

Terminating Parental Rights When a Child Has Special Needs

Few areas of family law are as bristling with risk and the potential for appeal as a petition to terminate parental rights. When the child involved has special needs, the child may be particularly imperiled if proper parental supervision is missing.

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Termination of parental rights (TPR) is the severance by court order of the legal relationship between a minor child and one or both of its parents. This can be done involuntarily or voluntarily. Should it happen, the child and parents become legal strangers. Because of the finality of this proceeding, a court will hold a hearing on a TPR petition. At the hearing, interested parties, represented by attorneys if they wish, have

the opportunity to present evidence and witnesses to support their positions. The petitioner has the obligation to prove to the court that a TPR would be in the child's best interests. Each state articulates specific evidentiary criteria. In 2019, parental rights were terminated 71,300 times in the United States.

According to the Children's Bureau, CYF/ACF/HHS (2021), the "most common statutory grounds for determining parental unfitness include the following:

- Severe or chronic abuse or neglect.
- Sexual abuse.
- Abuse or neglect of other children in the household.
- Abandonment of the child.
- Long-term mental illness or deficiency of the parent(s).
- Long-term alcohol- or drug-induced incapacity of the parent(s).
- Failure to support or maintain contact with the child.
- Involuntary termination of the rights of the parent to another child."

Parenting a child with special needs can be particularly challenging. Nonetheless, is the standard for terminating their parental rights the same as a parent whose child does not have special needs? Last month, the Court of Appeals of Texas, First District, Houston, decided *In the Interest of O.J.P.* (NO. 01-21-00163-CV, September 21, 2021). It held that, "Sufficient evidence supported the trial court's finding that termination of the mother's parental rights was in the child's best interest under Tex. Fam. Code Ann. § 161.001(b), because the child had special needs due to autism and the mother did not demonstrate an ability to meet the child's needs."

What facts did the court consider in reaching that conclusion?

1. The mother was unable to provide a safe environment for the child.
2. The mother did not visit the child.

3. The mother failed to complete the service plan promulgated by TDFPS.
4. The mother slept on the streets.
5. The mother sought nourishment from refuse in garbage cans.

Parenthood is a fundamental liberty interest. As such, when termination of parental rights is sought, a parent who faces such a threat is entitled to due process, including the benefit of counsel. The burden of proof is clear and convincing evidence. Moreover:

“The court strictly construes involuntary termination statutes in favor of the parent. ...There is a strong presumption that the child’s best interest is served by maintaining the parent-child relationship. Thus, the appellate court strictly scrutinizes termination proceedings in favor of the parent.”

The holding in Holley v. Adams has been codified in Tex.Fam. Code Ann. Section 263.307. How did those factors play into the holding in *O.J.P.*, which was an accelerated appeal?

1. The father acknowledged a history of domestic violence with the mother.
2. The child was removed from the parents’ care in 2015, 2017 and finally in 2019.
3. The parties acknowledged drug use, including marijuana and methamphetamine.
4. Moreover, the mother allowed Medicaid benefits for the child to lapse, as she feared that law enforcement would be able to detect that she was a drug user. She therefore neglected to provide basic health and dental treatment for the child.
5. In 2019, the mother asked the father to drive her to a hospital as she felt mentally unstable. The mother brought the child to the car with her, asking the father to take the child to the maternal grandmother’s home. When emotions escalated, the father contacted a DFPS caseworker to retrieve the child from his vehicle.
6. The child had serious dental issues when the child entered DFPS care in 2019, requiring significant treatment. The child had not seen a pediatrician while in the parents’ care.
7. The child suffered from autism and a speech delay. The child also had delays in motor skills and behavioral issues. To calm the child, the parents used candy.
8. The child’s parents never established a routine for the child, which could have eased the child’s ability to deal with his autism. The extent of the child’s routine when living with his father was to sleep, awaken, eat and watch television.
9. Ultimately, the father signed an affidavit of relinquishment of parental rights.

