

## Terminating parental rights: How much does a child's voice matter?

Elisa M. Reiter and Daniel Pollack | February 2, 2022



Ideally, courts take away an individual's parenting rights only when there are very good reasons. How often does it happen? In a 2019 [article](#), the authors conclude that: "First, according to the 2016 estimate, 1 in 100 U.S. children will experience the termination of parental rights by age 18. Second, the risk of experiencing this event is highest in the first few years of life. Third, risks are highest for Native American and African American children. Nearly 3% of Native American children and around

1.5% of African American children will ever experience this event. Finally, there is dramatic variation across states in the risk of experiencing this event and in racial/ethnic inequality in this risk. Taken together, these findings suggest that parental rights termination, which involves the permanent loss of access to children for parents, is far more common than often thought.”

A recent Texas Court of Appeals case, *T.D. v. Texas Department of Family & Protective Services*, 03-21-00387-CV, 01-06-2022, illustrates the series of considerations and “balancing acts” that ultimately lead a court to sever parental rights. One of those considerations is the child’s expressed desire. Justice Debra Lehrmann presented the background of law on court-appointed counsel. The focus of the debate centered on whether the attorney should advocate according to the child’s desires or whether the attorney should determine the goal of representation and advocate what was in the child’s best interests. Beginning in 1984, with the publication of Martin Guggenheim’s “The Right to Be Represented But Not Heard: Reflections on Legal Representation of Children,” the new focus for attorneys representing children must take into account the impact of the Disciplinary Rules of Professional Conduct. Attorneys representing children must balance competing directives. The ethical canons provide in Rule 1.02(a) that “a lawyer shall abide by a client’s decisions: (1) concerning the objectives and general methods of representation; lawyer shall abide by a client’s decisions ... concerning the objectives and general methods of representation.” What if the child’s court-appointed attorney is faced with a child demanding to return to a home where abuse, neglect and drug use are rampant?

In *T.D.*, T.D. (the mother) appealed from the trial court's termination decree following a bench trial. The Texas Department of Family & Protective Services took possession of T.D.'s five children: Lisa, John, Leon, Lucy and Sam. Although the department's initial recommendation was that the children be reunified with their mother, at trial, the department shifted its recommendation to termination. The eldest child, Lisa, was 14 when the case went to trial. Lucy's case was severed from the case involving her four siblings. The trial court terminated T.D.'s parental rights as to Leon (age 10) and Sam (age 8), but not as to Lucy (age 9) nor John (age 11).

The mother had been the subject of prior investigations in 2014, 2016 and 2019. In 2014, the department investigated a report that the mother's prior boyfriend sexually abused Lisa, then 7 years old. The former boyfriend was also the father of some of the children. The allegation of sexual abuse was not ruled out. The mother accepted Family Based Safety Services. In 2016, a report was made to the department that the mother deferred care of the children to a friend and that the children were found in the woods. While a case for neglectful supervision was filed, the children were returned to their mother's care after she successfully completed services. In 2019, the department again received a referral on the mother. An investigation gleaned information that:

1. The mother allowed her eldest child, Lisa, to smoke marijuana.
2. The mother was a drug user, including marijuana, methamphetamine and cocaine.

The department was named as the children's temporary managing conservator. The mother's parenting plan included requirements that she:

1. Complete a psychological evaluation and a psychiatric evaluation.
2. Engage in a substance abuse assessment.
3. Present for random drug tests.
4. Participate in therapy with a focus on parenting, substance abuse and domestic violence.
5. Participate in a protective parenting program.
6. Provide monthly verification of attendance at Narcotics Anonymous meetings.
7. Follow the recommendations of her treating psychiatrist.

The children endured multiple placements after the department removed them from their mother's care. Ultimately, the children were placed with a foster family; the foster mother had been Lisa's teacher. The mother tested positive for illegal drugs in April 2021, with the mother accusing the caseworker of falsifying those test results. The net effect of the positive drug test and the accusation was that the department changed its initial recommendation that the mother have unsupervised visits with the children, to later recommending that the mother have only supervised access to the children. As happens in termination cases, the witnesses presented did not share a unified vision of what the trial court should do to resolve the case. Witnesses included:

1. The department investigator (who opined that the mother admitted to using marijuana, methamphetamine and cocaine, recommending that the children live elsewhere due to the mother's history of drug use and prior cases, further noting that the mother's recommendation for placement of the children were inappropriate and not approved due to the mother's recommendations having criminal histories or prior histories with the department).
2. The department caseworker (who noted that the mother completed some of her court-ordered services, but not all of those services, and further, that despite prior admissions against interest, the mother denied her prior drug use, and failed to maintain sobriety despite knowing that failure to maintain sobriety could impact the outcome of the case. The caseworker also noted that Sam often did not participate in visits with his mother, expressing his fear of his mother).

