

How long must a court wait before terminating parental rights?

Elisa Reiter and Daniel Pollack | May 20, 2022



By statute (Texas Family Code § 161), parental rights can be terminated only by court order. Generally, a court must find that the parent or guardian abused, neglected or abandoned their child, or that the parent executed a voluntary termination of parental rights form. Yet, even after a finding of abuse, neglect or abandonment, a termination of parental

rights (TPR) will not necessarily happen. The court must also determine that it is, in fact, in the child's best interests that the TPR takes place. Moreover, we are beginning to see appeals of termination cases based on extensions of trial dates granted pursuant to the Texas Supreme Court's Emergency Orders granted during the COVID pandemic. Should the fact that a case took longer—or—was nonetheless resolved expediently during the lockdown—impact on a TPR?

In a late April, 2022 ruling issued by the Amarillo Court of Appeals, the court reviewed a TPR case, *In the Interest of I.O., N.S., AND J.S., Children*. The children's mother, A.O., filed an appeal presenting two issues:

- “1. The trial court erred by terminating mother's parental rights prior to the expiration of the Court ordered 'statutory extension for dismissal under section 263.401(b) of the Texas Family Code.’
2. Was TPR in the best interests of her children?”

A.O. had a history with the Texas Department of Family and Protective Services TDFPS/CPS. In fact, the mother previously lost custody of two other children. The children who were made the subject of the current litigation had been removed from the mother's care once before, but had been returned to her care in May 2020. The children had been removed from A.O.'s care, only to be returned to her less than three months after the lockdown for the pandemic. The children were removed by DFPS following that return due to repeated reports of neglectful supervision, and allegations of drug use by both A.O. and by her live-in boyfriend. There were also allegations that the boyfriend, a heroin addict, had assaulted the mother many times. However, neither the boyfriend's overdoses, nor the acts of domestic violence, were perpetrated in the

presence of the children. DFPS argued that A.O. failed to prioritize the needs of her children. While A.O. was appointed a temporary possessory conservator, with the right to visit with the children, DFPS twice halted or restricted her access to the children due to her failure and refusal to progress with the DFPS Family Service Plan.

Despite having the Family Service Plan explained to her by a social worker, signing off on the plan, and articulating that she understood the need to maintain sobriety, A.O. continued to use drugs and “remained in a toxic relationship with her boyfriend.” Meanwhile, the children’s biological father was incarcerated; he had a history of domestic violence against A.O.

A.O. was an intravenous methamphetamine user. She sought treatment for her drug use, only to fail to complete the programs, or to lapse and breach her sobriety shortly after completing such a program, at six different facilities. While the case was pending, she failed to find stable housing or employment. Soon before the case was tried, her boyfriend was arrested for assaulting her. Only after the mother broke free of the boyfriend did she begin to focus on fulfilling services imposed on her by the Family Service Plan.

Three children were made the subject of the suit. The children were 2, 3 and 5 years old as of December 2020, when they began to receive counseling services. Their counselor concluded that they suffered from adjustment disorders, and further, that the eldest child was on the autism spectrum. At the final hearing, the counselor testified that the children had progressed in counseling during the pendency of the case.

The case timeline looks like this:

June 17, 2020: Case filed.

June 16, 2021: Trial court signs an order to retain the case on its active docket through December 18, 2021.

July 13, 2021: Trial setting, but case not reached that day.

Aug. 3, 2021: Trial begins, only to be suspended when the trial court judge learns that A.O.'s husband, the children's presumptive father, had not been duly served.

Oct. 5, 2021: Trial resumes; TPR granted. Mother subsequently requests a de novo hearing.

Oct. 25, 2021: Termination order entered.

Nov. 10, 2021: De novo hearing, with conflicting testimony from DFPS social workers and a caseworker from the seventh facility where mother was seeking treatment during the trial.

Dec. 18, 2021: The date by which the case was to be disposed of via settlement or trial.

A TPR was granted based on findings that A.O. engaged in the following conduct, or "D", "E", "O", and "P" grounds:

- "Knowingly placed or allowed the children to remain in conditions or surroundings which endangered their well-being.
- Engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their well-being.

