DFPS Case Law Update

PRESENTED BY:

CAROLINE CAROW, APPELLATE ATTORNEY
TDFPS APPELLATE DIVISION
CAROLINE.CAROW2@DFPS.TEXAS.GOV

JERRY REYES, APPELLATE ATTORNEY
TDFPS APPELLATE DIVISION
JERRY.REYES@DFPS.TEXAS.GOV

14TH ANNUAL HILL COUNTRY AD LITEM SEMINAR
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Termination Grounds

In re E.D.E.L., No. 05-22-00103-CV (Tex. App.—Dallas July 1, 2022, no pet.) (mem. op.)

- Mother and Father were Guatemalan nationals; little formal education and spoke only Spanish.
- Father paid a "coyote" to transport him and the child across the border in search of better opportunities.
- Father and the child made the trip by bus, stayed in hotels, and had three meals a day during their journey. After arriving in the United States in May 2019, Father secured employment and an immigration sponsor and ultimately moved to Plano.
- Father would leave the child in the care of a woman who looked after children while he went to work, although he occasionally brought the child with him to his work as a landscaper.

- Father began abusing alcohol and became physically abusive to the child, who was then four years old.

- In June 2020, law enforcement was called for allegations of physical abuse to the child; law enforcement found the child in a closet with a bump and small cut on his head. Father admitted to law enforcement that he struck the child twice on the head while intoxicated. The child was taken to the hospital and the Department was called.

- Mother challenged the sufficiency of the evidence supporting termination of her parental rights pursuant to TFC §§ 161.001(b)(1)(D) and (E).

- The Department argued Mother knowingly endangered the child by allowing him to travel to the United States and live with Father.

"Subsection (D) unambiguously requires proof that Mother knowingly exposed [the child] to an endangering environment" but there was no evidence produced that Mother knew of the conditions prior to the child's removal.

Department's argument that Mother should have inquired as to the living situation:

- "[I]t is apparent from the record that Mother entrusted the care of her son to Father and the Department presented no evidence suggesting Mother should have suspected Father would subject the child to dangerous living conditions."

- No evidence that there was anything that should have alerted Mother to dangerous living conditions and no evidence the child was harmed while with the individuals Father's chose to care for the child.

Department's argument that the child had tooth decay, pinworms, and poor hygiene:

- No evidence that Mother "knew about these conditions, let alone had the means and opportunity to remedy these issues and chose not to do so.

- No evidence that dental care was available for the child in Guatemala, that the child lacked adequate nutrition [] while he lived in Guatemala, or that Mother was aware [the child] had pinworms and ignored same." The Court pointed out that "being poor, in and of itself, is not a ground for termination of parental rights."

Department's argument that Mother knowingly endangered the child by allowing him to travel to the United States:

- "Mother's acknowledgement of the danger associated with [the child's] travel to the United States is some evidence of awareness of the danger associated with emigration. Those dangers, of course, are inherent with the journey and, critically, were confronted with Father's presence and supervision."

Department's argument that Mother knowingly endangered the child by allowing him to travel to the United States:

- Mother and Father decided to have the child accompany Father in the belief entering the country could be legally accomplished and that it would improve their family's life.

- The child's counselor agreed that immigration alone is not a basis for termination of Mother's parental rights, and the Court also stated that this was not a situation wherein the family "simply handed [the child] over to an unknown person or a person known to be reckless or dangerous to escort to the United States".

- "[N]o evidence" to support termination of Mother's parental rights under subsections (D) and (E).

- In contrast, the Houston 14th District Court the held evidence supporting subsections (D) and (E) was legally and factually sufficient where Mother and Father allowed the six-year-old child to travel from Honduras to the United States with an individual and a human smuggler. *In re A.Y.C.*, 665 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2023, no pet.).

In re C.S. and A.S., No. 06-22-00032-CV (Tex. App.—Texarkana Aug. 16, 2022, no pet.) (mem. op.)

