer these questions, and totally waived any objection to them. It was only after a recess of the trial to the next day that the issue came up[RR VII:3].

III. <u>If Error, Harmless</u>

If there was error, any error was rendered harmless by the admission of other relevant evidence on the issue of Appellant's pedophiliac tendencies. *See* Appellee's Reply Point No. 6. The cumulation of other relevant, admissible evidence renders any error that was committed, harmless. The jury verdict was unanimous in this case, and a retrial without the testimony of Dr. Pugliese without the use of the term pedophilia would result in the same verdict.

## REPLY POINT NO. 4

THERE WAS NO ERROR IN THE TRIAL COURT'S LIMITATION OF APPELLANT'S VOIR DIRE.

### STATEMENT OF FACTS

The parties were instructed that they would have thirty minutes each for voir dire, that the court would control the flow of the questions, and would have the trial begin early and end late in an effort to keep it moving along [RR XIII:77-79]. An examination of Appellant's voir dire reveals that Appellant's attorney first spent time on comparing this "custody" case to political campaigns and that "negative stuff tends to be more attention grabbing" [RR II:40-46]. The Court tells Appellant's Attorney that he is out of time, after giving him a five-minute warning and a one-minute warning, and Appellant's Attorney objects [RR II:73]. Appellant's Attorney presents his bill of review, listing the questions that he wished to ask and the jurors he wanted to ask them of [RR II:120].

### SUMMARY OF APPELLEE'S ARGUMENT

Appellant was made aware of the time limitation on voir dire well ahead of the trial on the merits and could plan his voir dire to fit the trial court's proper limitation on the time. Even if the reviewing court applies the three-pronged test which is applied to the time limitations on voir dire in criminal cases, it is clear that Appellant was attempting to prolong voir dire by asking improper and immaterial voir dire questions. Appellant spent more time trying to color the jurors perception of the Department's case against Appellant as mud-slinging than in trying to ask proper voir dire questions in order to intelligently exercise his peremptory strikes. Further, he spent an unnecessary

amount of time individually questioning potential jurors outside the "strike zone". Appellant could have asked all of his proper and relevant questions of the jurors in the time allotted him; however, he misused his time asking immaterial and unnecessary questions.

ARGUMENT AND AUTHORITIES

No Error

In ***Wheatfall v. State*** ,746 S.W.2d 8-10 (Tex.App. – Houston [14th Dist.] 1988, writ ref'd.), the Court states the well accepted proposition "that a trial court may control the conduct of voir dire by imposing reasonable restrictions." The Court this goes on to state that it is equally well recognized that the right to be represented by counsel, guaranteed by Article 1, Section 10 of the Texas Constitution, encompasses the right of counsel to question the members of the jury panel in order to intelligently exercise his peremptory challenge. The Court then lists three factors established by the Court of Criminal Appeals in ***Ratliff v. State***, 690 S.W.2d 597, 599-600 (Tex.Crim.App. 1985) in determining whether the trial court has abused its discretion in limiting the voir dire examination.

First, the Constitutional guarantee of the right to be represented by counsel is a right guaranteed to a criminal defendant and does not extend in most cases to a civil litigant. An indigent respondent in a termination of the parent-child relationship does have the right under Section 107.013 of the ***Texas Family Code*** to have appointed counsel, but that right is not guaranteed by the Constitution. Second, the burden of proof in a criminal case is beyond a reasonable doubt, whereas the burden of proof in a termination case is clear and convincing. The clear and convincing standard is greater than by a preponderance, but less than beyond a

reasonable doubt required in criminal cases. While a termination case may require strict scrutiny, the same constitutional guarantees afforded a criminal defendant are not afforded the parent in a termination case.

It is appropriate before beginning an analysis of the record in the instant case, to show that the trial court made it quite clear that each party would be restricted in time in his voir dire in order to keep the trial moving along. The parties were also instructed that they would begin early and end late, and that the testimony would be moved along in a timely manner [RR XIII:77-79]. In analyzing the instant case using the three-pronged test, one must first determine whether appellant's voir dire examination reveals an attempt to prolong the voir dire, by asking irrelevant, immaterial, or unnecessarily repetitious questions.

An examination of Appellant's voir dire reveals that more time was spent trying to color the jurors' perception of the case than it was asking questions which would help Appellant intelligently exercise his peremptory challenges. These questions comparing a custody case to a political campaign and mud-slinging were irrelevant, immaterial, and a waste of time on the part of Appellant, considering the time limits that were set by the Court in advance [RR II:40-46]. Allowing Appellant to prolong voir dire in this manner would have made a mockery of the well-established standard that the trial court can make appropriate limitations on voir dire. Unlike some cases in which the tie limit was held to be unreasonable, there were no challenges for cause or discussions at the bench which contributed to a lengthy voir dire examination. Counsel should have some duty to tailor voir dire to fit the trial court's limitations, and should not be allowed to complain on appeal that his waste of time should not be held against him. It is obvious that Appellant attempted to prolong voir dire by saving his relevant and material questions for the latter

part of his voir dire.

