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TDHS v. E.B., the Coup de Grace for Special Issues.

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TDHS v. E.B., THE *COUP DE GRÂCE* FOR SPECIAL ISSUES

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I. A Brief History Lesson

A. *1913-1973: The Era of Special Issues*

1. Overview

The vast majority of states are able to muddle along with the general jury verdict. For reasons almost lost in the mists of time, Texas engaged in a nearly eighty-year experiment that required jury answers to specific, detailed factual inquiries in a wide variety of circumstances. Although the practicing bench and bar have been slow to recognize it, the Texas Supreme Court ultimately has declared this experiment a failure. With its decision in *Texas Department of Human Services v. E.B.*,[1] the supreme court reaffirms its determina-

1. 802 S.W.2d 647 (Tex. 1990).

tion that "special issues are dead. Long live the broad-form submission!"

A brief retrospective is in order. Prior to 1913 there had been a gradual accumulation of instructions that were considered to be helpful to juries. The unforeseen result was that an errorless charge became almost impossible to make. In 1913, to escape from the general charge then in vogue, the Texas Legislature enacted a "statutory reform" that ultimately led to a cure far worse than the original disease.[2] For the next sixty years, trial courts were required to use "special issues" that would be submitted separately and distinctly.[3]

Initially, case law development of special issues grew like Topsy—that is, without restraint and, more importantly, with no definitive plan. The real trouble began with *Fox v. Dallas Hotel Company*,[4] in which the court held that each specific act of alleged negligence must be submitted "distinctly and separately" in granulated special issues. A Texas jury was required to answer special issues so specific and so "granulated" that literally dozens might be required in order to submit a simple automobile accident case. As the number of issues increased, the possibility of conflicting answers was correspondingly multiplied. Further, the result of the jurors' answers was frequently quite different from what they had intended.

All of this could yield a reversal, which generally redounded to the benefit of a particular class of litigants, to wit, the deep-pocket defendant. Historically the preference for special issue submissions has generally been ascribed to tort defendants. The rumor was that the railroads were behind the creation of special issues practice; this has credibility because railroads were defendants in a disproportionately large number of lawsuits. As a matter of protective policy, such defendants could expect to out-spend and out-wait plaintiffs, thereby avoiding, or at least substantially delaying, liability for the harms they caused to the general public and to their employees. Negligence cases took the route of extreme granulation, as best illustrated by every Texas lawyer's favorite hypothetical.

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2. Act of March 29, 1913, 33rd Leg., R.S. ch. 59, § 1, 1913 Tex. Gen. Laws 113, *(repealed)* (current version at TEX. R. CIV. P. 277).

3. TEX. R. CIV. P. 277. Historical note: between the 1913 and the 1988 revisions, Rule 277 was amended only three times (the last being relatively minor), to wit: by orders of March 31, 1941, May 25, 1973, and Dec. 5, 1983. *Id.*

4. 111 Tex. 461, 240 S.W. 517 (1922).

The original author of the "killer hypothetical" that summarizes the virtues of special issue submission remains anonymous. But, while his identity is unknown, his inspiration has been burned into the cerebral cortexes of virtually every judge and lawyer in Texas for the past seventy-five years, to wit:

> [In a]n ordinary automobile collision case . . . [s]uppose the plaintiff alleges—and introduces proof to indicate—that the collision was proximately caused by the defendant's negligence in driving at an unsafe rate of speed, in failing to maintain a proper lookout, and in failing to timely apply his brakes. The fragmented submission required prior to 1973 would involve three separate "clusters" of questions—one each for speed, lookout, and brakes—each including questions of negligence and proximate cause. Only if the required ten jurors agreed that at least one specific act or omission constituted negligence, and that the negligence inherent in such specific act or omission constituted a proximate cause of the occurrence, would the plaintiff be entitled to recover. A checklist submission would similarly inform the court whether the jury agreed as to negligence and proximate cause on a single, specific ground of negligence. . . . [Under special issue practice, a plaintiff could not get an affirmative finding of negligence] if, for example, five jurors felt only that the defendant drove at an excessive rate of speed, three believed only that he failed to keep a proper lookout, two felt he had failed to promptly apply his brakes, and two thought him free from any negligence.[5]

2. The Unofficial Dichotomy Between Negligence and "Other Cases"

Other civil matters were subject to a more relaxed rule. Throughout the period from 1913 to 1973, a strange dichotomy developed. Broad-form submissions were held to be acceptable (at least to a degree) for "other cases," such as family law, while found to be abhorrent in the negligence context. For example, although the inquiry as to "domicile" was recognized as the controlling question, dependent upon subsidiary factual issues of intent and residence,[6] it was a proper question to ask the jury. Similarly, it was permissible to ask the jury whether the defendant was guilty of statutory conduct such that the

5. 34 HODGES & GUY, THE JURY CHARGE IN TEXAS CIVIL LITIGATION §§ 97-98 (Texas Practice 1988).

6. Hough v. Grapotte, 90 S.W.2d 1090, 1091 (Tex. 1936).

marriage was insupportable.[7] So, in family law cases and some other civil matters, broad-form special issues were satisfactory.

The day came when the supreme court finally recognized that the distinctions developed by Texas case law between negligence and other civil cases were "somewhat metaphysical."[8] Nonetheless, the practice had become so ingrained that the court felt powerless to do anything other than to allow the logical inconsistencies to persist. "Granulated" special issues continued to be the rule. Only the trial court's great discretion in non-negligence cases to fashion broader issues saved the system from absurdity.[9] This unofficial dichotomy reached its zenith in 1970 when the supreme court stated: "[I]t is quite clear that there will be no reversal in non-negligence cases simply because the issue is too broad or too small."[10] No similar statement could have been made for "negligence cases."

All of this pre-1973 complexity did not go unnoticed by legal commentators. The favorite quote of virtually all critics of special issues submissions was provided by distinguished district court Judge A.R. Stout:

> [The] special issue system . . . is founded upon incorrect logic and a false premise. . . . Assuming that we believe in the jury system, there are two points that condemn such procedure. In the first place, it does not make sense to say, as it is so often said, that trial by jury is one of the greatest institutions known to civilization, and then to turn right around and say that the jurors are rogues and Yahoos who are not to be trusted and who are too stupid to know what they are doing.
>
> In the second place, any system which requires a judge to submit self-destructive and contradictory issues, which, if answered as desired, only result in a mistrial or sending the jury back for further deliberation in order to resolve the conflict, is inherently wrong and fundamentally incorrect. Nor has the system been an effective means for the administration of justice. It produces confusion and conflict and is full of error.

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7. Howell v. Howell, 210 S.W.2d 978, 980 (Tex. 1948).

8. Roosth & Genecov Prod. Co. v. White, 262 S.W.2d 99, 103-04 (Tex. 1953).

9. *See generally* HODGES, 1969 SUPPLEMENT TO SPECIAL ISSUE SUBMISSION IN TEXAS 71 (1969). The leading authority on the topic stated: "The trial court has almost complete discretion, so long as the issue in question is unambiguous and confines the jury to the pleading and the evidence." *Id.*

10. Haas Drilling Co. v. First Nat'l Bank in Dallas, 456 S.W.2d 886, 889 (Tex. 1970) (quoting HODGES, 1969 SUPPLEMENT TO SPECIAL ISSUE SUBMISSION IN TEXAS, 71 (1969)). It's more than just an implication that a reversal could result from an overly broad issue in a negligence case.

> The cross-examination of the jury as to each fragment of fact spawns unnecessary issues and makes short cases unreasonably long. We have gone to seed in our requirements as to the submission of the converse or near-converse of affirmative issues so as to produce conflicts, and we hobble the minds of the jurors during their deliberations so as to promote error. The system has worked more as a bag of tricks than it has to prove or promote the integrity of justice. It serves as an aid to the more powerful and professional litigant and as a deterrent and handicap to those who are not so fortunate. It aids legal sharpers and is productive of shystery both in the law and in the legal profession.[11]

A similar view from another perspective was expressed a decade later by Fifth Circuit Chief Judge John R. Brown:

> At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once-in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers, either general verdict or special interrogatories. . . . All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issues submission are in reality merely a submission in another form of questions already implicit in the basic ones of the (a) Railroad's negligence, (b) causation by reason of the Railroad's negligence, (c) the injured worker's negligence, (d) causation by reason of the worker's negligence, and (e) the percentage reduction of damages. This effort to cross examine the jury—whether special interrogatories are used or in outlining the successive fact findings as a predicate for a general verdict—leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar.[12]

B. *1973-1988: A Move to Reform, Special Issues and Broad-Form Submissions in Not So Peaceful Coexistence*

1. The 1973 Amendment to Rule 277

In 1973 the supreme court amended Rule 277, replacing the previous requirement that issues be submitted "distinctly and separately" with a grant of discretion to the trial courts to submit separate questions on each element of a case or to submit broad issues. A viable objection did not lie just because a question was general or included a

11. Stout, *Our Special Issue System*, 36 TEX. L. REV. 44, 44 (1957).
12. Page v. St. Louis S.W. Ry. Co., 349 F.2d 820, 823, 826-27 (5th Cir. 1965).

combination of elements or issues.[13] The rationale underlying the amendment was succinctly stated by Texas Supreme Court Chief Justice Jack Pope as follows:

> In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The supreme court in 1973 amended Rule 277, Tex. R. Civ. P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.[14]

Three months after the 1973 revision to Rule 277, in *Mobil Chemical Company v. Bell*[15] the supreme court held that it was permissible to give the jury one broad negligence issue, as opposed to submitting issues on each of the many elements found in a particular negligence case. Most recently, the *Mobil Chemical* decision was described as a holding that the 1973 version of Rule 277: "meant what it said: simply ask whether the party was negligent. . . . Rule 277 was designed to abolish the 'distinctly and separately' requirement."[16]

Five years later the court took what some perceived to be a step backwards in *Scott v. Atchison, Topeka & Santa Fe Railroad Company*.[17] In that case the court reversed a broad form submission because of the variance between the pleadings and the proof.[18] Thus, if

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13. TEX. R. CIV. P. 277. Historical note: Orders of May 25, 1973, effective Sept. 1, 1973. *Id.*

14. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

15. 517 S.W.2d 245, 255 (Tex. 1974).

16. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (citing Brown v. Am. Transfer & Storage Co., 601 S.W.2d 931, 937 (Tex. 1980)).

17. 572 S.W.2d 273 (Tex. 1978).

18. *Id.* at 280. In *Scott*, Railroad brakemen sued under the Federal Employers Liability Act (FELA) to recover for personal injuries when a train derailed because of a track washout. *Id.* at 275. The jury found for the brakemen, but the appellate court reversed, 551 S.W.2d 740, and the supreme court affirmed the appellate court. *Id.* at 280. The trial court had approved a broad form submission: "Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of the suit?" *Id.* at 276. Unfortunately for the plaintiffs, several of the specifically pled alleged acts of negligence were not supported by evidence, while evidence had been introduced that raised other possible issues of negligence that had not been alleged. *Id.* at 277. For example, the plaintiffs alleged that the track and supporting bed had washed out because of faulty construction materials and maintenance. *Id.* They introduced no evidence in support of that allegation. *Id.* at 276-77. On the other hand, evidence was presented that there had been ample warning on television about the severity of the storm an hour before the train left the station and four hours before it derailed.

in a negligence case a plaintiff pled specific acts of negligence X and Y, and then introduced proof on X but not on Y, and also introduced evidence on Z (not pled), it was inappropriate to ask the jury merely whether the defendant was negligent. Rather, the jury's consideration of the alleged negligence had to be limited to X, the only pled and potentially proven act of negligence. Some writers and commentators took the view that the court had retreated from its apparent adoption of broad form questions. It was relatively clear from *Scott* that it was improper to submit a broad form question in one of the innumerable negligence cases that presented a variance between pleading and proof. Separate questions regarding each pled and proven matter were acknowledged to be a more appropriate method of submission.