- Failed to comply with a court order that established the actions necessary for the parent to obtain the return of the children following their removal under Chapter 262 of the Family Code.
- Used a controlled substance, as defined by Chapter 481 of the Texas Health and Safety Code in a manner that endangered the health or safety of the children, and failed to complete a court-ordered substance abuse treatment program or after completion of a court-ordered substance abuse treatment program.”

A.O. contends that the court failed to give her a proper amount of time to satisfy DFPS’ Family Service Plan by finding that her parental rights should be terminated prior to the dismissal date. During the 15 months that the case was pending before the trial court, A.O. had been unable to consistently maintain sobriety, to establish a stable place to live with her three minor children, or to maintain employment. The appellate court provides a review of applicable deadlines for CPS cases, noting that:

Section 263.401(b) of the Texas Family Code authorizes the trial court to retain a termination proceeding on its docket for not longer than 180 days after the statutory deadline provided in paragraph (a) of the statute.

§ 263.401(b). That deadline is the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator. § 263.401(a). The trial court may grant the extension when it finds that extraordinary circumstances necessitate a child remaining in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the best

interest of the child. In 2019, the Legislature amended section 263.401 by adding that the trial court shall consider whether the parent made a good faith effort to successfully complete a substance abuse treatment program in determining whether to find extraordinary circumstances for a child to remain in the temporary managing conservatorship of the Department. § 263.401(b-1).

The DFPS caseworker testified that while it was possible that the mother could complete services if the trial was abated, given her prior history, it was unlikely that she could maintain sobriety, and even if A.O. could do so, that would not change the caseworker's recommendations. The caseworker noted that any statements as to mother's ability to maintain sobriety were hypothetical. The extension available pursuant to the amendment to TX.FAM.CODE § 263.401(b-1) does not appear to guarantee a parent six months in which to complete services. Instead, the appellate court notes that statutory deadlines are intended to assure judicial expediency, assuring resolution for all parties.

While A.O. complains that she should have been given more time to complete services, the fact remains, she failed to complete the DFPS Family Service Plan as of the date that the case was initially called to trial in August 2021. Nor had she completed services by the time the case was resumed 62 days later. As the appellate court notes: "[t]oo often in situations such as this, that old adage is true—too little, too late." While the mother complains of insufficient time, there was no motion for continuance filed during the pendency of the case to give her additional time to complete services. Even if a motion for continuance had been filed, the appellate court conjectures that it would have been in the

sound discretion of the trial court to deny such an abatement, in light of A.O.'s long history of drug use.

A.O. also challenges the sufficiency of the evidence presented at trial in regard to a TPR being in her young children's best interests. The appellate court looks to *Holley v. Adams*, and further, to the fact that the burden of proof is "clear and convincing," rather than "beyond a reasonable doubt" to sustain a TPR. The trial court, as gatekeeper, has the duty to weigh the credibility of the witnesses, and to choose who or what to believe when presented with conflicted testimony. The determination of best interests must focus on the child, rather than on the parent. What does the Texas Supreme Court's holding in *Holley* mandate that the trial court consider?

1. The desires of the child.
2. The emotional and physical needs of the child now and in the future.
3. The emotional and physical danger to the child presently and in the future.
4. The parental abilities of the individual seeking custody.
5. The programs available to assist the individual to promote the best interest of the child.
6. The plans for the child by the individual or by the agency seeking custody.
7. The stability of the home or proposed placement.
8. The acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one.
9. Any excuse for the acts or omissions of the parent.

In the instant case, the mother was ill-equipped to deal with the complications posed by her eldest child's autism, let alone the demands of meeting the needs of her other two small children. Despite at least six other attempts, the mother had not surmounted drug addiction. She had a pattern of being drawn to men who physically abused her, had no stable home, and had no job.

There are judges and associate judges who will give parents facing TPR every benefit of the doubt, and as much time as allowed by law. With the extensions allowed by Emergency Orders granted by the Texas Supreme Court, cases could linger, and parents could be given more time than provided by statute. However, there will continue to be many cases in which parents fail to fulfill DFPS' Family Service Plans. The primary purpose of every state child welfare statutory scheme is to preserve the integrity of the family unit to the greatest extent possible. Toward that end, DFPS must make reasonable efforts to reunify children with their parents. But that goal must be weighed against all the other factors involved in TPR cases. Not an easy balance.

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, MSW, JD *is a professor at Yeshiva University's School of Social Work in New York City. Contact: dpollack@yu.edu.*