He also spent an inordinate amount of his time in individual jurors outside the "strike zone" [RR II:49,56-58,59-60,69-70]. In this case, no one had been challenged for cause so far in the trial, and none were challenged during Appellant's Attorney's voir dire, therefore anyone past Juror No. 24 was outside of the strike zone.

Although one would not reach the second-prong of the three-prong test, considering the Appellant's attempt to prolong voir dire, Appellee concedes that at least some of the questions set out in Appellant's Bill of Review were proper, relevant, material, and not unnecessarily repetitious. However, he could have asked those questions with a more judicious use of the time allotted him by the court.

In an analysis of the third-prong, it appears that counsel was allowed to individually question at least eight of the twelve jurors who served on the jury. The fact that spent an inordinate amount of time questioning jurors outside the strike zone affected Appellant's ability to individually question the jurors who would actually serve on the jury. Appellant should have some duty to manage his time and his questions appropriately in order to fit the trial court's reasonably-imposed limitations on voir dire. If he unreasonably questions jurors outside the strike zone on immaterial and irrelevant questions, it should only be held against him, and not against appellee.

## REPLY POINT NO. 5

THE TESTIMONY OF DR. PUGLIESE WAS PROPERLY ADMITTED AT TRIAL

This issue was totally covered under Reply Points No. 2 and 3. A repetition of those points here would be superfluous.

## REPLY POINT NO. 6

THE LOWER COURT DECISION SHOULD BE AFFIRMED BECAUSE APPELLEE PROVED BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT KNOWINGLY **PLACED** THE CHILDREN IN CONDITIONS AND SURROUNDINGS WHICH ENDANGER THE PHYSICAL AND EMOTIONAL WELL-BEING OF THE CHILDREN; KNOWINGLY ALLOWED THE CHILDREN TO **REMAIN** IN CONDITIONS AND SURROUNDINGS WHICH ENDANGER THE PHYSICAL AND EMOTIONAL WELL-BEING OF THE CHILDREN; OR THAT APPELLANT **ENGAGED** IN CONDUCT WHICH ENDANGERS THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILDREN **AND** THAT IT IS IN THE **BEST INTEREST** OF THE CHILDREN THAT THE PARENT-CHILD RELATIONSHIP SHOULD BE TERMINATED BETWEEN THE FATHER AND THE CHILDREN. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT NON-OBSTANTE VEREDICTO.

## SUMMARY OF FACTS

### Physical Abuse

Appellant was convicted for assaulting on his wife, [redacted] Retzlaff, which Appellant

admitted to [RR IV:36; RR IV:37]. The testimony of Retzlaff indicated that he began hitting her while she was pregnant with . He would hit her on her head, with a fist on her arm, and he would also shake her [RR V:53]. Retzlaff also testified that Appellant would choke her and would cover her mouth so that she couldn't scream. She indicated that, "He liked rough sex." She further testified that he would often do this while the children were at home [RR V:83] She further testified that the children were used to hearing her scream and would sometimes try to intervene in order to protect her [RR V:84]. The videotape displayed the Appellant very violently sodomizing his wife against her will, physically restraining her. [RR IV:65]. Appellant admitted that the children were in bed in the house during the videotaping of the rape scene. [RR IV:65]. Helen Huff, a former co-worker of Retzlaff, testified that she had witnessed injuries to , including bruises on her face and a bruise on her arm which looked like a hand print, and also that Retzlaff had complained to her of a bruise on her back. [RR VII:30]. Retzlaff testified that she suffered hand marks on her neck from Appellant's choking her, bruises on her arms, bruises on her legs from his fists, rug burns from being dragged, a bruised back, and a fractured finger [RR V:135, 136]. In Petitioner's Exhibit 16, Retzlaff indicated to Dr. Pugliese that "...he observed his father 'smack my mom lots of times'." He also indicated that his father "...routinely 'slapped us when we acted up' and (h)e conceded he often worried that his father might 'shoot my mom' during periods of anger and added he experienced a considerable amount of nervousness and anxiety when he was at school or when he was in his room 'hearing him beat her up'." [RR VIII:5]

Retzlaff testified that Appellant would slap and on the head and would spank with a belt on the rear, the back, or the legs and that it would sometimes leave

marks. [RR V:82, 134]. In Petitioner's Exhibit No. 17, Retzlaff indicated to Dr. Pugliese that she didn't want to live with her dad because he couldn't control his anger, was mean, would start fights with her mom, and that he would follow her mom around and push and slap her and punch her in the arm. She further indicated to Dr. Pugliese that "...she often felt unsafe and insecure around her father because of his explosive temper and tendency to 'spank us real hard' and mentioned she preferred to avoid him as much as possible when he was in the home." She also stated that "...she rarely felt comfortable around her father because 'he would start all the commotion and have a deep voice that was mean and scary' that would cause her and other family members to 'think he was going to hurt us again.'" [RR VIII:6,7]

