TEXAS LAWYER

COMMENTARY

Medical Neglect Can Be Grounds for Termination of Parental Rights

Elisa Reiter and Daniel Pollack | October 19, 2022

A child's environment can constitute a source of physical and emotional medical neglect. In the recent case of *In the Interest of J.A.R.R., J.N.R., and M.A.R.*, the U.S. Court of Appeals for the Fourth Circuit held that termination of parental rights was warranted where parents had no plan in place to meet their children's medical needs.

Where the Texas Department of Family and Protective Services (TDFPS) seeks to terminate a parent's rights, the case is one of constitutional proportion. Because of that, parents are entitled to due process to assure that the Department's attempts to terminate the parent-child relationship is warranted. Appellate courts are charged with ensuring that TDFPS has met its significant burden of proof—by reviewing the record to confirm that TDFPS submitted clear and convincing evidence that a statutory ground was proffered to terminate parental rights, and further, that termination of parental rights serves the best interest of the children made the subject of the case.

Across the country, and in Texas, there is a strong presumption that maintaining the parent-child relationship serves the best interest of our children. In order to rebut that presumption, an entity or an individual seeking to terminate the parent-child relationship has the burden of showing that continuation of the parent-child relationship would not serve the child's best interests. Texas courts will look to the *Holley v. Adams* factors, including the following:

• the desires of the child;

• the emotional and physical needs of the child, now and in the future;

• the emotional and physical danger to the child, now and in the future;

• the parental abilities of the individuals seeking custody;

• the programs available to assist those individuals to promote the best interest of the child;

• the plans for the child by these individuals or the agency seeking custody;

• the stability of the home or proposed placement;

• the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one; and

• any excuse for the acts or omissions of the parent.

The fact finder may rely on an individual's past conduct as an indicator of the party's future conduct. In the *J.A.R.R.* case, the appellate court grappled with review of the following scenario:

In May of 2020, the Texas Department of Family and Protective Services removed the children from the Father's and Mother's home because it had received reports of medical neglect. When the children were removed, both J.N.R. and M.A.R. were underweight to the point that they were immediately hospitalized for malnourishment (J.N.R.) and failure to thrive (M.A.R.). J.A.R.R., in contrast, was severely overweight.
The Department obtained temporary managing conservatorship over the children, placed them in foster care, and filed a petition to terminate Father's and Mother's parental rights. At the time of trial, J.A.R.R. and M.A.R. were placed with Mother's brother D.R. (Uncle) and his wife J.G.R. (Aunt). Due to her complex medical needs, J.N.R. was placed in a specially licensed foster home.

In a trial that spanned several settings over four months, the trial court heard from seven witnesses, including: the Department's caseworker, Alyssa Miller; the parents' therapist, Victoria Caylor; Myrah Guerra, a Department caseworker who briefly took over this case while Miller was

on leave; Aunt; the court-appointed special advocate; Mother; and Father.

The appellate court applied precedent as follows: "Neglect of a child's medical needs endangers the child. (*In re T.M.T.*, No. 14-18-00442-CV, 2018 Tex. App. LEXIS 9459, 2018 WL 6053667, at *11 (Tex. App.-Houston [14th Dist.] Nov. 20, 2018, no pet.) (mem. op.) (considering endangerment under both subsections D and E)."

In the instant case, the appellate court considered evidence that although the Department did not remove the children until May 2020, the Department had been working with the family in January 2020. Despite TDFPS' efforts through the beginning of 2020 (which coincided with the beginning of the COVID pandemic), five-year-old J.N.R. and four-month-old M.A.R. were so underweight and malnourished that they were immediately hospitalized at the time of their removal: "[a]t the time of removal, five-year-old J.N.R. weighed approximately twenty-four pounds, which Father agreed at trial was 'the weight of an average two-year-old.'" Neither parent contended at trial that hospitalization was not warranted. The child known as J.N.R. had special needs—she had to be fed through a G-tube, which the father contended was leaky, depriving the child of the ability to absorb needed nutrients. The parents did not take the child to have the leaky G-tube replaced after the Department became involved in their lives. The caseworker testified that the child's G-tube was ill-fitting, that her parents seemed to fail to notice that, and that they had not sought care for the child to attend to the issues presented by her G-tube. J.N.R. had failed a swallow study. The caseworker, Miller, noted that the parents' inability or refusal to grasp that the child could choke on solid foods constituted an issue in their ability to care for and to nurture the

child. There was little proffered for an alternative plan to assure that the child received proper nutrition.