Two years later, the court clarified its position in *Brown v. American Transfer and Storage Company*[19] by stating that the *Scott* decision "has been misconstrued by some judges and writers as a retreat from the revised rule [277]." The court explained that *Scott* only stood for the proposition that where there "was a case in which there was a 'wide variance' between what plaintiff pleaded and the evidence he produced at trial [was it objectionable]. . . . [In *Scott* the plaintiff] failed to produce any evidence on pleaded acts; he produced an abundance of evidence on six or seven unpleaded acts. A case could hardly be conceived in which a variance could be wider than that found in *Scott*."[20] Rather than retreat to the narrow specific issue practice, the court suggested that the variance problem could be corrected by coupling a broad question with a limiting instruction, or submitting a broad question that contains the limitation within it to include only matters pled and proved. In 1981, just a year after *Brown*, the court acknowledged that there might be continuing questions regarding

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Id. at 277. Further, although the railroad had a storm warning system, there was no relay of any warning nor an inspection of the track. *Id.* Finally, the jury could have inferred that the train was being operated at an excessive rate of speed or that the brakes were not applied soon enough. *Id.* None of these matters were pled.

Submission of Special Issue No. 1 asked the jurors "to make their own determination as to whether 'on the occasion in question the railroad was negligent' without regard to whether the acts or omissions upon which they reached a ten to two answer had been raised by the pleadings in proof." *Id.* at 277. In sum, the case did not turn on whether the submission was too broad. Rather, the supreme court held that the variance between pleadings and proof was too great, and that it was not feasible to ask a single broad question under the circumstances. *Id.* at 277-78.

19. 601 S.W.2d 931, 937 (Tex. 1980).

20. *Id.* at 937.

broad-form submissions—a fair understatement. Thus, in *Burk Royalty Company v. Walls*[21] the court found it necessary to overrule all of the cases that arose before the 1973 revisions and which followed the decision in *Fox v. Dallas Hotel Company*.[22] In retrospect, it was this action that heralded the court's ultimate rejection of narrow special issues in all of their many guises.

Initially, the developments during the '80s were marked by the supreme court's tolerance of recalcitrant judges and lawyers. For example, in *Burk Royalty*[23] this attitude was expressed:

> It is understandable that a rule requiring issues to be submitted "distinctly and separately" which prevailed from 1913 until 1973 would slowly relinquish its hold upon trial practice, but after 1973, Rule 277, as amended permits the submission of issues broadly even though they include a combination of elements or issues. This court . . . has on a number of occasions approved broad submissions.[24]

In *Lemos v. Montez*,[25] the court adopted a somewhat sterner tone, but one that was tinged with a wistful tolerance:

> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.[26]

Lemos can be read as an edict to accept pattern jury charges without change. Nonetheless, as late as 1985, hope still sprang eternal that judges and lawyers would willingly adapt to broad form practice. One justice wrote that broad multiple element submissions "are in" and clusters of issues "are out."[27] All good things must end, however, including paternalistic patience. The growing irritation of the court

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21. 616 S.W.2d 911 (Tex. 1981).

22. 111 Tex. 461, 240 S.W. 517 (1922) *see also Burk Royalty,* 616 S.W.2d at 925. *See generally* Pope & Lowerre, *The State of the Special Verdict,* 11 ST. MARY'S L.J. 1 (1979).

23. 616 S.W.2d 911 (Tex. 1981).

24. *Id.* at 924.

25. 680 S.W.2d 798, 801 (Tex. 1984).

26. *Id.*

27. J. Wallace, *Broad Issues Are Here To Stay,* in JURY ISSUE SUBMISSION (1985).

with the legal community's reluctance to take up the mantle of broad submissions had become apparent by 1986. In *Island Recreational Development Corporation v. Republic of Texas Savings Association*,[28] the court delivered itself of some tough talk:

> Our exasperation at the bench and the bar for failing to embrace wholeheartedly broad issue submission is thinly veiled. . . . This court has clearly mandated that Rule 277 means precisely what it says and that trial courts are permitted, and even urged, to submit the controlling issues of a case in broad terms so as to simplify the jury's chore. [Moreover,] when requested, the trial court should submit appropriate accompanying instructions. However, we decline to say that the failure to do so is reversible error per se.[29]

The last sentence of the quoted language may have given solace to unrepentant advocates of special issues practice, but the comfort to be drawn from *Island Recreational* was short lived.

2. State Bar Pattern Jury Charge Committees

The modern era of pattern jury charges began in 1969 with the publication of Texas Pattern Jury Charges Volume 1 (known by all and sundry as PJC-1), the keystone for use in negligence cases—and particularly automobile accidents.[30] After the 1973 version of Rule 277 was adopted, the Pattern Jury Charges Committees of the State Bar of Texas played an important role in working through the intricacies of broad-form submission. The 1984 supplement to PJC-3 began the process in the context of product liability cases.[31] But, the real breakthrough was made by the 1987 edition of PJC-1, which implemented the broad-form mandate across the full spectrum of negligence and damage issues.[32] The issues of negligence and proximate cause, which were once granulated into separate questions as to each ground of negligence, were combined into one broad-form question. No doubt part of the reluctance to adopt broad-form was due to the

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28. 710 S.W.2d 551 (Tex. 1986).

29. *Id.* at 555.

30. *See generally*, 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1969) (divided into three parts: general negligence issues, motor vehicles, and damages).

31. *See* 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 72.05A-.05C (Supp. 1984) (broad-form submission charges added for contributory negligence defense in product liability action).

32. *See generally* 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1987). The issues of negligence and proximate cause, which were once granulated into separate questions as to each ground of negligence, were combined into one broad-form question. *Id.* PJC 4.01.

fact that bench and bar had only the first edition of PJC-1 available before the revised version was published.

C. *The Paradigm Broad-Form Question Under the 1973 Rule*

The paradigm for the brave, semi-new world of broad-form submission under the 1973 version of Rule 277 is found in the first jury question in PJC-1, which adapts broad-form to a typical automobile accident.[33] A "final" break with the past is represented by a single question regarding proximate cause and negligence, to wit:

> QUESTION
>
> Did the negligence, if any, of *the persons*, named below proximately cause the *occurrence* in question?
>
> Answer "Yes" or "No" for each of the following:
>
> a. Don Davis _____
>
> b. Paul Payne _____[34]

The instructions for an ordinary negligence case are extraordinarily simple—at least when contrasted to prior practice. The complete rejection by PJC-1 of the old way of formulating special issues in an auto wreck no doubt came as quite a shock to the nervous systems of lawyers who grew up with granulated issues. After all, Texas negligence cases showed the world how to accomplish the dubious goal of confining the jury to answering "questions of fact," supposedly without the jurors ever even wondering about the ultimate effect of their answers. In a typical auto wreck, a plaintiff was virtually required to prove and request substantially correct jury issues that the defendant was driving too fast, with bad brakes and a bad attitude, all of which culminated in a terrific "krump!" to the plaintiff's detriment. Usually the jury would be asked those questions in a series of special issues about whether the defendant did indeed do all of those things.[35] In the revised PJC-1, neither special issues nor instructions are given about "speed, lookout, or brakes." These, and all of the other old negligence special issues, are subsumed in the general instruction re-

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33. STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 4.01 (1987).

34. *Id.* The 1989 version of PJC-1 made some changes of importance to plaintiffs and defendants (or at least to their attorneys). The basic question now reads: "Did the negligence, if any, of *the persons named below* proximately cause the [*occurrence*] [*injury*] [*occurrence or injury*] in question?" *Id.* PJC 4.01B (1989).

35. *See* HODGES & GUY, THE JURY CHARGE IN TEXAS CIVIL LITIGATION §§ 97-98 (Texas Practice 1988).

garding "ordinary care."[36]

It is this latter feature of PJC-1 that so amazed experienced attorneys. For example, just after a much-revised second edition of PJC-1 was published in 1987, a highly respected lawyer of over twenty-five years experience commented to me that he was amazed at the carelessness of the authors who unaccountably "forgot to write the instructions on brakes, lookout and speed." My friend obviously was under the impression that the change from the pre-1973 way of doing things was that the jury was to be instructed on each of the requisite elements of negligence, along with being provided appropriate definitions of such terms as "reasonable speed, proper lookout, and defective brakes." PJC-1 rejected that approach; what you see is what you get, and that's all that you are going to get.[37]

So far the elimination of special issues has not resulted in a proliferation of instructions, often alleged to be the natural consequence of broad form submission.[38] As seen in the question quoted above, the ultimate issue in an auto wreck is whether the defendant was negligent; nothing more, nothing less. The individual fact elements that made up the defendant's alleged negligence are subsumed in the question asking the jury for a conclusion on the subject. It is up to the jury to determine whether the defendant's conduct was negligent in fact. In sum, PJC-1 provides neither instructions nor definitions of those beloved old-time elements that made up special issues practice.

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36. *Compare* 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 5.02-.14 (1969) (questions about speed, brakes, and lookout framed as to what person exercising ordinary care would have done) *with id.* PJC 2.01 (1989) (ordinary care general definition only for all negligence action). Presently there are only four "basic definitions" supplied by PJC-1: "Negligence and Ordinary Care"; "High Degree of Care"; "Child's Degree of Care"; and, "Proximate Cause." *Id.* PJC 2.01-04 (1989). To illustrate the simplicity of the instructions to the jury, the following is the complete text of PJC 2.01, Negligence and Ordinary Care:

> 'Negligence' means failure to use ordinary care, that is failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.
>
> 'Ordinary care' means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Id. PJC 2.01 (1989).

37. *See Id.* PJC 5.01 (1989). Even negligence attributable to the alleged running of a red light, which falls under the heading of negligence per se, is subject only to instruction, and not to a special issue. *Id.*

38. *See* Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

D. *Broad-Form in Family Law Cases, 1973-88*

Other areas of the law bumped along without a great deal of focus or controversy regarding broad form versus special issues practice. In family law—the subject matter that ultimately led to what this article claims to be the death knell for special issues—very few cases even dealt with the formulation of jury submissions between 1973 and 1988. For example, the first serious challenge to the application of the then new no-fault divorce was tried to a jury.[39] Although the appellate court notes that the jury found "that the marriage had become insupportable,"[40] there is no discussion about the submission, nor are the special issues even quoted in the opinion. With regard to suits affecting the parent-child relationship (SAPCR), a variety of issues have arisen over the years with regard to jury trials, such as whether the details of a possessory conservatorship, *i.e.*, visitation, should be submitted to the jury.[41] Most of the controversy, however, has revolved around the question of whether the jury's findings are binding on the trial court or merely advisory. Ultimately the appellate courts accepted the legislative determination made in the Family Code that a jury verdict on any of the "major issues" in a SAPCR is binding on the court,[42] and that granting of a judgment *non obstante veredicto* is error in the face of a jury verdict pointing in the other direction.[43]

The issue of whether the questions or special issues posed to the jury were in proper form has almost never been discussed in family law cases. For example, in the context of the termination of parental rights, just before the advent of new Rule 277 the Dallas Court of Appeals sitting *en banc* (all 14 judges strong) wrote an opinion over thirty pages long, including two dissents.[44] The granulated form of the special issues submitted to the jury in that case was not discussed.