Verbal Abuse

Appellant admitted to calling his wife a bitch, stupid, and a slut in front of his children. [RR IV:141]. Appellant admitted to having a problem with impulse control, anger, and hostility. [RR IV:134]. Retzlaff testified that Appellant called her a "f___ing bitch" and "whore" in front of the children, and that had started copying his behavior around the age of four or five calling her "stupid" and "you bitch." [RR V:63]. also testified that Appellant told to "(g)o tell your mommy she's a f___ing bitch." [RR V:122]. Retzlaff further testified that Appellant "cut (her) down" in public. [RR V:141]. also testified that Appellant would call "stupid bitch" and would call , "You idiot, you stupid idiot!" [RR V:81,82]. Retzlaff also testified that Appellant had threatened to kill her. [RR V:78] In Petitioner's Exhibit 16, Retzlaff indicated to Dr. Pugliese that Appellant would call her mother names, make fun of her weight, and use lots of cuss words to criticize her.[RR VIII:6,7]. Retzlaff indicated to Dr. Pugliese in Petitioner's Exhibit 16, that Appellant would criticize

his mother by using vulgar and obscene language, including words such as "mother f___er, f__king bitch, and bitch."[RR VIII:5]. Robert Retzlaff, paternal grandfather testified that he had witnessed Appellant "hollering" at the children and that he had a problem with controlling his anger. [RR VI:231]. Judy Hicks, Principal of Cater Elementary testified that she had witnessed Appellant yelling at the children. [RR VII:68], and Wendy Beard, ██████ kindergarten teacher observed Appellant yelling at ██████ while she was attempting to run down the hallway carrying bags, books, coat, etc. [RR VII:75].

Endangering Physical Safety

Appellant admitted to keeping a loaded pistol on the headboard of his bed in 1991[RR III:150]. Appellant admitted to keeping a "sometimes" loaded gun in the house [RR III:151] He admitted that having a loaded gun around a 3-year old and an 11-month old was a problem. [RR III:158.] Evidence indicated that at the time of the search of the Retzlaff home by Temple Police Department in March 1997 both of the guns were loaded. [RR V:45]. ██████ Retzlaff indicated that Appellant kept the revolver either in the night stand in the bedroom or on the shelf of the headboard of the bed and was kept loaded [RR V:56]. She further testified that she had found ██████ holding the revolver once when ██████ was 5 years old and again when he was 6 years old. Appellant's response to this was to tell ██████ that it was wrong for him to touch the gun – that it kills people. ██████ also testified that she would take the bullets out and put them in the drawer, and Appellant would put the bullets back in the gun and put the gun back on the headboard in spite of her protestations [RR V:57]. Tom Ferman, a police officer for Temple Police Department, testified that in 1991 when he discovered 3-year old ██████ and 11-month old ██████ alone in the apartment, he had found a .357 Magnum in the headboard of the bed which is depicted with

in Petitioner's Exhibit No. 36 at R VIII:48 [RR VII:52]. Appellant admitted to leaving alone at the age of 3 with her 11-month old brother [RR III:150.] Appellant admitted to leaving alone in the house while he ran errands in 1992 [RR III:158.]. indicated that she watched the entire movie *Bambi* while she was home alone [RR IX:158]. Retzlaff testified that the first time was left alone was when she was three weeks old, because Appellant said it was okay to leave her for two hours to go to a movie. She testified that it was not an isolated incident, but that it happened often. [RR V:142,143]. Retzlaff testified that Appellant had been alone with the children in 1991 when she went to work that day in the first reported incident with CPS [RR V:59].

Physical Neglect

would come to school with his hair not combed, wearing pants he wore the day before, clothes not washed, face, hands, and fingernails dirty [RR VII:73]. Appellant would pick the children up late from school. School let out at 2:45 p.m., and he would pick them up anywhere from 3:00 p.m. to as late as 4:45 p.m. His only excuse was that he had business [RR VII:60].