- TFC § 161.001(b)(1)(D) provides for termination if a parent has knowingly placed or knowing allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being.
- On appeal, Father challenged the sufficiency of the evidence supporting the trial court's (D) finding.
- Before removal, the children witnessed Mother's and Father's brutal treatment of the children's sibling (who was not a child subject of the suit).

- Children witnessed brother "being hit with the paddle on all different areas of his body, that they had witnessed his hands bleeding and bruising on his body, that they also had been hit with paddles and sticks and paint sticks as well." The child was also made to do military workouts for hours at a time, like "burpees and crabwalks and pushups".
- Children also experienced a "one-for-all" punishment, where if their brother was punished, they received the same punishment. Meals were also routinely withheld from all the children as punishment.
- This conduct produced an environment that caused the children to fear their parents to the point that, even a year after removal, they feared being returned to Mother's and Father's care and had no desire to have any contact with either parent.

- The Court of Appeals rejected Father's contention that the evidence was insufficient to support the trial court's (D) finding.
- While the evidence demonstrated Mother to be the primary person who inflicted the punishments upon the children and created an endangering environment, it was also undisputed that the truck driver Father was often on the phone with mother when she punished the children, was aware of Mother's disciplinary methods, approved of the discipline, and punished the children himself when he was home.
- The Court agreed that Father knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being.

C.M.M. v. Tex. Dep't of Family and Protective Servs., Nos. 14-21-00702-CV, 14-21-00730-CV (Tex. App.—Houston [14th Dist.] June 2, 2022, pet. denied)

Mother and Father challenged the sufficiency of the evidence to support the trial court's finding under TFC § 161.001(b)(1)(D).

The Court noted "significant evidence" showed that the older children were considerably behind in their education and could not be understood when they tried to talk.

The child advocate asserted that the oldest two children had to basically start their education from the beginning after they came into the Department's care.

Assessments performed on the four oldest children showed diagnoses which included reading, communication, and language disorders.

The Court held that the trial court could have reasonably concluded that the lack of education that the children received while with Mother and Father contributed to an environment that endangered their physical and emotional well-being.

- Notably, TFC § 262.116(a)(1) states that a parents' decision to homeschool their children is not a ground for termination. However, here, the Court of Appeals found that the Mother's and Father's "apparent subsequent failure to provide the children with an education could certainly be seen as endangering the children."
  - There were no books or computers for homeschooling the children found in their home.
  - The trial court, as factfinder, could have disbelieved parents' testimony that they had purchased appropriate homeschooling material, when the older child had significant educational, speech, and reading delays.

In re J.S., No. 14-22-00723-CV (Tex. App.—Houston [14th Dist.] Mar. 14, 2023, no pet. h.) (mem. op.)

- Father argued evidence of his domestic violence was insufficient to support termination of his parental rights under TFC § 161.001(b)(1)(E).
- The record reflected significant evidence of Father's history of domestic violence.
- While Father acknowledged "this evidence is certainly problematic", he argued, "it is important to remember that [the child] was a teenager, not a child of tender years who was unable to protect himself."

- The Court "decline[d] to hold that a child's ability to protect himself from domestic violence can mitigate the endangering nature of such conduct."

- Accordingly, the Court concluded the evidence was legally and factually sufficient to support the subsection E finding.

In re A.A, No. 21-0998, —S.W.3d —(Tex. 2023)

- In 2017, Father was granted sole custody of the children. The children were subsequently removed from Father's home due to his physical abuse while the children in his care.

- Mother argued that the statutory language of "removal from the parent . . . for . . . abuse or neglect" limited (O)'s reach to the parent whose wrongdoing caused the child to be physically removed.

- The Supreme Court disagreed, stating that when the terms "removal" and "abuse or neglect" are viewed in the statute as a whole and in conjunction with the analysis in In re E.C.R., the evidence demonstrated the children were removed from Mother under Chapter 262 for . . . abuse or neglect".
- In *In re E.C.R.*, the Supreme Court ruled a mother's rights to "one child could be terminated due to her abuse and neglect of another child because her conduct toward the one placed the other's health and safety at risk."