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39. Cusack v. Cusack, 491 S.W.2d 714, 715-16 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd).

40. *Id.* at 720.

41. Killpack v. Killpack, 616 S.W.2d 434, 436-37 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

42. TEX. FAM. CODE ANN. § 11.13 (Vernon 1986).

43. *See id.* §§ 11.13, 14.032-.034, 14.052-.058; *see also* Fair v. Davis, 787 S.W.2d 420, 425-28 (Tex. App.—Fort Worth 1990, no writ).

44. In Interest of S.H.A., 728 S.W.2d 73 (Tex. App.—Dallas 1987, no writ).

II. (RADICAL) REFORM: THE 1988 AMENDMENT TO RULE 277

A. *The New Version of Rule 277*

In 1987 the Supreme Court of Texas unanimously adopted a number of amendments to the Texas Rules of Civil Procedure to become effective January 1, 1988. Although some of the changes were only cosmetic, Rule 277 underwent a major alteration. There is no doubt that the court intended to impact significantly the submission of all types of cases to the jury. The text of the new Rule 277 is reprinted below in full, with deletions from the old rule shown by cross-through and new language printed in bold typeface:[45]

Rule 277. [~~Special Issues~~] **Submission to the Jury**

In all jury cases the court [~~may~~] **shall, whenever feasible,** submit [~~said~~] **the** cause upon **broad-form questions.** [~~special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues controlling the disposition of the case that are raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties,~~] The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

[~~It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.~~] Inferential rebuttal [~~issues~~] **questions** shall not be submitted **in the charge.** The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

[~~In submitting the case, the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict and in such instances the charge shall not be subject to the objection that it is a general charge.~~

~~The court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, event or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act or omission which is listed. The court may submit a single question, which may be conditioned upon an answer that an act or omission occurred, inquiring whether a party was negligent, with a listing of the several acts or omis-~~

45. *Compare* TEX. R. CIV. P. 277 (effective Jan. 2, 1988) *with* Order of Texas Supreme Court, Adopting Rules of Civil Procedure, 661 S.W.2d XXXV (Rule 277 effective April 2, 1984 appears at pages LXXVI - VII).

~~sions corresponding to those listed in the preceding question and with appropriate spaces for each answer. Conditioned upon an affirmative finding of negligence as to one or more acts or omissions, a further question may inquire whether the corresponding specific acts or omissions (listing them) inquired about in the preceding questions were proximate causes of the accident, event, or occurrence that is the basis of the suit. Similar forms of questions may be used in other cases.~~]

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

The court may submit a [~~an issue~~] **question** disjunctively [~~where~~] **when** it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. [~~for example, the court may, in a workers' compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled.~~]

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

In construing new Rule 277 it is very useful to examine what the 1988 version omitted from the rule in effect from 1973 through 1987. Only 87 words were added, while a grand total of 354 words were deleted. Chief among the latter category of missing terminology are such previously popular and important words, terms, and phrases as:

- Special Issues
- discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly
- shall submit the cause upon special issues controlling the disposition of the case
- separate questions with respect to each element of a case
- negligence case
- answers as to each act or omission which is listed

- workers' compensation case . . .[46]

After the effective date of the rule change, January 1, 1988, the pace of publication of the pattern jury charges series picked up considerably: in 1989, PJC-5 on family law was published, extending broad-form to the full scope of those cases;[47] 1989 also saw a new edition of PJC-2 covering workers' compensation,[48] a second edition of PJC-3,[49] and additions to PJC-1; finally, a bit out of order, in 1990 PJC-4 saw the light of day.[50] All of the new PJCs uniformly extend broad-form submission to their respective subject areas with a relatively consistent approach.

Shortly after the 1988 amendment went into effect, then-Justice William W. Kilgarlin wrote:

> One of the most significant areas of change in the 1988 rules comes in the requirement of broad-form charges. New rules 277, 278, and 279 are the centerpieces of this move to broad-form submissions. . . . There is no doubt that broad-form issues are somewhat controversial, as even the Supreme Court has struggled with the speed and effect of the movement towards "global" issues. The new rules make broad-form issues the dominant species of submission in the coming years. . . . New rule 277 requires the submission of "broad form" questions, but omits a definition of that term. Broad-form issues typically combine several elements of a ground of recovery or defense into one question.[51]

Apparently not everyone thought that new Rule 277 was all that significant. Thus, the intermediate appellate court in *E.B. v. Texas Department of Human Services*,[52] found that the single question (per child) posed to the jury by the trial court to terminate parental rights was reversible error, while three questions (per child) as requested by the appellant would have been an acceptable broad form submission.[53] In passing, the court noted that "jury questions" under new Rule 277 were "[k]nown in the former practice as special issues. As

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46. The count and identification of "important words" missing from the new text is by the author.

47. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1989).

48. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1984).

49. *See generally* 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1990).

50. *See generally* 4 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1990).

51. Kilgarlin, Quesada & Russell, *Practicing Law in the 'New Age': The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 912-13 (1988).

52. 766 S.W.2d 387, 388 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).

53. *Id.* at 390.

used in this opinion, the terms *are synonymous.*"[54]

B. *A Diversion—The Special Function of the Jury Verdict in Family Law Cases*

One piece remains to be described to complete this introductory mosaic (or jigsaw puzzle). A jury's verdict is given special significance in family law cases by statutory fiat, to wit:

> § 11.13. Jury
>
> (a) In a suit affecting the parent-child relationship, except a suit in which adoption is sought, any party may demand a jury trial.
>
> (b) The court may not enter a decree that contravenes the verdict of the jury, except with respect to the issues of the specific terms and conditions of access to the child, support of the child, and the rights, privileges, duties, and powers of sole managing conservators, joint managing conservators, or possessory conservators, on which the court may submit or refuse to submit issues to the jury as the court determines appropriate, and on which issues the jury verdict, if any, is advisory only.[55]

This statute attempts to strike a balance between the exercise of judicial discretion and the imposition of a reasonable limitation on judicial power. Section 11.13 grants the trial court almost untrammeled discretion to establish the details of a child support and visitation order at the conclusion of a jury trial. Absent abuse of discretion, the trial court's decision will be final. Further, not only is anything the jury has to say on the details "advisory only," but the trial court is absolutely free not to ask them for their advice in the first place.[56]

On the other hand, if a jury has been empaneled, the discretion of the trial court is significantly constrained regarding the jury's selection of managing and possessory conservators. If the trial court seriously disagrees with the jury's verdict, the judge may order a new trial on the motion of a party or on the court's own motion through exercise of its plenary power.[57] But, section 11.13 prevents a trial court

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54. *Id.* at 388 n.2 (emphasis supplied).

55. TEX. FAM. CODE ANN. § 11.13 (Vernon Supp. 1991).

56. *See id.* §§ 14.032-.034, 14.052-.058; *see also* Fair v. Davis, 787 S.W.2d 422, 425-28 (Tex. App.—Fort Worth 1990, no writ). A radical decrease in the discretion of the trial court took place in 1989 with the advent of statutory guidelines for child support and visitation. *Id.* This does not bear on the balance of power between the court and the jury insofar as the details of support and visitation are concerned.

57. Wenske v. Wenske, 776 S.W.2d 779, 780 (Tex. App.—Corpus Christi 1989, no writ).

from rendering a judgment n.o.v. on a conservatorship decision, no matter how dissatisfied it is with the jury's choice. That is, when a jury decides that a particular person should be named managing conservator, the court cannot reverse the jury determination on that controlling question and award the powers that belong to the managing conservator to someone else by way of a judgment n.o.v. It is only "with respect to the issues of the specific terms and conditions of access to the child, support of the child, and the rights, privileges, duties, and powers of . . . conservators" that a court may override a jury's answers.[58] This very significant distinction between family law and negligence cases suggests that caution be used when comparing the two.

III. BROAD-FORM SUBMISSIONS AFTER *MARTIN* AND *E.B.*

A. *Overview*

The committee drafting the family law pattern jury charges[59] had great difficulty in formulating jury questions regarding establishment of child support and the terms and conditions of sole managing, joint managing, and possessory conservatorships.[60] Modification of such orders posed even greater difficulties. Indeed, drafting certain jury questions in this regard was viewed by at least some committee members as an exercise-in-futility because Texas Family Code § 11.13 leaves such details to the trial court.[61] Moreover, because the ques-

58. TEX. FAM. CODE ANN. § 11.13(b) (Vernon Supp. 1990); *see also* In Re Soliz, 671 S.W.2d 644, 647-48 (Tex. App.—Corpus Christi 1984, no writ); Fambro v. Fambro, 635 S.W.2d 945, 948 (Tex. App.—Fort Worth 1982, no writ); T.A.B. v. W.L.B., 598 S.W.2d 936, 938 (Tex. App.—El Paso), *writ ref'd n.r.e.*, 606 S.W.2d 695 (Tex. 1980).

59. Members who served on the PJC-5 Committee through its original publication were: Professor John J. Sampson, Austin, Chairman; Judge John Montgomery, Houston, Vice-Chairman; Jon Coffee, Austin; Kenneth Fuller, Dallas; Richard Orsinger, San Antonio; John F. Nichols, Houston; Sarah Ryan, Bryan; Thomas J. Purdom, Lubbock; Harry L. Tindall, Houston; M.J. (Ike) Vanden Eykel, Dallas. The State Bar coordinator was Susannah R. Mills, Director: Books and Systems Division, who actually did the work.

60. A majority of the members of the committee voted early on that no dissenting opinions would be published, arguing that quarrels in print would detract greatly from the persuasive power of the pattern charges. Thereafter, the chairman—an ivory-tower type— developed the brilliant idea that there must be a significant consensus of the eight real lawyers and one real judge before any PJC would be published. To accomplish this, he never voted to break a tie, but always voted with the minority to make a tie. In effect, the real lawyers had to agree by a margin of at least 6-3 for any instruction or question to be finalized. This led to many a lively discussion over a period of 18 months, but eventually that consensus was attained.

61. *See* TEX. FAM CODE ANN. § 11.13 (Vernon 1988); 5 STATE BAR OF TEXAS, TEXAS

tion of whether to submit advisory issues is wholly discretionary with the court, the committee took a fairly strong stand against submitting such issues to the jury.[62]

In contrast, a question asking whether things should be changed, but not asking how they should be changed, seems to be almost futile—at least if the jury supplies an affirmative answer. This was so bothersome that the PJC-5 committee breached its otherwise strong opposition to formulating advisory opinions. A suggested formulation was provided for cases involving modification of child support. In practice, a large percentage of motions to modify child support in one direction are countered by motions to modify in the other direction. Merely asking whether child support should be modified when both sides are seeking such a modification would be futility writ large. So, contingent on a "yes" answer on support modification, an additional advisory question was prepared for the jury to indicate the direction of the modification, up or down.[63]

The conundrum leading to this inconsistency was the result of the

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PATTERN JURY CHARGES PJC (1989) (extending broad-form submission to full scope of family law cases); Wenske v. Wenske, 776 S.W.2d 779 (Tex. App.—Corpus Christi 1989, no writ); *see also* this article section III "Broad Form submission after Martin & E.B."

62. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 216.05 (1989). The commentary reads:

> The Committee believes that it is usually inadvisable to submit questions for a jury verdict in order to elicit advisory opinions on such matters. To submit such questions, it may be necessary to instruct the jury at great length. Because establishing the terms and conditions of access to a child and the rights, privileges, duties, and powers of conservators and setting child support are routine matters for the trial court, jury advice is likely to be unproductive.
>
> Further, the advent of guidelines . . . immeasurably complicates the already almost impossible task of instructing the jury in an efficient and simple matter on these subjects. For these reasons, the Committee has formulated neither instructions nor jury questions regarding advisory opinions of these matters.

63. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 217.05A-.05B (1989). The first question asks if there has been a material and substantial change of circumstances since the original date of rendition. *Id.* This question is characterized as a "binding" question of fact. The second, contingent question asks for the direction of its charge, and "may be considered merely advisory."

After the manuscript had been typeset, *Martin v. Martin*, 776 S.W.2d 572 (Tex. 1989) was decided. Fortunately, this occurred before final publication, so it was possible to insert a notice in PJC 217.05 stating that "[b]ecause . . . the Committee considers the submission of advisory issues inadvisable, these questions would not have been included if the *Martin* decision had been available before the volume was being printed." STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 217.05B (1989).

supreme court decision in *Phillips v. Phillips*,[64] which held that the existence of a material and substantial change of circumstances of a child, or of a person affected by the child support order or decree, is a question of fact for the jury. Under the burdensome weight of that decision, the committee felt duty-bound to draft pattern questions regarding the modification of child support, and for the terms and conditions of conservatorship.[65] This, despite the fact that such detailed questions are wholly inconsistent with broad form submission.

The court's subsequent decision in *Martin v. Martin*,[66] changed the committee's approach entirely. *Martin* overruled *Phillips*, holding that failure to ask a jury such questions in a modification hearing is not reversible error. While the logic of *Martin* may be troublesome, the bottom line is thoroughly practical insofar as pattern jury charges are concerned.

In *Martin*, the prior divorce/SAPCR decree provided that the children's residence was to be in either Caldwell or Travis Counties, until modified by further order of the court. When the mother/managing conservator remarried, she sought to modify the decree to permit her to establish the children's legal domicile way-out-west in Ector County, the county where her new husband resided. The children's father wasn't too crazy about having to travel to Midland-Odessa to visit his kids, so he resisted the modification and demanded a jury. The trial court denied his request for a jury and heard the case on the merits. Ultimately, the mother's motion to modify was granted and she was allowed to establish the legal residence of the children in Ector County. The court of appeals reversed, in an unreported decision, holding that the father was entitled to a jury determination regarding whether there had been a change of circumstances. Asking "questions" on one or more elements that make up grounds for a modification of conservatorhip is difficult to distinguish from "special issues on speed, lookout, and brakes."

The supreme court reversed and reinstated the trial court's decision, struggling manfully with the "issue of the right to a jury trial on any of the . . . tests for modification of child access rights."[67] The bottom line is that the failure to grant that right under the circum-

64. 701 S.W.2d 651 (Tex. 1986).
65. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 217.06 (1989).
66. 776 S.W.2d 572 (Tex. 1989).
67. *Id.* at 573.

stances was not reversible error. This despite the fact that "the parties have a right to a jury trial."[68]

This rather extraordinary juxtaposition of apparently contradictory statements is justified by the fact that Family Code § 11.13 allows a trial court to enter a decree that contravenes a jury's verdict on matters concerning certain terms and conditions of the decree.[69] This gives a trial court great discretion in submitting jury issues on the details of conservatorships because the jury's answers are only advisory. This led the court to conclude:

> Inasmuch as the trial court determines the conditions of access, it is not reversible error to refuse a jury trial in actions involving only the modification of the conditions of access or the threshold requirements for the conditions of access. . . . There is no absolute right to a jury trial in matters where the jury's answers are only advisory.[70]

Finally, the court explicitly reversed its relatively recent *Phillips* decision.[71]

B. Texas Department of Human Services v. E.B.

In September, 1986, the Texas Department of Human Services (TDHS) took physical custody of two allegedly abused and neglected children, young girls born November 1982 and August 1986. After numerous, ultimately unsuccessful attempts to rehabilitate and reunite the family, TDHS decided to seek termination of parental rights. The father relinquished his rights by affidavit, but the mother contested the state's action. In early April, 1988, at the conclusion of an eight-day trial the mother's parental rights were terminated based on a jury verdict.[72]

The jury was asked a series of contingent questions regarding termination of the mother's parental rights or, alternatively, conservatorship of the children. These questions were taken directly from a draft version of what ultimately became PJC-5.[73] At the point of focus was a single question for each child regarding termination.[74] Rel-

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68. *Id.*

69. Discussed previously section B(1) "1973-1988: A Move to Reform, Special Issues and Broad Form Submission in Not So Peaceful Coexistence."

70. *Martin*, 776 S.W.2d at 574-75.

71. *Id.*

72. *Id.* at 648.

73. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 218.01 (1989).

74. *See id.* PJC 218.01B.

atively extensive instructions accompanied the questions, also almost entirely derived from the draft version of PJC-5, including the listing of the rights, privileges, duties, and powers of a parent taken directly from the Family Code;[75] definitions of the terms "termination"[76] and "clear and convincing evidence," also taken from the statute;[77] the statutory grounds for termination involved in the case, repeating the statutory formulation;[78] "some of the factors to consider in determining the best interests of the child," as drawn from case law;[79] and finally, a definition of the term "endanger," also derived from a supreme court decision.[80]

The first two questions that the jury was asked in *E.B.* were:

QUESTION 1

Should the parent-child relationship between [Respondent/mother E.B.] and the child [E.B.] be terminated?"

Answer "Yes" or "No".

Answer:

QUESTION 2

Should the parent-child relationship between [Respondent/mother E.B.] and the child [B.B.] be terminated?

Answer "Yes" or "No".

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75. *See id.* PJC 218.01A. The list of parental rights, privileges, duties, and powers is based on TEX. FAM. CODE ANN. § 12.04 (Vernon 1988).

76. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 218.01A (1989). The definition of "termination" is based on TEX. FAM. CODE ANN. § 15.07 (Vernon 1986).

77. *See id.* PJC 218.01A. The definition of "clear and convincing evidence" is based on TEX. FAM. CODE ANN. § 11.15(c) (Vernon 1986).

78. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 218.01B (1989). This submission is based on TEX. FAM. CODE ANN. § 15.02(1)(D)-(E) (Vernon 1986). There were eleven culpable parental acts described by § 15.02(1) as of the time of trial (including the signing of an affidavit of relinquishment, which was used to terminate the father's rights in this case). TEX. FAM. CODE ANN. § 15.02 (2) (Vernon 1986). Only (D) and (E) were pled and proved by the state in the case of the mother. E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 388 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).

79. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 218.01A (1989). Termination of parental rights requires both proof of culpable activity by the parent and a finding that a decree of termination will be in the best interest of the child. The instruction supplying the list of possible factors that comprise best interest was taken directly from *Holly v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976), a case that involved a private termination suit filed by a father against the mother.

80. Texas Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987). The definition of the term "endanger" does not appear in PJC-5, but, rather, came directly from *Boyd*.

Answer:[81]

Eleven jurors answered both of these questions "Yes." The trial court[82] rendered a decree based on the jury's verdict that terminated the parent-child relationship between the mother and her two children. Because of the affirmative answers, the jury did not answer the contingent questions relating to managing and possessory conservatorships posed to it regarding the conservatorship of the children.[83]

On appeal, the controversy revolved around the PJC-5 submissions to the jury, as contrasted to the mother's requested jury questions which were refused by the trial court. The mother's appeal was almost entirely based on the asserted legal superiority of the "special issues" that were submitted in the similar case of *In Re S.H.A.*[84] (with the apparent, but unstated, approval of the Dallas appellate court). She claimed, *inter alia*, that the trial court had erred in refusing her request that three separate questions for each child be submitted to the jury in substantially the following form:

QUESTION No. 1

Do you find by clear and convincing evidence that [appellant E.B.] knowingly placed or allowed the child, [E.B.], to remain in conditions or surroundings which endangered the physical or emotional well-being of the child, [E.B.]?

Answer: "Yes" or "No".

Answer: _____

QUESTION No. 2

Do you find by clear and convincing evidence that [appellant E.B.] engaged in conduct or knowingly placed the child [E.B.] with persons

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81. *E.B.*, 766 S.W.2d at 388.

82. Judge Joseph Hart of the trial court is well-known in his own right as an author and lecturer.

83. In the event the jury had answered "No" to termination of the mother's parental rights, it was asked who should be named sole managing conservator of the children, the mother or the Texas Department of Human Resources. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 216.01 (1989). If TDHS was to be named managing conservator, yet another contingent question was to be asked; whether the mother should be named as possessory conservator. See *id.* PJC 216.03.

84. 728 S.W.2d 73, 81-82 (Tex. App.—Dallas 1987, no writ). Incidentally, the appellate court in *S.H.A.* was not called upon to rule on the validity of the special issues submitted to the jury. Rather, those issues were merely reported on without comment. Apparently there was no appellate issue or error raised regarding their submission.

who engaged in conduct which endangered the physical or emotional well-being of the child, [E.B.]?

Answer: "Yes" or "No".

Answer: _____

QUESTION No. 3

Do you find by clear and convincing evidence that termination of the parent-child relationship between [appellant E.B.] and the child [E.B.] would be in the best interest of the child, [E.B.]?

Answer: "Yes" or "No".

Answer: _____

The request for three identical questions relating to the other child, B.B., also was denied by the trial court.

Interestingly, the mother did not complain on appeal with regard to the sufficiency of the evidence supporting the verdict of the jury.[85] Rather she based her appeal entirely on the relatively technical issue of the propriety of the jury questions. While acknowledging that the rules require broad-form submissions whenever feasible, the appellate court reversed the trial court's decree of termination, finding that the mother's requested multiple questions were in fact "broad-form," and holding that the single question (per child) actually propounded to the jury constituted reversible error.[86]

The court advanced two reasons in support of its view. First, the court recited the mother's argument that the trial court's submission may have allowed the termination of parental rights "on the basis of five (and only five) jurors concluding that [the mother] 'placed the [child] in a dangerous situation,' and five (and only five) jurors concluded that [the mother] 'engaged in dangerous conduct.' "[87] This was held to be error because "the submission . . . permits the State to obtain an affirmative answer without discharging the burden imposed

85. In my opinion, at least ten jurors would have answered "yes" to termination of the mother's parental rights whether they were asked one question per child, three questions per child, or thirty-three questions per child on that issue. The next jury trial in which the Children's Rights Clinic appeared as attorney ad litem involved four children, the contesting mother, and the contesting father of one of the children. Perhaps influenced by the appeal pending in *E.B.*, the trial court accepted the questions submitted by the attorneys representing the mother and the contesting father. The jury did not hesitate to answer "yes" nineteen times in a row.

86. *E.B.*, 766 S.W.2d at 390.