3. A clinical psychologist (who confirmed that the mother completed a psychological evaluation in October 2019, when she was diagnosed as suffering from schizophrenia at the age of 13, and had PTSD, a history of depression, symptoms consistent with psychosis, a substance abuse problem, a history of suicidal ideation and self-injury, as well as proclivity for unstable moods and anger management issues, which, taken as a whole, could impact the mother's ability to parent if left untreated. Moreover, the psychologist explained that the mother's substance abuse issues could affect her ability to parent effectively, particularly given the volume and frequency of the mother's prior drug use. In addition, the psychologist focused on the mother's romantic relationships, noting that the father of three of her children was controlling and sexually abused the eldest child. The psychologist also noted that the mother physically and psychologically abused the eldest child, by forcing that child to watch the mother engage in sexual activity and by providing that child with marijuana for the child's use).
4. A therapist who counseled several of the children (who testified that Sam reported that the mother physically abused Sam, resulting in the child having nightmares. The therapist focused on Sam's prior traumatic experiences, and the fact that Sam was progressing in school, and that Sam was able to process his prior trauma in therapy. As to Leon, the therapist noted that Leon would tell department representatives one thing—such as his mother taking him for ice cream—only to later confide in the therapist that as soon as Department workers were not around, his mother would hit Sam. Notwithstanding the longstanding abuse, the therapist noted that Leon, Lucy and Sam all indicated that they wanted to live with their mother).
5. The eldest child's counselor (who testified that in therapy, Lisa discussed the mother beating Lisa's back with a belt).
6. The foster mother (who testified about some of her experiences in fostering the children, including her observation that the children flinch if their mother is nearby, and further, that Sam indicated that his mother had him lay in bed while the mother had sex with two different men on at least two different occasions. As to Leon, the foster mother opined that there were occasions when Leon would become upset, would cry for several minutes, and in response to a request for a hug, he would scream "please don't hit me").
7. The court-appointed special advocate (the CASA volunteer first met the children in 2016. The CASA volunteer was not in favor of reunification, despite the mother achieving some semblance of stability via gainful

employment and completing required services, noting that the children would be endangered if placed with their mother in light of the mother's substance abuse history, and her lack of growth or ability to demonstrate appropriate parenting skills. By contrast, the CASA volunteer noted no safety concerns for the children when in the care of the foster parents).

8. The mother (who denied having sex in her children's presence, of having Lisa take naked pictures of her, as well as the allegations that she had given drugs to the children. She testified she would protect the children, keep them safe from the threat of abuse, and that she and the children love one another).
9. The mother's parenting coach (who endorsed the mother's home as safe, stocked with items that the children needed, and that the mother was receptive to coaching).
10. The department visit supervisor (who testified that she had no concerns about the mother's ability to keep the children safe, that the children are happy to see their mother, and that she meets her children's needs during visits, based on the supervisor's observation of only five visits).
11. The mother's counselor (who debunked the allegation that the mother continued to have a pattern of substance abuse, noting that the mother had been working on how to nurture her children and to address her children's needs).

After the testimony, the trial judge met individually with John, Lucy, Leon and Sam. Following those individual sessions, the trial judge noted that John and Lucy wanted to live with their mother, while Sam and Lucy wanted to live with their foster parents. How to reach a resolution in such a matter? Termination of parental rights mandates that the department "prove its case by clear and convincing evidence that the parent engaged in conduct listed as a statutory ground for termination in the Family Code and that termination is in the child's best interest." What does "clear and convincing" mean? To meet the burden of proof of clear and convincing evidence, one must present evidence that produces "in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Appellate review of a termination order involves deference to the factfinder, as the

gatekeeper who had the opportunity to weigh the credibility of the witnesses first hand.

Focusing on factors regarding the child's wellbeing, development and safety is part of the best interest test, guided by the factors enumerated in *Holley v. Adams*, including:

1. The child's wishes.
2. The child's physical and emotional needs.
3. The physical and emotional danger to the child now and in the future.
4. The parental ability of the person seeking custody.
5. Programs available to help the person seeking custody.
6. The plans for the child by that person or the agency seeking custody.
7. The stability of the home(s).
8. The parent's acts or omissions indicating that the parent-child relationship is improper.
9. Any excuse for the parent's acts or omissions.

In *T.D.*, the appellate court concluded "that a fact finder could have formed a firm belief or conviction that termination of mother's parental rights is in the best interest of Sam and Leon." Turning to the statutory predicate for a finding of endangerment:

"Evidence regarding domestic violence is relevant to an endangerment determination even if the violence is not perpetrated against the child. ... Similarly, evidence regarding a child being exposed to the sexual activity of the parent is relevant to an endangerment determination."

When reviewing the evidence in a light most favorable to the trial court's rulings, the appellate court concluded "that a fact finder could have formed a firm belief or conviction that mother knowingly placed or allowed Sam and Leon to remain in conditions or surroundings that endangered their wellbeing." The appellate court views the evidence

presented in *T.D.* as legally and factually sufficient to justify the trial court's endangerment determination. Of most significance to the litigator: the trial court listened to the voice of the children involved, giving their desires a high priority in issuing rulings.

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