Exposure to Pornography

Intervenor's Exhibit No. 5, the certified copy of the conviction of Appellant for the display of harmful to a manner, was entered into evidence [RR IX:64]. Appellant admitted to owning Petitioner's Exhibits No. 48 through 63, which were books and magazines with titles such as, *Loving Daddy*, Exhibit 48 [RR IX:58], *High School Sluts*, Exhibit 49 [RR IX:60], *Hot and Naughty Daughter*, Exhibit 50 [RR IX:62], *Family Orgy* , Exhibit 51 [RR IX:64], *Raped Daughter*, Exhibit 52 [RR IX:66], *A Sister to Rape*, Exhibit 54 [RR IX:71], *Incest Poker*, Petitioner's Exhibit 57 [RR IX:77], and *Schul-Madchen*, Exhibit 62 [RR IX-87]. Appellant

admitted that books he purchased approximately four years prior to trial were partly about incest. [RR III:43]. Evidence indicated that the videotape of the rape scene between Appellant and his wife, as well as other pornographic-type films, was found in the entertainment center close to the television in the living room and that it was accessible to the children [RR V:26-29, 44]. Evidence also indicated that some of the collages and pornographic magazines were found in a small table with unsecured doors in the living room [RR V:44], and that others were found throughout the apartment [RR V:3]. ████ Retzlaff testified that Appellant always had pornographic materials in the master bedroom in the night stand or under the bed that he used when he masturbated [RR V:64.] She further testified that he often masturbated in front of the television in the living room and kept Crisco in the entertainment center or next to it for the purpose of masturbation. She also testified that the children knew about the Crisco and what it was for [RR V:65,66]. ████ Retzlaff testified that Appellant would keep the collages contained in Petitioner's Exhibit No. 64 in the night stand in the bedroom or under the bed, both areas which were accessible to the children. She further testified that Appellant took the photographs in Intervenor's Exhibit No. 36, cut them out, and pasted them on paper. Appellant indicated that he kept them because he thought they were "fine" and "babes". ████ testified that the photos were taken no more than seven years ago and were photographs of young girls, ages 7 or 8 to 11 or 12. ████ Retzlaff testified that he used to masturbate to them [RR V:70-72.] ████ Retzlaff testified that she discovered ████ with Appellant's pornographic magazines in his bedroom at age 6. She testified that ████ had a bottle of lotion and was playing with himself [RR V:147]. ████ indicated he observed his father 'doing gross stuff' on numerous occasions i the home and said his dad kept many "dirty magazines and dirty movies all around the house", and acknowledge that he occasionally looked through some of

the pornographic magazines and watched X-rated movies from his bedroom while his dad was "scrubbing his private parts with cooking cream." He said there were numerous occasions when he saw his father "pull down his pants, put this cooking cream on his private part, scrub it, and his private part would stick up and he would say come on baby do it, come on, come on as he would rub his private part" [RR VIII:6]. [redacted] indicated that her father "would do nasty stuff" in the living room while she and her brother were getting ready for bed and that she often saw him "watching gross movies on TV." She also had witnessed her father on numerous occasions when he "put Crisco on himself and rubbed his privates" as he watched pornographic movies and that he "moaned and groaned all the time." She also indicated that he left many of his pornographic magazines on the table or on the coach and seemed to have little concern about her and her brother having access to them. She recalled one occasion when her father would "keep flipping back and forth to this program on nude people." In spite of the fact that she requested that he change the channel, he simply ignored her and kept watching that channel. [RR VIII-7]. [redacted] told the staff at Cedar Crest that "(h)is Dad has touched his sister's older friends in their private places", and also indicated to the staff that his dad would put "cream" on his "hot dog" [RR IX:183].

Exposure to Inappropriate Sexual Behavior

Appellant admitted to having sex in his apartment while the children were in their bedrooms, and at least on one occasion having sex in the living room while the children were in their bedrooms [RR IV:127]. Appellant admitted to videotaping at least one sexual encounter with Belinda Mendieta in the living room [RR IV:128]. Appellant indicated that he tried to protect the children from any exposure by telling them to stay in their bedrooms and to knock on their doors first before coming out [RR IV:12-131]. Appellant denies that he thinks [redacted] is making up what

he told Dr. Pugliese [RR IV:104] Appellant admitted to liking porno movies and to owning porno movies [RR IV:132,134]. Appellant admitted to watching *Heavy Metal* while the children were at home, while there is other evidence that Appellant called the four minor children who were in the home at the time to watch the movie which contained scenes of animated characters fully nude and engaging in sexual intercourse [RR IX:68]. Appellant admitted to masturbating in the living room while he was watching pornography on television [RR IV:138,139] Appellant admitted to keeping magazines such as ***Playboy*** under the bed and in the living room [RR IV:142, 143]. Appellant admitted to cutting out the pictures displayed in Petitioner's Exhibit No. 64 [RR IV:91] which are photographs of young girls from age 7 to 12. Appellant admitted that he was interested sexually in young girls [RR IV:111] and that he had been sexually excited by the photos of the younger girls. Appellant further admitted to using the photos to masturbate with [RR IV:112]. Appellant admitted to creating the collages of young girls in bras and panties from magazines and Sears catalogues and admitted to using them as part of his sexual fantasies [RR IV:114]. [redacted] Retzlaff testified that [redacted] would ask her to tell Appellant to put his clothes on around the house, but that Appellant would refuse to do so [RR V:150, 151].