87. *Id.* at 389.

by § 15.02 and Rule 292 that at least ten jurors conclude that [appellant] violated one or more of the grounds for termination set out in § 15.02."[88]

Second, the trial court's submission was not broad-form because it "comprehends the total factual and legal inquiry posed by the State's lawsuit."[89] The appellate court reasoned that the jury was permitted to invade the proper role of the trial court. That is, by answering the questions posed, the jury was able "to determine the ultimate legal issue of whether the parent-child relationship should be terminated—a function served *only* by a district court's judgment."[90]

On June 20, 1990, the Texas Supreme Court unanimously reversed the court of appeals in an opinion authored by Justice Eugene A. Cook.[91] On October 10, 1990, the court denied the mother's motion for rehearing in a substituted opinion issued without further explanation (more about this later).[92] Both the original and the revised opinion give short shrift to the rationale expressed by the appellate court.

C. *Word-By-Word, Line-By-Line Analysis of* TDHS v. E.B.

1. The Issue

> The issue before this court is whether Rule 277 of the Texas Rules of Civil Procedure means exactly what it says, that is, "in all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."[93]

One thing is for sure, when the supreme court states that the issue to be decided is whether one of its prior pronouncements "means exactly what it says," the litigant on the receiving end of this rhetorical device can kiss his case good-bye.[94] In support of the inevitable conclusion that the court had not just been joking in its past judgments on the subject, Justice Cook's opinion provides the obligatory review of the history of broad-form submissions, culminating in the 1988 ver-

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88. *Id.* at 390.
89. *Id.*
90. *E.B.*, 766 S.W.2d at 390.
91. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990).
92. *Id.*
93. *Id.* at 648.
94. How else can such a question be answered but with the affirmative, "Yes we meant what we said!"? It seems extraordinarily unlikely that the court would say, "April Fools, we were only joking with our prior pronouncements."

sion of Rule 277. There is no hint in the opinion that the language of the new rule is anything but clear, concise, and self-explanatory. On the other hand, the opinion does not reflect any of the impatience with the lower court that had sometimes characterized earlier opinions by the court.

2. The Controlling Question

> The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under § 15.02 the jury relied on to answer affirmatively the questions posed. . . . Here the trial court tracked the statutory language in the instruction and then asked the controlling question.[95]

The supreme court pays absolutely no attention to the appellate court's rationale that somehow the single questions (one per child) posed to the jury "invaded the province of the court." Rather, the supreme court specifically approves the question asked of whether parental rights should be terminated, referring to it repeatedly as "broad-form" and "the controlling question." In effect, this is a restatement of the principle enunciated in *Island Recreational* that broad-form submission means that it is not "reversible error for a trial judge to submit a single broad issue encompassing more than one independent ground of recovery."[96] In short, the controlling question is termination of parental rights and "not what specific ground or grounds under § 15.02 the jury relied on to answer affirmatively the questions posed." (emphasis supplied)

As noted much earlier in this article, when the supreme court rewrote Rule 277 in 1988, a number of traditional concepts were eliminated from the text. The phrase "special issues *controlling the disposition* of the case" was among the casualties.[97] To some degree, at least, this concept of "controlling issue" has been resurrected in this case. The idea expressed now answers to the name of "controlling question." Because everything must be called something, this is as good a shorthand reference as any for the principle that only the

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95. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990).

96. Island Recreational Dev. Corp. v. Republic of Tex. Serv. Ass'n, 710 S.W.2d 551, 554 (Tex. 1986).

97. *See* TEX. R. CIV. P. 277 and previous discussion section II A: "The New Version of Rule 277."

question (or questions) that determine the outcome of the case should be posed to the jury in the broad-form system.

By deciding *E.B.* in this manner, the supreme court mandates that modern Texas jury questions shall no longer make the illusory distinctions that previously predominated the special issues practice. The purpose of a jury question is to present an issue that the jury can comprehend and answer without undue confusion. To accomplish this goal, excessive complexity must be rejected. The ultimate test of whether a submission adequately addresses the elements of the cause of action (or any issue presented to the jury), is whether the trial court can reasonably convert the jury's answer into a proper judgment. Therefore, in a case seeking termination of parental rights, the parent's culpability does not turn on whether "placing the child in a dangerous situation" was the result of "placing the child with a child molester, in a lion's cage, in a sky diving class, etc."[98] Broad-form submission is designed and intended to avoid this sort of hair splitting. Such illusory distinctions are unrelated to the significant inquiries that the jury is being asked to resolve.

Determining exactly what is the controlling question in a particular case will vary from situation to situation. For example, in the analogous family law context of divorce the issue once was phrased in terms of whether the defendant was guilty of adultery or, alternatively, of cruel treatment. Later the question of whether the marriage had become insupportable was added to the inquiry.[99] Today, only hidebound traditionalists would dispute the assertion that the proper jury question is whether a divorce should be granted, not whether a particular ground exists to sustain the granting of a divorce.[100] Similarly, there was a time when it would have been almost unanimously

98. All of these arguments were advanced by the mother.

99. Howell v. Howell, 147 Tex. 14, 17, 210 S.W.2d 978, 980 (1948); Bell v. Bell, 540 S.W.2d 432, 435 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Cusack v. Cusack, 491 S.W.2d 714, 717-18 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd).

100. *Cf.* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 201.010. This charge asks the question "Do grounds exist for divorce between HUSBAND and WIFE? Yes or No." *Id.* This question is almost entirely theoretical because it would be virtually inconceivable that a jury would ever be called upon to answer such a question in the 1990's. Still, the issue does arise from time to time, as in a non-jury case where the court granted the wife a divorce on a cruelty ground in addition to a finding of insupportability. Gutierrez v. Gutierrez, 791 S.W.2d 659, 662 (Tex. App.—San Antonio 1990, no writ). The appellate court found, because the insupportability ground supported the divorce, that it was "unnecessary to consider the challenge to the cruelty finding." *Id.*

agreed that the controlling issues in a suit seeking a modification of a sole managing conservatorship were whether each of the elements in the well-known three-prong test had been met *seriatim*.[101] Indeed, this probably remains the view of a substantial number of judges and lawyers. In the opinion of the relevant pattern jury charges committee, however, the proper broad-form submission is to ask the jury the single question of whether managing conservatorship should be changed from Party A to Party B.[102]

3. Instructions Track the Statute

> Accompanying these questions were instructions, substantially in accordance with volume 5, § 218.01A of Texas Pattern Jury Charges, including a description of the rights, privileges, duties, and powers of a parent and definitions of the terms "termination," "clear and convincing evidence," and "endanger." The crucial instructions basically track the statutory grounds for termination as set forth in the Texas Family Code § 15.02(1)(D), (E). Additionally, the jury was given a list of "some of the factors to consider in determining the best interest of the child" taken directly from *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).[103]

In *E.B.*, the trial court's charge carefully tracked the statutory language, a practice that the supreme court has routinely approved and encouraged.[104] In this instance, however, there was an imminent danger of a "proliferation of instructions," which was cited as a major reason for the creation of special issues practice in the first place.[105] The supreme court opinion does not even hint that the approved procedure in *E.B.* remotely resembles that particular calamity, notwithstanding the fact that a very significant number of instructions were provided to the jury.

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101. Jones v. Cable, 626 S.W.2d 734, 735 (Tex. 1982).

102. 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 217.01C (1989) asks the question: "Should *PARTY A* be removed as sole managing conservator and *PARTY B* be appointed sole managing conservator of the child?, Answer 'yes' or 'no'." *Id.* Other questions deal with two or more children in a similar fashion. The "three prong test" is provided by instruction only. *Id.* PJC 217.01A, 207.01D-.01E.

103. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 648 (Tex. 1990); *see* Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).

104. *E.g.*, Hurst v. Sears, Roebuck & Co., 647 S.W.2d 249, 252 (Tex. 1983); Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 937 (Tex. 1980); Dutton v. Southern Pacific Transp., 576 S.W.2d 782, 785-86 (Tex. 1978).

105. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

The trial court's charge in *E.B.* ran a total of eleven pages. As noted previously, matters for instruction included: the rights, privileges, duties and powers of a parent; definitions of "termination of parental rights," "clear and convincing evidence," and the term "endanger"; the statutory grounds of § 15.02(1)(D) and (E); factors to consider in determining the best interest of the child; and, contingent instructions on: the definition of "preponderance of the evidence;" the rights, privileges, duties and powers of a nonparental managing conservator; and the statutory test for appointment of a parent as possessory conservator.[106] While the instructions were certainly lengthy, given the seriousness of the issue involved, they probably did not reach the level of excessive "proliferation."

4. Definition of "Whenever Feasible"

> In the 1988 amendments to Rule 277 this court said broad-form submission "shall" be used "whenever feasible" and eliminated trial court discretion to submit separate questions with respect to each element of a case.
>
> Rule 277 mandates broad-form submissions "whenever feasible," that is, in any or every instance in which it is capable of being accomplished.
>
> "The history and struggle to recognize broad-form submission is a long one. The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions."[107]

Justice Cook's statement is plain and direct. Unfortunately, in the *E.B.* case such a "plain meaning" approach encountered significant resistance at the appellate court level, which took over a year to correct. Despite the clarity of the opinion this may continue to be true in the future. Proof of intractability is found in everyday conversations with judges and lawyers. For an unarticulated and unaccountable reason, the "whenever feasible" clause has been perceived by some to be a barrier to simple, direct jury questions, such as those posed by the trial court in *E.B.* For example, in its opinion the court of appeals noted that the mother urged "that the district court's submission of a single question incorporating the two independent grounds for termi-

106. *See* previous discussion in text section III B: "Texas Department of Human Services v. E.B.".

107. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990).

nation was not 'feasible.' "[108] Neither the appellate court nor the mother explained just what might be meant by this "not feasible" statement. It appears that both the mother and the appellate court attempted to use the term "feasible" as a synonym for "appropriate" or "desirable." Note that the appellate court only quoted "appellant's argument," without actually expressing an opinion regarding the correctness or error of that argument. It's as if the appellate opinion wanted to keep its options open on both sides of the fence on this point. None of this, however, gives any hint as to what the term "feasible" might have meant to the appellate court.

The fact that the intermediate appellate court acted unanimously when it incorrectly decided *E.B.* is evidence that heretofore the supreme court has not been clear enough nor direct enough. But, in *E.B.* the supreme court supplies the standard English dictionary definition of "feasible," thereby erasing any possible ambiguity. Noah Webster undoubtedly smiled when the court defined "feasible" as "in any or every instance in which it is capable of being accomplished."[109] It seems that many of the bench and bar would never have guessed that the plain meaning of an English word is exactly what the court intended to convey when it used the term in a rule of procedure. Alert court-watchers, however, would have guessed this in a minute, and are surely gratified to learn Texas jurisprudence isn't always complex or tricky. Formulating a broad-form question to terminate the mother's parental rights to each of her two children obviously was feasible in *E.B.* Incontrovertible proof of this assertion is found in the fact that the trial court did, in fact, propound such questions. Of course, the supreme court's opinion in *E.B.* does not continue to explore hypothetical situations in which the further definition of "not feasible" will arise. Hypotheticals are the business of law professors, not judges.

In examining "feasibility," recall that the trial court implicitly determined it was "not feasible" to ask a single question to cover the termination of the mother's rights to both of her children. It is theo-

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108. E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 389 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).

109. The dictionary on my desk states that the word "feasible" means: "1. Capable of being done or carried out. 2. Capable of being used or dealt with successfully: suitable. 3. Reasonable; likely. Synonym, see possible." WEBSTER'S NEW COLLEGIATE DICTIONARY 419 (1974).

retically possible that a jury could find that the state only proved that a termination decree should be rendered with respect to one of them.