10. By the time the case reached trial, the child had spent approximately one-half of his life with his foster family. The caseworker testified that the child was thriving in foster care. At the time of trial, the child was more than 6 1/2 years old.
11. During the COVID19 pandemic, the child was schooled remotely. Although he was described as a happy child, prior to the transition to remote learning, he had difficulty focusing, and had bitten one of his teachers.
12. Services to the child while he was in foster care included special services at his school, speech therapy, and occupational therapy. The foster family sought out and implemented additional therapies for O.J.P.
13. Regarding the mother, she:
 - a. did not complete the requirements of her DFPS service plan.
 - b. was homeless.
 - c. failed to procure appropriate housing for herself and for her child.
 - d. failed to participate in random drug testing, despite 4 or 5 sessions being scheduled for her.
 - e. indicated she had a job at a beauty supply store, but failed to provide any paystubs.
 - f. claimed to participate in parenting classes, but failed to provide a certificate of completion.
 - g. took part in a substance abuse evaluation, but then failed to attend counseling despite being diagnosed with severe amphetamine use disorder and severe cannabis disorder.
 - h. failed to take part in a psychosocial evaluation and failed to attend domestic violence classes.
 - i. had a theft conviction during the pendency of the case.

Applying a Holley assessment:

1. **Child's desires.** At the time of the termination trial, the child did not express a desire as to whether he wished to return to his mother, or remain with his foster family. He referred to his mother by her first name. When there is no specific evidence of a child's desires, or a child is too young to express those desires, the fact-finder can consider how bonded the child is with its foster family, the quality of care in the current foster placement, and whether the child has spent minimal time with a parent.
2. **Current and future physical and emotional needs versus current and future physical and emotional danger.** The mother lacked housing stability. The parents exposed the child to violent behavior, undermining the safety of the child's home environment. Use of narcotics and/or alcohol lends itself to the conclusion that the child's surroundings endanger the child's physical or emotional well being. Although the mother agreed to refrain from participating in illegal or criminal activity during the pendency of the case, she failed to do so. Regarding the medical and dental care of O.J.P., the mother failed to meet his routine medical and dental care. In addition, the mother failed to meet her child's special needs even when the child was one year

of age, and first entered the foster system. At the time of the termination trial, while the demands of the child's condition increased, there was no commensurate increase in mother's ability to meet O.J.P.'s needs—not even to coordinate a structured environment, nor to establish a treatment protocol for him.

- 3. Abilities of the parent(s) to create plans for the child, stability of proposed placement and available assistance.** Regarding the mother: There were no indications that she had the ability to provide O.J.P. with safety, stability or a home. In fact, she was homeless. She demonstrated violent behavior and engaged in drug use when the child was in her care. The men in her life abused her. She endangered O.J.P. by accepting the dangerous conduct of the men in her life. The record indicates that she was also unable to provide for the child in the past. O.J.P. received only about two months of treatment for autism spectrum related issues while in his parents' care. When he returned to foster care in 2017, his behaviors had worsened. He still was not talking, nor could he be understood. He screamed to communicate, and he threw objects, struck, bit, spit and kicked other people. He was frightened of bathing and would shovel food into his mouth to the point of gagging.

The entire record was reviewed by the appellate court to determine the “best interest” of O.J.P. Deference is paid to the trial court as the gatekeeper in observing witnesses, weighing their credibility, and in factors considered in determining what is in the child's best interest. The Houston Appellate Court (1st District) provides not only an excellent analysis in this case, but a history of pertinent cases, including appeals heard during the COVID-19 pandemic.

Few areas of family law are as bristling with risk and the potential for appeal as a petition to terminate parental rights. When the child involved has special needs, the child may be particularly imperiled if proper parental supervision is missing. Termination of parental rights is a daunting possibility for any parent. There are times when the failure to terminate those parental rights can be equally frightening for a child with special needs.

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