Exposure to Inappropriate Relationships

Appellant admitted to holding hands with Laura Ellison in front of the children [RR IV:117]. In Petitioner's Exhibit No. 16, it was stated that [redacted] was aware that his dad had a girlfriend, dated their babysitter, Belinda, and witnessed his father and Belinda kissing, and on one occasion, that Appellant videotaped Belinda when she was naked. He also indicated that his father encouraged him to view the video tape of Belinda [RR VIII:6] [redacted] also indicated that she saw her father with two different girls, Laura and Belinda [RR VIII:7].

Engaging in Criminal Conduct

In addition to Appellant testifying that he was residing in jail at the time of the trial [RR III:22], following certified copies of his criminal records were entered into evidence:

Intervenor's No. 1 - an order deferring adjudication for the felony offense of carrying a prohibited weapon on school premises [RR IX:5,6];

Intervenor's No. 2 - an order deferring adjudication and a judicial confession for the felony offense of tampering with or fabricating physical evidence [RR IX:20-27];

Intervenor's No. 3 - an order deferring adjudication on a Class C criminal attempt for harassing communications by telephone against Belinda Mendieta [RR IX:30-36];

Intervenor's No. 4 - a misdemeanor conviction for violation of a protective order [RR IX :44-60];

Intervenor's No. 5 - a misdemeanor conviction for the display of harmful material to a minor [RR IX: 64-86];

Intervenor's No. 6 - a misdemeanor conviction for Class A theft [RR IX:90-109];

Intervenor's No. 7 - a misdemeanor conviction for tampering with a governmental record [RR IX:113-133];

Intervenor's No. 8 - A misdemeanor conviction for assault with bodily injury on a family member, namely his wife, ███ Retzlaff [RR IX:137:153]

Appellant further testified that he was presently residing in Bell County Jail on a contempt charge for violating the court's order [RR III:22]. Steve Hughes testified that Appellant had potentially committed hundreds of violations of his felony probation orders while in jail [RR V:20]

Anti-social behavior

Appellant treated women without respect [RR VII:73,74], would carry a gun to the door to answer it [RR VIII:5], indicated to his children that law enforcement is not trustworthy [RR VIII:5]; failed to follow court orders - continuously calling Retzlaff's home in violation of the court's orders [RR VI:172-175; Appellant admitted to writing letters against the conditions of his community supervision to the children [RR III:53-54]; Appellant admitted he dialed Dawn Engelke's phone number when he was court-ordered not to contact her [RR IV:52-54]; Retzlaff testified that Appellant got kicked out of Drury College for stalking and harassing Beverly Santucci, a girlfriend Retzlaff had had an affair with early in their marriage [RR V:79]; Robert Retzlaff, paternal grandfather of the children, admitted that Appellant had a "level of defiance" for authority [RR VI:231]; In dealing with an incident where took a knife to school, Appellant reacted by asking why he took his property, not by reprimanding him for doing something dangerous or against school rules [RR VII:61, 62].

## SUMMARY OF APPELLEE'S ARGUMENT

In considering all of the evidence tending to support the findings of the jury, and disregarding all of the evidence to the contrary, it is clear that there is an overwhelming amount of clear and convincing evidence tending to prove the high probability that Appellant had knowingly placed the children in conditions and surroundings that endangered their physical and emotional well-being; knowingly allowed the children to remain in conditions and surroundings that endangered their physical and emotional well-being; or engaged in conduct which endangered the children's physical and emotional well-being, **and** that it was in the best interest of the children that the parent-child relationship between Appellant and the children be terminated. Only one of the

three grounds for termination must be proven, as well as that it is in the best interest of the children that the relationship be terminated.

Even considering **only** Appellant's admissions which was corroborated by other evidence, there is still much greater than a scintilla of proof that there was a high probability that Appellant had committed at least one of the grounds for termination, if not all three, and that it was in the best interest of the children that the parent-child relationship between Appellant and the children be terminated.

If one were to totally disregard Dr. Pugliese's testimony, the videotape, and the photographs complained of by Appellant, and weighing all of the evidence, including the credibility of Appellant, the judgment is still not so contrary to the overwhelming weight of the evidence that the judgment is clearly wrong and unjust. The jury verdict was unanimous, and the overwhelming weight of the evidence supports the jury's findings.

## ARGUMENT AND AUTHORITIES

I. No Error - Judgment Non Obstante Veredicto

The Court did not err in denying Appellant's Motion for Judgment Non-Obstante Veredicto. Rule 301 of the ***Texas Rules of Civil Procedure*** provides that "...upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper...." A directed verdict is proper only if there is no evidence on which to submit an issue to the jury.

