

Parents need to be on their best behavior during the pendency of a child termination suit

Elisa Reiter and Daniel Pollack | April 5, 2022



For child welfare agencies across the United States, it's the ultimate measure to use against parents—termination of their parental rights (TPR). Used when there are serious concerns about abuse or neglect, the procedures and prevalence for termination of parental rights varies among states. To avoid this ultimate sanction, parents can assert their legal interests, yet must do so while complying with outstanding court and department of human services directives and case plans.

According to Statista, in a report regarding the number of annual terminations of parental rights in the U.S. during FY 2008-2020, “in the fiscal year of 2020, parental rights were terminated 63,800 times in the United States. This is a decrease from the previous year, when parental rights were terminated in 71,900 cases nationwide.”

Addressing the issue of TPR, on March 24, 2022, the Court of Appeals of Texas, Second District, Fort Worth, delivered an opinion in the case *In the Interest of J.M.*, No. 02-21-00346-CV. Here are the essential facts:

1. In 2019, the Department of Family Protective Services (DFPS) received a referral regarding children James and Julien, the subjects of the case. The mother had been taken into police custody for allegedly assaulting the father.
2. Both the mother and father tested positive for cocaine and marijuana.
3. The children were initially placed with their paternal grandmother through a parental child safety placement.
4. The grandmother, despite being admonished not to do so, allowed the mother to take James and Julien from her home on more than one occasion.
5. DFPS, through various social workers, attempted to provide services via its Family Based Services Program from July 2019 through filing its petition for termination in October 2020.
6. The dismissal date for the termination suit was Oct. 11, 2021. The case was initially scheduled for trial on Sept. 15, 2021, but later reset to Sept. 20, 2021. On Aug. 11, 2021, the father filed a “Motion for Continuance and Motion for Extension of Time” asking the trial court to grant him a continuance, and to extend the case’s automatic dismissal date.
7. The basis of the father’s motion was that he had been jailed since March 2021 in a substance abuse felony level facility at the Glossbrenner Unit, part of the Texas Department of Criminal Justice.
8. The father was to be released to a halfway house once his treatment was completed. He asked to have the chance to complete services once he was released to the halfway house and to “demonstrate his sobriety and ability to care for his children.”
9. The associate judge denied the motion for extension. The father re-urged his motion for extension the morning the case was called to trial. The trial

judge denied the motion. At the time of the bench trial, the trial court judge heard testimony from the caseworkers, the father, and the father's adult daughter.

What is the timeline for a trial in a termination case?

Generally, the deadline for beginning a termination trial is the Monday following the first anniversary of the day that the trial court appointed the Department as the child's temporary managing conservator. See Tex. Fam. Code Ann. (a). However, if a trial on the merits has not commenced within that § 263.401 time, the court may grant an extension and retain the case on its docket if the court makes two findings: (1) extraordinary circumstances necessitate continuing the department's temporary managing conservatorship and (2) continuing it is in the child's best interest.

Moreover, in this timeframe, the Texas Supreme Court granted a number of emergency orders facilitating extensions and continuances, attempting to create mechanisms to move the courts forward, notwithstanding the COVID pandemic. Extraordinary circumstances may exist in a termination case to justify an extension of the trial setting, such as where a parent made a good faith effort to complete a substance abuse treatment program. A third provision to Tex. Fam. Code Ann. § 263.401 was enacted following the filing of the termination petition in this case, but was not made retroactive, making it incumbent upon the trial court to grant the extension if the first two prongs were satisfied. The Second Court of Appeals found that: "Neither parent objected that the trial court was using the wrong version of Section 263.401, and thus they both failed to preserve their argument that the trial court should not have applied Subsection (b-3)."

In the instant case, the father could have availed himself of services beginning in October 2020, when the children were taken into DFPS' care, and also in January 2021, when he turned himself into law enforcement. The father did avail himself of services while incarcerated. Yet, he failed to complete services, noting that he had been unable to do so because he had allegedly gotten into an argument with another person. "Father's inability to complete services because of and after his incarceration was the consequence of his own actions," and "actions that are considered to be the parent's fault will generally not constitute extraordinary circumstances." COVID restrictions apparently did not resonate with the appellate court. As the father delayed seeking services until a few weeks prior to trial, and failed to complete services prior to that time, his status did not present "extraordinary circumstances" in the estimation of the Second Court of Appeals.

The mother's oral motion for continuance was denied, as she failed to comply with T.R.C.P. 251 by not filing a written motion for continuance. The mother had had a baby prior to trial; the baby had been removed from her care by DFPS. While her attorney made an oral motion for continuance, noting that a (second) case had been initiated by DFPS regarding the baby, the attorney failed to address the mother's living arrangements nor the mother's transportation issues and how they could or would be resolved. The mother could not rely on the father's written motion for continuance, as the father's motion for an extension of the trial date had been overruled by the trial court.