Moreover, the trial court explicitly determined that it was not "feasible" to settle all of the potential issues in the case with a single question for each child. Additional contingent questions were submitted in the event that the first question—termination of the mother's parental rights—elicited a negative answer regarding either child. In such event, an additional contingent question (one per child) was required because TDHS was seeking managing conservatorship in the alternative.[110] Further, if the jury determined that the agency should be named as managing conservator, yet another contingent question (one per child) had to be posed, to wit, the alternative question of whether the mother should be named possessory conservator.[111] In sum, even though the *E.B.* decision ratifies the greatest extent of broad-form submission, it cannot be cited for the proposition that it sanctions the much disfavored "global general verdict." That is, the jury was not merely asked, "Who wins?"

For some, the basic question remains unanswered; that is, *E.B.* does not explain when broad-form submission is not feasible. Future cases will probably yield the following short answer: "Very, very seldom." In the authoritative discussion, all that has been said officially is found in *E.B.* And, in all of the published literature, the sum and substance of commentary on this topic is found in PJC-1, which sets forth an example of "not feasible" involving the distinction between types of liability of governmental entities and potential disputes over whether a violation is "negligence per se."[112] Until the courts develop further

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110. In the event the jury did not find for termination of the mother's parental rights for a particular child, they were instructed on sole managing conservatorship and then asked who should be appointed in that role. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES P.J.C. 215.01, 216.01 (1989).

111. *See* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 215.03, 216.03A (1989). In the further event that the jury chose the Department of Human Services as the entity to be named sole managing conservator, after instructions, the jury was asked additional contingent questions of whether the mother should be named as possessory conservator of each child.

112. Pattern Jury Charges Vol. 1, P.J.C. 4.01, states:

When broad-form submission not feasible. In some situations a broad-form submission may not be feasible. For example, pleadings and proof in a negligence action against a municipality might embrace acts for which there is complete governmental immunity, acts for which there is a limited waiver of immunity under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. ch. 101 (Vernon 1986), and acts of a proprietary nature for which there is no immunity at all. Since a single broad-form submission find-

examples on a case-by-case basis, a residual uncertainty will continue over the full extent of the nonfeasibility of broad-form submission. Until further developments, assume that the basic rule is that if a question can be phrased broadly, it should be.

5. Is Broad-Form Mandatory?

> In the 1988 amendments . . . this court said broad-form submission "*shall" be used* . . . and *eliminated trial court discretion to submit separate questions* with respect to each element of a case.
>
> Rule 277 *mandates* broad-form submissions. . . . The rule *unequivocally requires* broad-form submission. . . . Unless extraordinary circumstances exist, a court *must submit* such broad-form questions.[113]

While broad-form clearly was "not mandatory" under the 1973 version of Rule 277,[114] it is highly dubious that the same statement can be made under the 1988 rule. Certainly the statements quoted above mitigate against such a conclusion. On the other hand, it is unclear (and unknowable) what sanction, if any, is available if the "unequivocally required" submission is not made. This issue will be discussed further, *infra*.

6. *The Controlling Question Revisited—The Crucial Language*

a. The Crucial Wording

The following four sentences constitute the heart of the court's opinion:

> The court of appeals held that a single broad-form question incorporating two independent grounds for termination of a parent-child relationship permits the state to obtain an affirmative answer without discharging the burden that the jury conclude that a parent violated one

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ing would not reveal which acts or omissions were found to be negligence, the court could not determine from the jury's answer what judgment should be rendered. In this situation, an alternative submission should be used so that the varying law applicable to the acts or omissions found by the jury can be taken into account in rendering judgment.

See 1 PJC 5.01 comment (1987), 'If uncertain whether violation is negligence per se,' for another situation in which broad-form submission may not be feasible. Alternatives include use of limiting instructions or questions phrased in terms of more specific facts. *See* Scott v. Atchison, Topeka & Santa Fe Ry. Co., 572 S.W.2d 273 (Tex. 1978).

Id.

113. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (emphasis supplied).

114. Prudential Ins. Co. of Am. v. Henson, 753 S.W.2d 415, 417 (Tex. App.—Eastland 1988, no writ).

> or more of the grounds for termination under the statute. Tex. Fam. Code § 15.02 (Vernon Supp. 1990); Tex. R. Civ. P. 292.
>
> The charge in parental rights cases should be the same as in other civil cases. The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under § 15.02 the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in § 15.02.[115]

The first sentence raises the classic "special issues" argument discussed previously.[116] The second sentence boldly states that there is to be one rule, and one rule only, applicable to all civil cases. The third and fourth sentences reaffirm the court's prior statement that the questions asked were the proper ones for this case. Moreover, these sentences refute any argument that at least ten jurors must agree on a particular "ground or grounds" in order to sustain termination of parental rights. If the parent does "one or the other" of the prohibited acts, termination will lie.

b. Semantic Game

In the light of the statutory language for termination of parental rights, the "same ten jurors" argument is grounded in semantics rather than in substance. Subsections (D) and (E) of § 15.02(1) cover closely related fact situations, which often are only theoretically distinguishable. Under subsection (D), the parent must knowingly place or allow the child to remain in conditions or surroundings that endanger the child, while under subsection (E) the parent must engage in conduct or knowingly place the child with persons who engage in conduct which endangers the child. Under both subsections the result of the parental action or inaction—omission or commission—is the endangerment of "the physical or emotional well-being of the child." Here the supreme court takes the view that the operative agreement of at least ten jurors was that the mother endangered the child by her conduct. Exactly what constitutes "endangering" conduct often cannot be broken down into discrete categories of "acts of omission or commission." For example, long-term failure to feed an

115. *E.B.*, 802 S.W.2d at 649.

116. *See* Haas Drilling Co. v. First Nat'l Bank in Dallas, 456 S.W.2d 886, 889 (Tex. 1990) (implies reversal could result from overly broad issue in negligence case).

infant does not so clearly fall under either one of the grounds as to compel the exclusion of the other. A reasonable person could conclude that a parent who fails to feed an infant is guilty of either or both passive and active culpability. Thus, in many instances any asserted "alternative" factual predicates of underlying "abuse" or "neglect" are really indistinguishable, or even illusory.[117]

E.B. holds that the appropriate factual inquiry is whether the parent-child relationship should be terminated because the parent directly or indirectly endangered the physical or emotional well-being of the child. In *E.B.* that question was unequivocally answered "yes" by eleven jurors. Obviously, the supreme court is not concerned with whether five jurors focused on endangering conditions, while five others may have had endangering conduct in the forefront of their minds. The key is that eleven jurors voted on the question presented, that the mother's parental rights should be terminated. This answer establishes all of the fact-finding essential to sustain the trial court's decree to that effect.

c. Multiple Elements

The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective. Broad-form, in its essence, requires combining into one compact question not only elements of a cause of action, but in certain instances, even combining affirmative defenses and independent factual and legal grounds of recovery as well.[118]

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117. *See* TEX. FAM. CODE ANN. §§ 15.02(1)(D) (Vernon 1986). Subsection 15.02(1)(D) contains three disjunctives: "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." *Id.* If each "or" establishes a choice that jurors might split over, there are twenty-seven possible combinations for the "five juror this, five juror that argument" to be based on in this formulation; *e.g.*, five thought "conditions" and "emotional"; five thought "conditions" and "physical"; five thought "surroundings" and "emotional"; etc.

118. *See* Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 554 (Tex. 1986) (independent grounds of recovery submitted in a single question); Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 255 (Tex. 1974) (where several specific predicate acts are alleged, it is proper to submit a broad question asking whether defendant was negligent, and also proper to submit independent grounds of recovery, negligence and *res ipsa loquitur*, in a single question); Southern Pac. Co. v. Castro, 493 S.W.2d 491, 498 (Tex. 1973) (condemning submission of excuse of negligence per se as separate question, rather than as instruction to contributory negligence question, thus combining independent ground of affirmative defense and element of plaintiff's recovery in single broad question); Scott v. Ingle Bros. Pac., 489

d. The Jury Decides

At center, broad-form submission rejects much of the traditional distinction between questions of fact and law under which supposedly only questions of fact are proper for the jury. A broad-form question may well involve both facts and the application of law to those facts. For example, the paradigm broad-form question in a negligence case—"Did the negligence, if any, of *the persons named below* proximately cause the *occurrence* in question?"[119]—requires the jury to determine the ultimate legal issue of whether a party or parties were negligent, and whether such negligence was the proximate cause of the occurrence. Once that question is answered, nothing of substance is left for the court to do but to give effect to the jury's findings on the issue of liability. Given such a predicate, it makes no sense to object, as did the intermediate appellate court in *E.B.*, that in answering whether parental rights should be terminated the jury is thereby invading the court's function to determine "the ultimate legal issue."[120] It is the court's function to render the judgment or decree, and it is the judge who signs the bottom line, not the foreman of the jury. But, if a jury has been empaneled, it is the jury that supplies the answer or answers that really matter. After all, otherwise why go to all that time, trouble and expense?

7. Rule 292: Ten Jurors Must Agree

In *E.B.* Justice Cook notes: "All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in § 15.02."[121] Nothing in the rule governing the required degree of juror concurrence suggests that the critical ten jurors must agree on the precise basis of a broad-form answer. Rather, Rule 292 simply states: "A verdict may be rendered in any cause by the concurrence,

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S.W.2d 554, 557 (Tex. 1972) (single question inquiring whether plaintiff was discharged without good cause where various predicate acts were alleged); Grieger v. Vega, 153 Tex. 498, 504, 271 S.W.2d 85, 88 (1954) (method employed by the trial court of grouping several elements of an ultimate issue into one special issue "*is to be commended*"; the ultimate question "was whether or not the killing was wrongful") (emphasis supplied); Hough v. Grapotte, 127 Tex. 144, 146, 90 S.W.2d 1090, 1091 (1936) (the controlling question of domicile, which included elements of residence and intent, properly framed as single comprehensive question).

119. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 4.01A (1987); *see also* 1, 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (1987).

120. E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 390 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).

121. *E.B.*, 802 S.W.2d at 649.

as to each and all answers made, of the same ten members of an original jury of twelve."[122] Similarly, there is nothing in the statute governing the termination of the parent-child relationship that requires juror agreement on a specific subsection describing culpable parental conduct.[123] The rationale that couples these disparate legal principles and converts them into mutually dependent requirements, strikes at the heart of the philosophy justifying broad-form submission. There is no doubt that in *E.B.* the appellate court deeply regretted (and perhaps resented) the fact that broad-form submission sacrificed its ability to track the jury's reasoning processes. But, broad-form submission is founded on the principle that a holistic judgment by the jury, rather than a fractionated one, is more consistent with the right to trial by jury. Moreover, a broad-form submission is best suited to avoid the complications and conflicts that prevent a jury from expressing its true intent. The natural consequence of this policy is that the requisite ten jurors must agree only on the broad question posed. There is no requirement regarding how, or even if, the ten affirmative jurors agree on narrower issues, irrespective of whether those issues are labeled as evidentiary or dispositive.

By this juncture it ought to be clear that the supreme court promulgated the 1988 amendment to Rule 277 fully aware that broad-form submission mandates that jurors reach agreement on the broad question posed, while accepting the possibility (or even the likelihood) that individual jurors might disagree on the particular basis supporting their common conclusion. That is, "five excessive speed, two improper lookout, and three bad brakes" equals negligence of the defendant—and NO ONE WILL EVER KNOW the exact score of the competing elements.