II No Error

In ***D.O. v. Texas Dept. of Human Services***, 851 S.W.2d 351,353 (Tex.App.- - Austin

1993, no writ) this court set out the standard for review in a termination case:

> TDHS had the burden to prove the elements necessary for termination by clear and convincing evidence. *In re G.M.*, 596 S.W.2d 846, 847 (Tex.1980); *Neal v. Texas Dept. of Human Servs.*, 814 S.W.2d 216, 222 (Tex.App. - - San Antonio 1991, writ denied) *see Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979) (function of standard of proof is to instruct the factfinder concerning the degree of confidence society thinks it should have in correctness of factual conclusions). The clear and convincing standard of proof requires 'that measure and degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.' *In re G.M.*, 596 S.W. 2d at 847.
>
> When both no-evidence and factual-sufficiency challenges are raised, we must first examine the legal sufficiency of the evidence. *Glover v. Texas Gen. Idem. Co.*, 619 S.W.2d 400, 401 (Tex.1981). In deciding a no-evidence point, we consider only the evidence and inferences tending to support the finding and disregard all evidence to the contrary. *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 593 (Tex.1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *In re S.H.A.*, 728 S.W. 2d 73, 90 (Tex.App. – Dallas 1987, no writ).
>
> In deciding whether the evidence is factually sufficient, this Court considers and weighs all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951); *see also Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex.1986). The clear and convincing standard of proof required to terminate parental rights does not alter the appropriate standard of appellate review. *State v. Turner*, 556 S.W.2d 563, 565 (Tex.1977); *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex.1975)(evidence is reviewed by only two standards: factual and legal sufficiency); *Browning-Ferris Indus., Inc. v. Zavaleta*, 827 S.W.2d 336, 341 (Tex. App. – Corpus Christi 1991, writ denied); *see Director of the Dallas County Child Protective Servs. Unit v. Bowling*, 833 S.W.2d 730, 732 9Tex.App. - - Dallas 1992, no writ) (clear and convincing evidence standard is correct standard for jury evaluation and not standard for instructed verdict).

A. <u>Legal Sufficiency</u>

In examining a legal sufficiency question, the reviewing court should consider only evidence and inferences tending to support the finding and disregard all evidence to the contrary.

Court must determine whether trier of fact could reasonably conclude that the existence of

a given fact is highly probable. ***Wetzel v. Wetzel***, 715 S. W. 2d 387 (Tex. App--Dallas 1986, no writ). The Appellant avers that "the trial court could not have determined that it was highly probable that Appellant had engaged in conduct which endangered the child" [AB 28]. However, the Appellant has neither made any reference to the record in support of his proposition, summarized the evidence, nor discussed it as applied to the facts relating to the law given by Appellant, except with reference to "highly inflammatory and prejudicial evidence proffered by Appellee" [AB 29].

In an evaluation of the evidence produced at trial tending to support the jury's findings, the charge of the court directed the jury as follows:

> "For the parent-child relationship between **Thomas C. Retzlaff**, the father of the children, and the children, [redacted] **A. Retzlaff** and [redacted] **A. B. Retzlaff**, to be terminated, it must be proven by clear and convincing evidence that at least one of the following events has occurred:
>
> 1. That **Thomas C. Retzlaff** has knowingly placed the child in conditions and surroundings which endanger the physical and emotional well-being of the child;
> 2. That **Thomas C. Retzlaff** has knowingly allowed the child to remain in conditions and surroundings which endanger the physical and emotional well-being of the child;
> 3. That **Thomas C. Retzlaff** has engaged in conduct which endangers the physical and emotional well-being of the child"[CR 197].

***Texas Dept. of Human Services v. Boyd***, 727 S.W.2d 531, 534 (Tex. 1987) holds "that if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under section 15.02(1)(E) is supportable." The Court further found that "endanger" means to expose to loss or injury; to jeopardize; that it is not necessary that the conduct be directed at the child or that the child actually suffers injury, and that imprisonment is a factor to be considered by the trial court on the issue of

endangerment. ***Id***. At 533. Although Appellant was only temporarily jailed at the time of the trial, he had engaged in a course of conduct which had gained him two felony probations and in which he had violated potentially hundreds of times for which the potential for his being sent to prison was great. His course of conduct clearly exposed the children to loss and injury in numerous ways, emotionally and physically.

Considering the plethora of evidence in this case, it would be difficult to argue that the trial court could not have determined that it was highly probable that Appellant had engaged in conduct which endangered the physical and emotional well-being of the children and/or knowingly placed or knowingly allowed the children to remain in conditions and surroundings which endangered the physical and emotional well-being of the children.