The standard of review for termination involves examination of the following: "the Department must prove two elements by clear and convincing evidence: (1) that the parent's actions satisfy one ground

listed in Family Code Section 161.001(b)(1); and (2) that termination is in the child's best interest." The Second Court of Appeals reviewed the trial court's record, including:

1. The testimony of Virginia Olger, the FBSS Social Worker, which covered the following:
 - . From June 2019 through the end of September, neither parent participated in FBSS services.
 - a. The mother submitted to one drug test in September 2019.
 - b. The father failed to submit to any drug tests during that time frame.
 - c. Sometime between October and December 2019, the mother submitted for drug assessment, and finished a domestic violence program.
 - d. The mother was then referred to the North Texas Addiction Center; she attended only one session at North Texas Addiction Center.
 - e. The father began a drug rehabilitation program, but failed to complete it. He did complete his parenting class.
 - f. Each parent stated that they used drugs.
 - g. The father did not participate in random drug testing.
 - h. The father attempted to participate in counseling, but he was discharged from the counseling program.
 - i. The grandmother, with whom the children were placed, began to have health issues in February, 2020.
 - j. In April or May, 2020, the mother was arrested, but she was out in time to attend a virtual meeting in June, 2020, where she admitted her drug use: methamphetamine, marijuana, and cocaine. Further, she drank alcohol to excess and her drug use was ongoing.
 - k. The father admitted to ongoing use of the same substances.
 - l. Soon after that virtual meeting, the father was arrested for committing domestic violence against the mother.
2. As to the mother, the state introduced exhibits confirming that:
3. In June 2019, she was convicted for a January 2019 misdemeanor assault causing bodily injury (presumably the domestic violence incident against the father) for which she was sentenced to four days' confinement in the Tarrant County Jail.
4. On April 27, 2020—during the FBSS case—she was charged by information with theft of property with a value of more than \$100 but less than \$750, which she allegedly committed that same month.

On July 1, 2021, she was charged by information for theft of property with a value of more than \$100 but less than \$750, an offense allegedly committed on Dec. 13, 2020, after the children had been removed from her care.

1. On Aug. 19, 2021, the state indicted her for an alleged April 15, 2021, unauthorized use of a vehicle. The department also introduced a Sept. 2, 2021, judgment nisi stating that she had failed to appear for trial on the unauthorized use of a vehicle charge.
2. Documents were also admitted regarding the father's domestic violence history against the mother.
3. The trial court heard from FBSS caseworker Makayla Roberson. She addressed the intricacies of the service plan developed for the parents. The mother had been asked to participate in random drug testing and in an outpatient drug treatment program, which she failed to do. She did visit with the children. She had another baby during the pendency of the case. Julian and James' father was not the father of the baby. The mother's visits had been discontinued after the baby's father had engaged in an altercation at one of the mother's visits with James and Julien—she asked for directions to slip out the back door when the police were called to the scene, as she was aware that there were outstanding warrants for her arrest. The father visited the children, but failed to submit to random drug screening, despite being admonished that failure to submit would be viewed as a positive result.
4. The trial court also heard from Makayla Roberson's supervisor, Ramon Hodridge. Hodridge testified that termination would serve the children's best interests, that the children were in a loving foster placement, and that the foster care providers had expressed an interest in adopting the child.
5. The trial court heard the father's testimony regarding his progress during his incarceration. He confirmed that he and the children's mother ended their relationship, and after that: "I started doing more and more drugs. ... The kids got taken away. I started—you know, it was so hard for me. I mean, everything came at one time. Hit me. Lost my apartment. Lost my truck. Lost my job." The father alluded to taking an anger management class while at the halfway house.
6. The trial court also heard from the father's adult daughter, Yvonne, who opined that James and Julien were happy to visit with their father, and further, that termination would be hard on the boys. From her perspective, the boys believed they would be returning to their father's care.

7. The trial court also took note of the CASA report, which provided an historical overview of each parent's acts or omissions.

The Second Court of Appeals concluded that the trial court heard sufficient evidence to support termination pursuant to Tex.Fam. Code Section (b)(1)(E). Here, the court found that the parents “knowingly placed or knowingly allowed the child to remain in conditions or surroundings [that] endanger the physical or emotional well-being of the child.” Termination may also be granted where a parent “engaged in conduct or knowingly placed the child with persons who engaged in conduct [that] endangers the physical or emotional well-being of the child,” where termination is viewed as being in the child’s best interest. Were the boys endangered due to acts or omissions by their parents? Yes. Failure to complete the service plan can be considered as part of that endangerment assessment. The mother’s drug use during the pendency of the case while pregnant supported a finding of endangerment of James and Julien, as did each party’s conviction for acts constituting family violence.

Of course, the appellate court looked to the *Holley v. Adams’ standards* as well, concluding that the mother failed to provide evidence that she had a steady job, a safe place to live with the children, and transportation. The mother’s inability to assuage the trial court regarding such basic needs for the children, coupled with her history of drug use, netted an insufficient basis to warrant overturning the termination of mother’s parental rights, even if she retained the parental rights as to the baby born during the pendency of the case. The appellate court reviewed the testimony of the supervising social worker, acknowledging that although the father progressed in treatment provided to him in the course of his incarceration, “neither parent could, at that point, truly parent the

children due to ‘what’s going on in their life today’ and ... it was unfair for the children to have to keep waiting for their parents.”

Children do not come equipped with a parenting manual. Each parent has to learn how to best parent each child. While a learning curve is anticipated, that curve is no excuse to condone acts or omissions that can endanger the life of a child.

Elisa Reiter *is an attorney, board certified in family law and in child welfare law by the Texas Board of Legal Specialization, at Underwood Perkins. Contact: ereiter@uplawtx.com.*

Daniel Pollack *is a professor at Yeshiva University’s School of Social Work in New York City. Contact: dpollack@yu.edu.*