The task of identifying and analyzing the jury's reasoning process on appellate review is made even more impossible (if there are degrees of impossibility) when the jury answers in the negative. To illustrate, Chief Justice Phillips stated in a recent concurring opinion:

> In an earlier era of granulated issues, it might have been possible for an appellate court to confine its review to affirmative answers, while scrupulously ignoring negative ones. Such an artificial distinction, however, is impossible under the broad submission now mandated by our court. When a defensive issue is submitted only by instruction, for example,

122. TEX. R. CIV. P. 292.
123. TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1991).

> the reason for a jury's negative answer cannot be known. Did the jury answer 'No' because plaintiff failed to carry its burden by a preponderance of the evidence or because the jury found by a preponderance of the evidence that defendant established its defense? . . . [*This is an*] *insoluble and currently irrelevant query.*[124]

8. Termination Cases Are Civil Cases

> The charge in parental rights cases should be the same as in other civil cases. . . . Petitioner argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission.[125]

As Gertrude Stein would have said if anyone had given her half the chance, a civil case is a civil case is a civil case. It is indisputably true that in principle the termination of parental rights is a more serious legal consequence than a money judgment stemming from an automobile accident. There is no legitimate debate over the fact that termination of the parent-child relationship raises questions of "constitutional dimension."[126] Indeed, some courts have stated that "fundamental constitutional rights are involved."[127] In sum, whatever the exact extent of her rights, the mother in *E.B.* had a right to have and raise her children that the jury verdict abrogated. But, the form of the submission of the question to the jury does not affect those rights. Analogously, a litigant is accorded the greatest constitutional protections in the criminal justice system. But, in the most complicated "capital murder for hire" case, or even in an almost incomprehensibly com-

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124. Herbert v. Herbert, 754 S.W.2d 141, 145 (Tex. 1988) (Phillips, C. J., concurring) (citations omitted and emphasis supplied).

125. *E.B.*, 802 S.W.2d at 649.

126. Holick v. Smith, 685 S.W.2d 18, 20 (Tex. 1985); *In re* G.M., 596 S.W.2d 846, 846 (Tex. 1980).

127. In Interest of S.H.A., 728 S.W.2d 73, 91, 92 (Tex. App.—Dallas 1987, no writ). Interestingly, in *In Interest of S.H.A.*, the *en banc* panel split 8-6 upholding a termination, but both sides agreed on this point. In support of its construction of this principle, all six dissenters joined in an opinion citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) and *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In point of fact, the U.S. Supreme Court has never quite applied the term "fundamental constitutional right" in a case involving termination of parental rights. Both *Santosky* and *Stanley* dance around such a definitive statement. The former discusses the "fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]." *Santosky*, 455 U.S. at 753. The latter refers to the fact that "rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man.' " *Stanley*, 405 U.S. at 651 (citations omitted).

plex criminal conspiracy case involving layers and layers of activities and multiple defendants, the jury is asked the broadest of all broad-form questions: "Is the Defendant Guilty or Not Guilty?" The constitutional protections accorded to a criminal defendant do not implicate the form of the question submitted to the jury. Rather, these are found in the high burden of proof that the state must bear to obtain a conviction and in the procedural protections accorded the defendant. Analogously, termination of parental rights must be proven by "clear and convincing evidence,"[128] not by the customary "preponderance" generally applicable to civil cases,[129] and an indigent parent has a right to appointed counsel when the state seeks custody or termination of parental rights.[130]

In *E.B.*, the Texas Supreme Court emphatically declares that separate rules for jury questions shall not be formulated on an alleged difference between types of civil cases. There is no constitutional requirement to provide different rules for various civil cases depending on the relative importance of the subject matter involved. The constitution does not mandate the creation of false or spurious distinctions. Nor does the fact that a claim is based on a statute (as in *E.B.*), rather than being founded on the common law, serve as a distinction. Texas jurisprudence has already trod along a path strewn with such inappropriate distinctions; former Rule 277 created dichotomies between negligence cases, workers' compensation cases, divorce cases, etc. This rationale ultimately proved to be wholly unsatisfactory to the court, and was washed away by the 1988 amendment to the rule. Henceforth, there is to be one rule, and only one rule, for jury submissions—and the name of that rule is broad-form.

9. Standard of Review

> The standard for review of the charge is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle. Here the trial court tracked the statutory

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128. TEX. FAM. CODE ANN. § 11.15(b)-(c) (Vernon 1986).

129. *Id.* § 11.15(a) (Vernon 1986).

130. *Id.* § 11.10(d) (Vernon 1986). One thing is for certain in the *E.B.* litigation, the mother surely had dedicated, effective representation of counsel (Leonard F. Green of Austin). The right to appointed counsel in termination cases is statutorily based. *Id.* The United States Supreme Court held a decade ago that there was no federal constitutional right to counsel in this context. Lassiter v. Department of Social Servs. of Durham County, 452 U.S. 18 , 33-34 (1981).

> language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.[131]

An alleged error in the charge to the jury is subject to review under the abuse of discretion standard,[132] coupled with the harmful error rule.[133] Whether the multiple "special issues" requested by the mother in *E.B.* would meet the "guiding principle" test established by the supreme court is unclear. If not, her requested multiple questions would fail the abuse of discretion test and require a reversal. But, such a result would be unreasonably harsh. That is, if a jury were to give negative answers to all of the proposed multiple questions regarding the parent's culpability, termination of parental rights clearly is not warranted. For the state to prevail on appeal on such a technicality would force a "vindicated" parent to retry the case. In such a context, this would permit the state one too many bites of the apple.

On the other hand, if a jury were to answer at least one of the proposed multiple questions in the affirmative, and also answers "yes" to the best interest question, termination is warranted. Under those circumstances, the state has nothing to appeal, and the parent, having requested the multiple submissions, also will not be allowed to complain on an estoppel theory.

It is this possibility that identifies the danger. Before *E.B.*, a cautious trial judge would have been tempted to give the predictable loser all the rope he or she asks for in the jury questions, perhaps justified by the fact that an appeal would be precluded. To do so, however, sacrifices the virtues of broad-form on the altar of expedient practicality (well, I suppose there are worse altars).

10. Broad-Form Theory and the Turf War

> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.
>
> Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.[134]

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131. *E.B.*, 802 S.W.2d at 649.

132. DeAnda v. Home Ins. Co., 618 S.W.2d 529, 534 (Tex. 1980).

133. *See* Texas Power & Light Co. v. Hering, 224 S.W.2d 191, 192-193 (Tex. 1949).

134. *E.B.*, 802 S.W.2d at 649.

Broad-form submissions make appellate review more difficult by choice, not by chance. In the days when questions were submitted "separately and distinctly," error was more easily identified on appellate review. Revised Rule 277 decreases the likelihood of the appellate reversal—a deliberate, conscious trade-off. The basis for review of the alleged point of error in *E.B.* remains essentially intact—at least ten jurors must agree on an answer, which may be a compilation of essential elements. Further, the jury must be so instructed of this requirement.[135] If ten jurors do not agree on all of the elements or issues embraced by a broad question, theoretically the jury will "hang" on the entire broad question. But, there is no way to ascertain whether this actually happened when at least ten jurors affirmatively answer the broad-form question submitted. Bench and bar must accept, if not embrace, this reality. The only other course available is a retreat to the muck and mire of "separate and distinct" special issues.

It is very clear that the supreme court has already decided that the future course of Texas law will not be backwards. It is also clear that acceptance of the direction that the court is pushing, pulling, and even dragging its recalcitrant constituency toward has not obtained unanimous consent. This phenomenon is not new. In the past, the supreme court has expressed "exasperation at the bench and bar for failing to embrace wholeheartedly broad issue submission."[136] The appellate court's decision in *E.B.* demonstrates that acceptance of revised Rule 277 still has a ways to go.[137]

IV. THE TWO MISSING SENTENCES

A. *Original Opinion Withdrawn = Two Sentences Deleted on Rehearing*

In its original *E.B.* decision, issued June 20, 1990, an abortive at-

135. *See* TEX. R. CIV. P. 226 (requiring instruction to jury that ten or more jurors must agree upon all answers made and to the entire verdict).

136. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986).

137. *See* Coulson v. Lake LBJ Mun. Util. Dist., 781 S.W.2d 594 (Tex. 1989) *reversing*, 771 S.W.2d 145 (Tex. App.—Austin 1988). The Austin court seems particularly devoted to supervising and reversing jury verdicts. *E.B.* marks the second time in the span of six months that the supreme court reversed a decision by that court which had overturned a jury verdict. In fact, the reversal of *Coulson v. Lake LBJ Mun. Util. Dist.*, is the second time that the supreme court corrected the Austin court in the same litigation.

tempt was made by the supreme court to deal with the persistent "five jurors this/five jurors that" argument. The opinion stated:

> The charge in parental rights cases should be the same as in other civil cases. **The five jurors this/five jurors that argument could easily have been handled by an instruction. However, none was requested.** The controlling question in this case was whether . . .[138]

For advocates of broad-form submission, the two sentences shown in bold typeface were unquestionably the most troubling aspect of the original opinion. Fortunately, this potential controversy was resolved relatively quickly. In denying the mother's motion for rehearing, on October 10, 1990, the court substituted a new opinion to replace the original version. The two opinions are identical except that the two sentences relating to the "five jurors this/five jurors that argument" were deleted without comment.[139]

The court's statement that the "five jurors this/five jurors that argument" could have easily been handled by an instruction suggested a loophole that would have encouraged lawyers to try to wiggle through for the next decade. Judges and lawyers enamored of special issues would have concentrated their efforts on preparing all of those "easily drafted" instructions that would have restored a semblance of special issue practice behind the jury door. That idea is too dreadful to contemplate, because the jury submission does not contain special issues. So after receiving the instructions, the jury would be at least tempted to draft its own special issues and then vote on them in the sanctity of the jury room without judicial supervision.

In both its original and revised opinions, the supreme court stresses that the controlling question in *E.B.* was asked, to wit, whether the mother's rights should be terminated. Which particular ground or provision in the statute she violated by her culpable conduct was not the issue. Ironically, the actual language of the termination statute is such that even if the mother's requested "special issues" had been submitted to the jury, she would still not know exactly by what reasoning process the jury reached a verdict regarding her culpable conduct and the best interests of the child. In fact, her complaint was

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138. Texas Dep't of Human Servs. v. E.B., 33 Tex. Sup. Ct. J. 596, 598 (June 20, 1990) (opinion withdrawn, substitute opinion at 802 S.W.2d 647 (Tex. 1990)) (emphasis supplied).

139. *See E.B.*, 802 S.W.2d at 649. In response to the mother's motion for rehearing, as attorney ad litem for the children, I also urged the court to delete the two troubling sentences from its opinion.

nothing more than a disingenuous semantic game. For example, under either subsections 15.02(1)(D) or (E), it would be possible for a jury to decide that the mother was responsible for endangering the physical well-being or the emotional well-being of the child. On reflection, it is obvious that the exact nature of such distinct endangerments is very different. Arguably, even under the mother's requested special issues, five jurors might think "physical," and five jurors believe "emotional." A "Yes" from ten jurors would not enable the mother to determine whether the same ten jurors agreed on a particular type of endangerment, physical or emotional. Similarly, under Subsection 15.02(1)(E), termination is warranted either if the mother "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers . . ." It is obvious that very different offenses are contemplated by the statute. Holding the mother culpably responsible for her own acts is markedly distinguishable from holding the mother vicariously liable for the acts of others. Again, five jurors might think she "engaged in conduct," while five other jurors decide to hold her vicariously liable for the acts of others, while no combination of ten jurors agreed on the issue. Such a dichotomy would not be discoverable on appellate review. In sum, on close analysis the distinctions the mother sought to draw in her requested "special issues" were truly illusory.