E. Best Interest

Appellant argues without reference to the record or authoritative cites that it is in the best interest of the children to have two parents. There are several cases which stand for the proposition that there is a presumption that it is in the best interest of the child to be with its natural parents. It is well established that the factors to be considered in determining the best interest of the children as set forth in ***Holly v. Adams***, 544 S. W. 2d 367 (Tex. 1976) includes, without excluding other factors, the desires of the child; the emotional and physical needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the parental abilities of the individuals seeking custody; the programs available to assist these individuals to promote the best interest of the child; the plans for the child by these individuals or by the agency seeking custody; the stability of the home or proposed placement; the acts or omissions of the parent which may indicate that the relationship is not a proper one; and any excuse for the acts or

omissions of the parent.

The desires of the child - The evidence indicates that the children are more comfortable with their mother and are afraid of their father, and although there was a statement that [redacted] missed her mother and her father, the children are protective of their mother and angry at their father. [redacted] would sometimes tell [redacted] Retzlaff that she wished Appellant were dead [RR V:84].

The emotional and physical needs of the child now and in the future - The testimony of both psychologists made it clear the children would need a lot of counseling in the future in order to overcome the emotional damage they have suffered.

The emotional and physical danger to the child now and in the future - The testimony of both psychologists also made it clear that a relationship with their father would be emotionally, and potentially physically dangerous, in the present and in the future [RR VI:83-84]. Dr. Pugliese made it clear that there was a risk that Appellant would act out on his sexual proclivities for young girls towards his own daughter, [redacted] [RR VI:86-87,90, 92}. Collin was already exhibiting disturbing behaviors imitative of his father's behavior: being disrespectful of women, slapping children, stealing, carrying weapons, cursing, and using pornography [RR VII:61,71-74,76-78]. A jury could draw its own conclusions as to how a relationship with Appellant could permanently scar [redacted] and be an emotional and physical danger to him now and in the future.

The parental abilities of the individuals seeking custody - The jury could easily compare Appellant's self-description of his parental abilities with the reality that was presented by other witnesses. He indicated that he took the children to the baseball games and taught them swimming, when it was really his father who did it. He indicated that he was very active in school

activities, when he couldn't even remember the teachers' names and failed to attend parent-teacher conferences. He indicated that he took care of the children's physical needs, kept them clean and well-dressed, when the testimony showed that [redacted] showed up dirty and unkempt. He indicated that he was the one who had [redacted] baptized, but it was at his parents' church with his parents that she was baptized. He indicated that he took them on outings with friends, but the evidence showed that they were isolated in their apartments from other people, and he couldn't get along with other people, unless it was for his self-aggrandizement or pleasure. The children indicated it was their mother that they felt comfortable with and were concerned about. The psychologist indicated that [redacted] Retzlaff had the potential for being a good parent and was making some gains in her parental abilities.

The programs available to assist these individuals to promote the best interest of the child - The evidence indicated that the Department was in the process of helping [redacted] Retzlaff get on her feet and gain better parenting skills with which to better handle the children [RR V:160]. The evidence also indicated that Appellant was in jail, was incapable of seeking help when he was out of jail, but was fixated on revenge.

The plans for the child by these individuals or by the agency seeking custody - The evidence indicated that the Department wanted temporary custody so that they could eventually return the children to their natural parent, [redacted] Retzlaff. Appellant had no real plans for the children.

The stability of the home or proposed placement - The evidence showed that although being in foster placement had been somewhat emotionally hard on them, the children had benefitted. [redacted] Retzlaff was on the A honor roll for the first time. [redacted] Retzlaff had made

some progress in her life [RR V:160]. Obviously, jail is no place for children, therefore the stability of Appellant's "home" was not suitable.

The acts or omissions of the parent which may indicate that the relationship is not a proper one - There was plenty of evidence showing the acts of Appellant [and omissions] which indicated that his relationship with his children was not a proper one, and that a continued relationship with them would cause them further harm.

Any excuse for the acts or omissions of the parent - The battered-wife syndrome is the excuse for the omissions of [redacted] Retzlaff [RR V:159]; there was no excuse in the evidence for the acts and omissions of Appellant.

B. Factual Sufficiency

There were no facts given by Appellant in support of his argument that the decision lacked factual sufficiency. The fact finder had the right to consider the credibility of the witness in determining what the facts were. In determining Appellant's credibility, the jury could consider Appellant's admission that he is not a truthful person all of the time [RR IV:42], his convictions for theft, tampering with a governmental record, his assault with bodily injury on a female, and his admission that he would sometimes grossly exaggerate, lie, and manipulate people [RR IV:73]. As a review of Appellant's testimony would reveal, Appellant would quibble about words, give evasive answers, deny an act, then change his testimony while on the stand. Even considering **only** Appellant's testimony which was corroborated by other evidence, there would be sufficient evidence to survive a factual sufficiency point.