- Here, the Supreme Court held that "[b]y a similar analysis, here we hold that sufficient evidence exists that Mother's misconduct in exposing her children to Father's abuse and neglect was itself abuse and neglect on her part."
- Mother knew of Father's domestic violence and drug use, yet she allowed the children to be in his care, her acts and omissions were "easily within the broad statutory definition of abuse or neglect".

- "[R]emoval" is not limited to taking physical possession, because the broader concept of removal under Chapter 262 applies. The Court observed that when the Department takes emergency possession of a child, the emergency order addresses not just physical possession, and Chapter 262 equates the emergency order to "a temporary order for the conservatorship of a child under Section 105.001(a)(1)", which has a long list of rights and responsibilities not limited to physical possession.
- The Court accordingly ruled that the "removal of a child under Chapter 262 is not just a physical act. It also includes the transfer by court order of the bundle of rights that the law gives a parent by default from the parent to DFPS."

In Re R.J.G., R.J.G., and D.G.M., No.22-0451 (Tex. 2023)

- Dept sought termination solely on (O)
- Mother conceded she did not "comply in the precise way the Department hoped she would" but argued she "complied with the plan's terms."
- Mother completed a long list of services
- Caseworker agreed Mother complied with her service plan, just not in the way the Department wanted
- Trial court concluded it could not consider "substantial compliance" and strict compliance was required

- Subsection (O) requires that a parent fail to comply with a "specifically established" court-ordered service plan
- Even if it is specifically established in a written plan, "that requirement may be so trivial and immaterial, considering the totality of what the plan requires, that the parent's noncompliance does not justify termination . . . The trial court should consider whether the nature and degree of the asserted noncompliance justifies termination under the totality of the circumstances."
- Supreme Court rejected "strict compliance"

- TXSC reasoned that based on the permissive language of 161.001(b)(1)(O), "if the noncompliance is trivial or immaterial in light of the plan's requirements overall, termination under (O) is not appropriate."

- "We granted review in this case to clarify that strict compliance with every detail of a service plan is not always required to avoid termination under (O).

- Mother failed to provide a physical completion certificate, as opposed to an actual failure to complete a particular, specific service
- "the particular act of noncompliance in question—the failure of Mother to provide the Department a certificate demonstrating what the caseworker concedes she knew—is too trivial and immaterial, in light of the degree of Mother's compliance with the plan's material requirements, to support termination under (O)."
- - Requirements that are bureaucratic or technical MAY be too trivial, so strict compliance is not required
- Trial court's hands are not tied as tightly anymore, but instead, the trial court seems to have the discretion to weigh the nature and degree of the parent's noncompliance against the materiality of the requirement

Best Interest

In re L.G., No. 14-22-00335-CV (Tex. App.—Houston [14th Dist.] Oct. 20, 2022, no pet.) (mem. op.)

- "[P]arenting abilities" under Holley.

- "[A]mple evidence" of Father's "anger and hostile behavior" during the case, including during hearings, visits with the child, meetings with the Department, and at trial.

- Father was also unable to read the child's emotional cues and was unable to recognize the negative impact his absence had on the child. Moreover, Father showed a "concerning" amount of teasing toward the child, which damaged their relationship.

- In contrast, the child called her foster placement “mom” and “dad”, and the foster placement wished to adopt her.

- Accordingly, the Court of Appeals affirmed the trial court’s best interest finding.

In re S.O., No. 05-22-01019-CV (Tex. App.—Dallas Feb. 27, 2023, no pet.) (mem. op.)

- In analyzing the first *Holley* factor, the desires of the child, the Court considered evidence of the child's characterization of her parents' home versus her foster home.

- The child's therapist testified that the child told her that Mother and Father were "mean" and the child referred to their house as "the anger house".

- In contrast, the child called her home with Foster Parents "the kindness house."

- The CASA witness recommended termination of parental rights and testified the child "made it clear that her wishes are consistent with CASA's recommendation."

- Based on this evidence, the Court concluded that this factor supported the trial court's best interest finding.