How complicated were J.N.R.'s needs? Guerra, one of the other caseworkers, testified that J.N.R. had been diagnosed as suffering from "septo-optic dysplasia sequence, cerebral palsy, growth hormone deficiencies, hypothyroidism, adrenal insufficiency, hypoglycemia, and 'possible sickle cell traits.'" Guerra noted that the child's medical needs mandated taking the child to approximately six medical appointments per week. Many such appointments had been missed prior to the child's removal, as the parents apparently lacked the ability to transport her with ease. The caseworkers also presented testimony that J.A.R.R. was placed in the position of parenting his younger siblings.
This "parentification" of a small child was properly reviewed by the trial court in determining that the father left one or more of the children in a situation that constituted a threat to their physical or emotional development. Caseworker Miller testified regarding the father: "He continues to be argumentative. He continues to refuse to accept blame on himself. He continues to try to place blame on others. It is a conversation that we have had multiple visits, multiple times, about him blaming CPS and blaming doctors, just overall lack of accountability."

The appellate court found that a reasonable trier of fact could find that the children's pre-removal environment endangered their physical and emotional well-being. In addition, the appellate court found that in presenting a *Holley v. Adams* analysis, the father was unable to articulate a plan of action that would address his three children's respective needs. While the caseworker testified that there were times that the parents were appropriate during supervised visits with the children, Miller also

opined that the child's parents "left [M.A.R.] in the stroller for upwards of 45 minutes, even though he was awake and alert …. I have observed him running around visitation areas and the parents are ignoring him or not interacting with him." Undisputed evidence was presented at trial that J.A.R.R.'s relationship with his father had deteriorated during the course of the case, and the father's repeated bullying remarks to the child resulted in the child feeling rejected to the point of no longer wanting to have a relationship with him. The aunt and uncle opined that J.A.R.R. wanted them to adopt him, and that they wanted to adopt. The caseworker (Miller) also testified that when the children were initially placed in the care of their aunt and uncle, J.A.R.R. "would destroy the foster family's belongings, he would hit things and he would hide the things that he had broken or destroyed." Miller's testimony also included the observation that such issues have been resolved since J.A.R.R.'s removal from his parents' care. Miller also noted in her testimony that J.A.R.R. lost weight, "is almost completely off of junk food" and "is very active. The caseworker added that the father did not take responsibility for his culpability as to the children's condition(s), and further, that the father apparently feels that it is not a man's place to bathe the children, to change diapers, catheters, feeding tubes or the like. In his own testimony, the father reflected on his work at a nursing home—that one should not attend to a person of the opposite sex, nor see them "naked". The parents rejected the notion of visits with their children being supervised by the aunt and uncle. This lead the caseworker to opine that she did not believe that the parents would make much of an effort to foster a continuing relationship with the children were they to be appointed as possessory conservators of the children.

Mother's appeal was denied as well. She did little to obtain care or replacement of the G-tube. The mother admitted that the few calls she placed in regard to attempting to address the leaky G-tube were insufficient to address the child's needs. In contrast to mother's attempt to paint the Department's efforts as inadequate in keeping the parents informed, the caseworker opined as to her attempts to:

• frequently remind the parents of the children's medical appointments;

• encourage the parents "to reach out to the medical providers on their own time and gain a better understanding";

• "strongly" encouraged the parents to take part in trainings with medical professionals and to speak with the physicians and their support staff; and

• send the parents copies of "packets that were printed out, that had all upcoming medical appointments."

Miller asserted that the parents did not merit appointment as possessory conservators of the children, as the caseworker seriously doubted that the parents would foment a cordial relationship with the children's aunt and uncle. The appellate court notes that when there is a dispute or contradictory evidence, such disputes or conflicts did not preclude the trier of fact from "forming a firm belief or conviction that the finding is true."

A child's environment can constitute a source of physical and emotional medical neglect. Termination is warranted where clear and convincing evidence is presented that parents had no plan in place to meet their children's medical needs. For amicus attorneys and ad litem attorneys

representing parents and children, the message is clear: Heed the siren call of the *Holley v. Adams* factors. Help your clients develop a plan of action, or—where warranted—build a case showing by clear and convincing evidence that the parents have failed to meet their children's physical and/or emotional needs.

Elisa Reiter *is an attorney at Underwood Perkins, P.C. She is Board Certified in Family Law and Child Welfare Law by the Texas Board of Legal Specialization. Contact: ereiter@uplawtx.com.* **Daniel Pollack, MSW, JD** *is a professor at Yeshiva University's School of Social Work in New York City. He is also a Commissioner of Game Over: Commission To Protect Youth Athletes, an independent blue-ribbon commission created to examine the institutional responses to sexual grooming and abuse by former USA Gymnastics physician Larry Nassar. Contact: dpollack@yu.edu*