In a letter brief as *amicus curiae* filed after the decision, University of Texas law professor J. Patrick Hazel urged the court to delete the third and fourth sentences from its opinion, as follows:

> The portion of the opinion which disturbs me is [the two sentences under discussion]. . . .
>
> What instruction could have been requested that would have been proper? If the jury is instructed that ten must agree to one ground, this is contrary to Rule 292 which says that ten must agree to "all answers" and to Rule 226a, III-6, which says that the "same ten or more of you must agree upon all of the answers". Hence, our rules provide agreement to answers, not to grounds for answers.
>
> Finally, I believe that an instruction that ten must agree on at least one ground rather than answer would be contrary to the very notion of broad questions. It would be a regression from rather than a promotion of the broad question.
>
> Hence, I respectfully request in order to promote broad question submission that you delete the two sentences referred to above from the opinion, or that you specifically note that in our broad form submissions it is not necessary for at least ten jurors to agree on a single

ground for the answer but only that they agree on the answer.[140]

Professor J. Hadley Edgar of Texas Tech also weighed in with some good advice to the court. In his *amicus* letter brief, he reiterated these points, and added:

> What instructions are necessary? The question is one of negligence, *not* brakes, speed or lookout. If the jury is instructed that at least ten of them are to find either brakes, speed or lookout, then we have emasculated the broad form submission and regressed to a check list system. Surely this is not the Court's intention.
>
> I fear that, knowing the nature of the trial lawyer, the above language will create many problems for our Court system if it is not removed on motion for rehearing. . . .
>
> I suggest two alternatives to the Court on motion for rehearing—either state specifically the instruction that "could have easily handled" the "five jurors this/five jurors that" argument or simply delete these sentences from the Opinion. The latter is more preferable than the former.[141]

Professor Edgar took quite a risk when he challenged the supreme court to write the instructions that could "easily handle" the hypothetical. After all, the court might have taken him up on it. On the other hand, exactly how the "five jurors this/five jurors that argument" could have been cured by an instruction is not apparent to me, nor was it apparent to the members of the PJC-5 Committee when the question arose. In light of the rest of the language of the *E.B.* opinion, it is inconceivable that the jurors should have been instructed that ten of them must agree on a single § 15.02(1)(D) or § 15.02(1)(E) "ground" to decide for termination of parental rights. As noted above, these "grounds" contain an array of "elements" that could easily be granulated further, just as negligence can be broken down into speed, lookout and brakes. This would be analogous to asking the basic "whose negligence caused the accident" question, while at the same time instructing the jury that the same ten of them must agree on whether it was speed, lookout, or brakes that constituted the defendant's specific negligence. It makes absolutely no sense to expect the jury to vote on the instructions given to it by the court. True, the jury must vote—but that vote must be on the questions posed to it by

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140. Amicus Curiae Brief, Texas Dep't of Human Servs. v. E.B. 802 S.W.2d 647 (Tex. 1990) (No. C-8617).

141. *Id.*

the court, and nothing else. Therefore, no instruction conceivable by the human mind would "easily handle" the "five jurors this/five jurors that argument."

In sum, if broad-form submission practice is to function efficiently, it must be accepted as an inevitable consequence that all of the jurors may not agree on every exact detail underlying their collective answer. It must be conceded that there will be no way to determine whether the same ten jurors agreed that the defendant was going too fast, didn't keep a proper lookout, or failed to maintain proper brakes. Those days have been left behind forever.

The "five jurors this/five jurors that" hypothetical is at the root of the intermediate appellate court's complaint about *E.B.*, and pervades the widespread discussion the case has generated. Given the past track record of an already recalcitrant bench and bar, "a proliferation of instructions" would surely have followed. This would have gone counter to the oft-quoted warning issued many years ago by Justice Pope, to wit:

> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. "Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges."[142]

In this matter, failure to heed Justice Pope's warning could have dire consequences. Sliding down the slippery slope of excessive instructions leads not to purgatory, but to that special hell known as special issues practice—with the warfare waged over the instruction phase of the charge instead of the phrasing of the issues. Such efforts would surely lead to innumerable appeals. Ultimately there would be further personal tragedies, such as those suffered by the children in *E.B.*, due to the time-consuming appellate process. Fortunately, all of these unwanted results should be precluded by the withdrawal of the offending two sentences. The passing into history of the "five jurors this/five jurors that" hypo will be noted with regret by many. After all, the charm of this hypothetical so beloved by generations of Texas

142. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

lawyers was primarily or entirely attributable to the fact that it was so easily understood. It could not be surpassed as an explanation of, and justification for, special issues practice. On the other hand, while it is possible that situations vaguely resembling the hypothetical actually did occur on rare occasions, it seems more likely that the hypo was always nothing more than a professorial abstraction. At bottom it depends on the assumption that jurors are either totally stupid, wholly corrupt, or entirely disinterested in the impact of their verdict on the outcome of the litigation—or some combination thereof.[143] Because of the potential for mischief, it would have been very useful to bench and bar for the supreme court to have made an unambiguous declaration that the "five jurors this or that" argument no longer has merit in the era of mandated broad-form submissions. Perhaps the inclusion and subsequent deletion of the two offending sentences accomplishes the same result. By this action, the supreme court has determined that the loss of every lawyer's favorite hypothetical is more than compensated for by the virtues of broad-form submission. Hair-splitting, illusory distinctions should also be lost. Bench and bar should no longer debate abstract, unproductive points, such as whether the jury question was one of fact or law, whether the issue was controlling, or whether evidentiary or ultimate facts are involved. Fortunately, the attempt in *E.B.* to add yet another illusory distinction, *i.e.*, between a remedy and a controlling issue, was thwarted.

V. CONCLUSION

The theory justifying special issues practice had merit, provided that it was applied in an ideal world with ideal jurors. In this world, however, the alleged distinctions created by the theory led only to complexity, jury confusion, and ultimately to the inefficiency of excessive appeals and too many retrials. Ultimately, the heritage of special issues submission was frustration of justice by way of excessive appellate interference with jury determinations.

In the bad old days, the decision in *E.B.* would have caused little

143. *See* Stout, *Our Special Issue System*, 36 TEX. L. REV. 44, 44 (1957). Part of the difficulty is no doubt the result of head-in-the-sand language in Rule 277, to wit: "The court shall not . . . advise the jury of the effect of their answers." TEX. R. CIV. P. 277 Whether a jury answers "guilty of murder" or "yes, the defendant was negligent and caused $1 million in damages," it goes beyond innocent naivete to pretend the jury is unaware of the impact of its answers.

stir because it involved a family law case—a subject matter in which broad-form submission was sanctioned early on. The major area of jury litigation—negligence—would have been unaffected thanks to an illogical, but very real, dichotomy between those cases and other areas of the law. With the advent of new Rule 277 on January 1, 1988, all that has changed. Henceforth, there is to be one rule for all civil cases. This means that *E.B.*, as the supreme court's most recent and most dramatic pronouncement, takes on far greater significance than would have been true just three years ago.

E.B. is a perfect example of the frustration the supreme court has felt regarding its effort to mandate broad form jury questions. Certainly the goal of "reducing appeals" was not met. Indeed, the children who were the real parties in interest in the case are but the latest victims of the theory of special issues submission. Recall that the case was tried to a jury for eight days in early April 1988—well more than two years before the decision of the supreme court. Over four years passed from the time the children were taken into the custody of TDHS until the case was finally resolved with the denial of the mother's motion for rehearing. The child E.B. was born in November 1982, and the child B.B. was born in August 1986: thus, one child has spent nearly one-half of her life, and the other almost all of her life, waiting for their fate to be resolved in order that an adoption may be consummated. These children needed to get on with their lives, but were unable to do so, in large part, because of the continuing conflict over broad-form submission and the reluctance of bench and bar to accept the supreme court's directives.

Mandating broad-form submission does not affect the requirement that at least ten jurors must agree on the answers to the questions posed. But, there is no way for the trial court, or an appellate court for that matter, to invade the province of the jury to determine the reasoning process by which the jury reached its conclusion. In this regard, the jury must be presumed to have followed the instructions of the trial court. The ability to supervise closely and conduct a nit-picking analysis of an unfavorable jury verdict has been forever lost.

Left unstated in the roll-call of justifications for the supreme court's preference for broad-form submissions is the fact that such submissions reduce the power and authority of the intermediate appellate courts. If a jury verdict cannot be nit-picked for illusory errors, the role performed by appellate courts will be diminished—and so much the better for judicial efficiency and economy. With its final decision

in *E.B.*, the supreme court has once again communicated the message that Rule 277, in fact, "means exactly what it says." Perhaps this time it will be understood.

VI. ADDENDUM

After this article was accepted for publication, cite-checked and typeset, the United States Supreme Court decided an important case related to the subject of this article. In the analogous case of *Schad v. Arizona*, 501 U.S. ___, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), the Court upheld a capital murder conviction and death sentence. The defendant was found guilty after the jury had been instructed that "[f]irst degree murder is murder which is the result of premeditation. . . . Murder which is committed in the attempt to commit robbery is also first degree murder." *Id.*, 501 U.S. at ___, 111 S. Ct. at 2495, 115 L. Ed. 2d at 563. The latter is usually referred to as "felony murder." The defendant claimed that his due process rights had been violated because the jury's guilty verdict did not inform him of whether he was being convicted of premeditated murder or felony murder.

In a plurality opinion written by Justice Souter, joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy, the conviction was upheld based on the conclusion that the United States Constitution does not require a jury to agree on one of the two alternative theories for capital murder established by the state statute. A criminal defendant's right to a unanimous jury verdict is a due process claim, not a Sixth Amendment claim. As such, the Supreme Court is not free to substitute its own interpretation of the statute. If the Arizona courts and legislature have determined that certain statutory alternatives are but means of committing a single offense rather than independent elements of crime, the Court is not at liberty to ignore that determination and to conclude that the alternatives are, in fact, independent elements of separate offenses. Decisions about which facts are material, and which acts constitute separate crimes and therefore must be proved individually, are for the legislature, not for the courts.

Justice Scalia, while concurring with the plurality, gives even greater deference to the legislative determination. His opinion traces the history of felony murder and premeditated murder back to the very beginning of the nation, and would find that the criminal jurisprudence under attack is supported by long-established precedent.

Justice White, joined by Justices Marshall, Blackmun, and Stevens, disagrees; his dissenting opinion advances a version of the familiar (to Texas lawyers) "five jurors this/five jurors that" argument—except in a criminal case it becomes "six jurors this and that."

The *Schad* decision validates the Texas Supreme Court's rejection, in *E.B.*, of the mother's claim that the broad form submission violated her constitutional due process rights. *E.B.*, 802 S.W.2d at 649. Surely if a capital murder conviction and death sentence can withstand constitutional scrutiny when the jury returns its broad form verdict, *i.e.*, "guilty," then a civil lawsuit such as that involved in *E.B.* falls well within the bounds of constitutional due process.