## REPLY POINT NO. 7

THE DECISION SHOULD BE AFFIRMED BECAUSE THERE WAS NO VIOLATION OF APPELLANT'S U.S. AND STATE OF TEXAS CONSTITUTIONAL RIGHTS.

### STATEMENT OF FACTS

There had been three prior referrals by Child Protective Services and an open Family Preservation Case on the Retzlaff family, due to Appellant leaving his young children at home alone for an extended period of time [R III:150-151; V:59]. He commonly kept loaded weapons in the home and accessible to the children, while they were at home alone [R VII:52; IX:158]. He refused services from the Department. During the short period of time that he was out of jail, he failed to seek counseling, but violated his felony probation numerous times [R V:19].

### SUMMARY OF APPELLEE'S ARGUMENT

Appellant was afforded all due rights under the U.S. and Texas Constitutions. He was provided a court-appointed attorney, both for the trial on the merits and for the appeals process. A showing was made that an important state right was promoted by the termination of Appellant's parent-child relationships. Finally, it was shown that there were no less restrictive means to achieve the proper state goal to protect the children.

### ARGUMENT AND AUTHORITIES

Appellant relies on ***In Interest of S.H.A.,*** 728 S.W.2d 73 (Tex.App.--Dallas 1987, writ ref'd n.r.e.) for an explanation of the constitutional dimensions and requirements before

termination will survive constitutional scrutiny. The Court in ***S.H.A.***, Id. At 91, states that "because fundamental constitutional rights are involved, severance of the parent-child relationship will survive constitutional scrutiny only if: the asserted governmental interest is compelling; a particularized showing is made that the state interest is promoted by terminating the relationship; it is impossible to achieve the goal through any less restrictive means; and procedural due process protections are met." As in that case, each of these requirements have been satisfied.

First, Appellant was represented by an attorney both at trial and on appeal, and an attorney ad litem and a guardian ad litem were appointed to represent the children's interests. Appellant was afforded a jury trial and were afforded due process.

Second, witnesses in the trial testified as to the necessity of the termination of Appellant's rights, and a particularized showing was made that protecting the children's life and well-being would be promoted by the termination of Appellant's rights.

Finally, it was very clear that the only way that the children would be safe from Appellant because of the sociopathic nature of his tendencies and his fixation on revenge would be to terminate the parent-child relationship between him and the children. Anything less would not achieve the necessary goal of protecting the children legally from any ties with Appellant.

Appellant argues that the record contains no evidence that the Appellee did all they could to prevent termination. The record does contain evidence of three prior referrals on the home of Appellant, an offer of services to Appellant, and a refusal on his part to accept services or to cooperate with the Department. Indeed, it shows the opposite of an intention to cooperate. Further, there is evidence that during the short period of time that Appellant was out of jail during the summer, he failed to attend counseling, but managed to violate innumerable times more than

one court order, thereby landing back in jail.

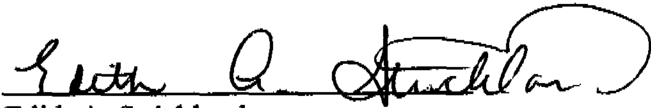
Appellant further argues that he was forced to represent himself pro se until four months before trial. A scrutiny of the court transcript will reveal that Appellant never requested a court appointed attorney until that time, however, he did file a request for a free transcript [CR 223]. A petition for termination was filed just prior to his requesting a court-appointed attorney. Prior to that the petition requested only temporary orders. The evidence further shows that he filed numerous In Forma Paupers affidavits on civil cases he was pursuing [RR III:109-116].

Finally, the parent-child relationship was only terminated as to one parent in order to afford the other parent a chance to release herself and her children from the environment of physical and emotional abuse they had been placed in. The relationship with the mother was maintained because it was felt that it would be in the children's best interest that they eventually be returned to her. The only way to protect her and the children from Appellant's legal ties, would be to break those legal ties.

## PRAYER FOR RELIEF

For the reasons stated herein, the Texas Department for Protective and Regulatory Services requests that this Honorable Court uphold the unanimous verdict of the jury, affirm the decision to terminate the parent-child relationship of Appellant and the children, and deny all relief requested by Appellant.

Respectfully submitted,



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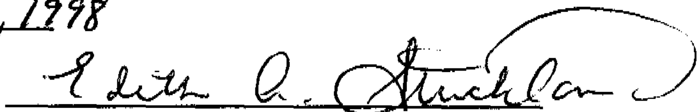
## CERTIFICATE OF DELIVERY

I certify that a true and correct copy of the foregoing Brief for Appellee, the Texas Department of Protective and Regulatory Services, was delivered this date to the parties or their attorneys of record, as required by the Texas Rules of Appellate Procedure.

SIGNED: November 20, 1998



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