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COMMENTARY

When Domestic Violence Is a Two-Way Street, Terminating Both Parents' Rights May Be in the Best Interest of the Children

Elisa Reiter and Daniel Pollack | November 10, 2022

In the recent trial of Johnny Depp and Amber Heard, the phrase "mutual abuse" was used by the psychologist testifying on Depp's behalf. Mutual abuse is a term sometimes used to assign accusations of instigation and abusive behavior to both people in a relationship, not just one. Whether

the term is ever appropriate or if it describes domestic violence situations in an accurate fashion is not the focus of this article. Rather, this article looks at a case where the court found that domestic violence was, in fact, perpetrated by both the husband and wife. As a result, there were severe consequences for their children. Domestic violence impacts families of all socio-economic strata. Those stricken by poverty are not alone in facing the psychosocial stressors that exacerbate domestic violence.

In a recent Texas Court of Appeals case, *In the Int. of D.A.* [Court of Appeals of Texas, Twelfth District, Tyler Sept. 30, 2022, Opinion Delivered, NO. 12-22-00183-CV], the appellate court found sufficient evidence to support termination of both mother's and father's parental rights, based on endangerment grounds. At the trial court level, the 420th Judicial District Court of Nacogdoches County, Texas found that both parents engaged in acts constituting domestic violence around the children, and further, that the parents failed to complete all of their court ordered services.

To terminate parental rights, a court must find that two elements exist: First, the parent engaged in any one of the acts or omissions set out within Texas Family Code §161.001. Second, that termination must be in the children's best interest. The burden of proof of these elements must be established by clear and convincing evidence. Best interest is, in part, determined via the *Holley v. Adams* factors.

In the Int. of D.A. involved C.P., the father of D.A. and G.A., and their mother, M.A. On or about June 19, 2020, a bit over three months following the closure of many activities due to COVID, the Department of

Family and Protective Services (Department) filed an original petition seeking to protect D.A. and G.A. by terminating C.P. and M.A.'s parental rights. The Department was appointed temporary managing conservator of the children. A bench trial followed, with the trial court entering an agreed order in a suit affecting the parent-child relationship (SAPCR) in January 2021. That order appointed the Department as the children's permanent managing conservator, granting the parents access to the children at the Department's discretion. Just over one year later, the Department filed a petition seeking to modify the agreed order, arguing a material and substantial change in circumstances. The court found by clear and convincing evidence that termination of parental rights was warranted based on (D), (E), (N) and (O) grounds. At the time of entry of the initial order, the Department intended to place the children with their maternal grandmother, who lived in South Dakota. Subsequently, the grandmother contacted the caseworker, advising the caseworker that she would not feel safe harboring or being involved with the children if C.P. knew the children were with her. The parents proved difficult to locate to set up visitation and a new service plan. Neither parent engaged in new services with the Department.

The appellate court noted that: "Although endanger means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the parent's conduct be directed at the child or that the child actually suffers injury."

In the instant case, a Department investigator, Alice Wilson, testified that the Department acted on a referral in June 2020 due to M.A.'s hospitalization—C.P. had beaten the children's mother for two days, allegedly because she had purchased incorrect diapers. Put in

perspective, this was about three months into the COVID pandemic, as supply chain issues were on the rise. An individual's preferred brand—of anything—might not have been readily available at that time. The referral also noted that M.A. conceded using methamphetamines two days prior to the incident, resulting in her hospitalization. M.A. and the children were apparently living in South Dakota, but were visiting relatives in Texas at the time of the incident. M.A. had no recollection of the beating that left her injured in a hotel stairwell, as, in addition to using methamphetamines, she acknowledged she had also ingested a significant amount of alcohol. C.P. was arrested in Galveston on charges related to assault. Wilson confirmed in her testimony that it was her understanding that the children witnessed their father assaulting their mother, and further, that she believed that the children were endangered as a result of the domestic violence emergent between their parents.

Another witness, Skillern, testified that after the children's removal, M.A. and C.P. lived in Nacogdoches, later moving to the Dallas area in February 2021. The couple remained transient until March 2021. The Department engaged in a reunification assessment, recommending return of the children to their parents. The children were returned to their parents in October 2021. The children's mother was pregnant, giving birth in late September or early October. However, the baby died soon thereafter. Skillern asserted in trial court testimony that the baby died as a result of "inappropriately co-sleeping" with M.A. and C.P., even though there was a crib or bassinet available in their apartment.

As a result of the baby's death, D.A. ad G.A. were again removed from their parents' care, and again placed in foster care. At the time of the second removal, one of the children, G.A., apparently had cigarette burns

on her legs, and further, was displaying reversion by way of being very shy around males. In upholding the termination of parental rights, in addition to the *Holley v. Adams* factors, the appellate court considered the following, as set out in Texas Family Code §263.307(b):

(1) the child's age and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.

D.A. and G.A. were four years old and two years old, respectively, at the time of trial. While visits were available to the parents through the Department, the parents were inconsistent in availing themselves of access (there is no specific treatment of how COVID might have impacted

the ability to see the children in person in the opinion). The appellate opinion does note that the parents attended seven visits between them—often visits proffered after the failed monitored return.

Not only did the parents engage in domestic violence around their children, the parents were unable to locate their children when the mother was hospitalized in Galveston for treatment of her injuries. The parents failed to complete all of their court ordered services, and further, failed to engage in a meaningful way with the Department at the end of the case.

Amber Heard and Johnny Depp are not the only couple making accusations of "mutual abuse." Certainly, many similar incidents have gone unreported. The lesson is clear: Engaging in domestic violence in the presence of one's children should not be condoned.

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