In re A.P., No. 02-22-00180-CV (Tex. App.—Fort Worth Nov. 3, 2022, no pet.) (mem. op.)

- The family was living in a hotel when the Department's case was initiated.

- Police found the family "squatting" in a home that did not belong to them and indicated that Mother and Father had used the younger children to break into the home through a window. The family had broken into a home before. Oldest child reported the family had moved from hotel to hotel.

- The Department's permanency specialist testified that Mother "had a history of . . . stating she lived somewhere and never providing proof of that."
- Mother and Father had reported living in a new home and that the construction was completed "surprisingly fast." Yet, the picture of the "home" that Mother showed the children did not match her description as it was just a construction center and not a completed house.

- Testimonial evidence at trial supported a factfinder's reasonable inference that "while the children's current foster placements may not be permanent, they are safe and stable."
- In contrast, Mother did not provide a stable, permanent home for the children in the years leading up to termination and surmised that "[b]ecause Mother was '[u]nstable herself,' she had no stability to offer the children."

S.L. v. Dep't of Family and Protective Servs, No. 14-22-00194-CV (Tex. App.—Houston [14th Dist.] Sept. 8, 2022, pet. denied) (mem. op.)

- The subject Child was removed shortly after her birth due to Mother testing positive for cocaine in a termination proceeding relating to another child.

- The child's older siblings lived with their grandmother and "moved around between family members" nearly their entire lives.

- The Court held that the "Parenting Ability" *Holley* factor weighed in favor of termination.

- The Court reasoned that Mother's "pattern of conduct with her older children" allows an inference that Mother lacks the parenting ability to care for the child.

Other Topics

In re D.A.A.-B., 657 S.W.3d 549 (Tex. App.—El Paso 2022, no pet.)

- Former Wife was in a legally-recognized same-sex marriage in which the child's birth mother had the child via artificial insemination during their marriage.
- Former Wife filed a suit affecting the parent-child relationship (SAPCR) seeking entry of a conservatorship order to determine custody and support issues regarding the child.
- The trial court determined Former Wife lacked standing to bring the suit.

- Spouses in same-sex marriages are afforded the same opportunity to assert their parentage to a child born during the marriage as spouses in opposite-sex marriages.

- The Court relied on *Obergefell v. Hodges*, 576 U.S. 644, 675, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), in which the United States Supreme Court held that state laws must treat same-sex couples in a civil marriage "on the same terms and conditions as opposite-sex couples."

- Plain language of TFC §§ 160.704(a) and (b), the allegation that the non-gestational woman in the lawful same-sex marriage was the child's "mother" was sufficient to establish that the wife had standing to bring a SAPCR to determine custody of child.

- "[M]other" was included in the statutory definition of "parent," and a child born into a same-sex marriage with two female spouses necessarily would have two "mothers" serving as parents.

In re K.S. No. 10-22-00070-CV (Tex. App.—Waco Aug. 3, 2022, pet. denied) (mem. op.)

- Mother filed her Motion to Retain Suit on Court's Docket and Set New Dismissal Date, citing a desire to complete inpatient drug treatment as grounds pursuant to TFC § 263.401(b-2).

- Her motion was denied, as she failed to make a good faith effort to complete her service plan.

TFC § 263.401(b-2) provides:

When considering under Subsection (b) whether to find that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department for a case in which the court orders a parent to complete a substance abuse treatment program, the court shall consider whether the parent made a good faith effort to successfully complete the program.

- Mother chose not to participate in inpatient treatment; she missed intake appointments and indicated she did not wish to attend.
- Later, Mother did not meet admission requirements, as she told the facility she had not used drugs;
- Mother had positive drug screens during the time she told the facility she was not using drugs.
- Mother began treatment in September 2021, but she missed many sessions.
- Mother failed to make a good faith effort to complete her service plan based on these facts, and therefore the trial court did not err in denying Mother's motion for extension.
- The Court ruled that the trial court did not err in denying Mother's motion for extension.

Questions, Concerns, Complaints?