

TEXAS LAWYER

ANALYSIS

Abusive or dangerous conduct may result in termination of parental rights

Elisa Reiter and Daniel Pollack | June 29, 2023



A parent's rights can be terminated if they are not able to properly care for their child. The Eighth District Court of Appeals in El Paso recently dealt with this issue in [In the Int. of R.A.B., 2023 Tex. App.](#) The appellate court held that the termination of a mother's parental rights was appropriate based on Tex. Fam. Code Ann. Section 161.001(b)(1)(D) and (E), and based on a finding of child endangerment. As such, severing the parent-child relationship was in the children's best interest. Why?

In R.A.B., the mother and her partner were observed at a known drug house. In addition, the mother's partner was also seen blowing into the children's faces.

Following that incident, the children tested positive for amphetamine and methamphetamine. One might presume that the mother had learned her lesson, and would abstain from drug use during the pendency of the ensuing C.P.S. case. Unfortunately, the mother endangered the children's lives prior to their removal, and continued engaging in the use of illicit drugs following their removal, during the pendency of the case. The mother's drug use was reflected by her refusal to comply with a court order mandating random drug testing. In addition, in regard to the testing that the mother did engage in, she tested positive for methamphetamine and amphetamine on several occasions, spread over the 18-month pendency of the case. Additionally, the parenting plan required her to attend in-patient drug rehabilitation, which she refused to do.

The Texas Department of Family and Protective Services (TDFPS) filed its case on June 4, 2021; a bench trial was held in November, 2022. At the time of trial, R.A.B., Jr. was 13 years-old and M.M.G.-B., was 12 years-old. Amphetamines and methamphetamines are narcotics, categorized as group 1 penalty drugs. [TEX. HEALTH & SAFETY CODE ANN. Section 481.102](#). The mother's in-person visits were suspended pending submission of a clean drug test. TDFPS was appointed as temporary sole managing conservator of the children. The trial court found that mother "partially complied with random drug testing but failed to demonstrate sobriety." In October, 2021, approximately four months after initial drug testing, the mother did submit to a hair follicle drug test, and her results were positive for amphetamines and methamphetamines. In December, 2021, claiming an inability to get herself to the drug testing facility, the mother failed to submit to a urinalysis. She also missed an additional drug test in February, 2022. In March, 2022, the mother submitted to a hair follicle drug test, and again tested positive for amphetamines and methamphetamines. In June 2022, her urine drug test results were again positive for amphetamines and methamphetamines.

In July, 2022, the trial court ordered the mother to present herself for in-patient drug rehabilitation. The mother claimed she was unable to attend the program due to her obligations to her own ailing, elderly mother.

In October, 2022, after the Respondent Mother submitted to another urinalysis, she again tested positive for amphetamines and methamphetamines. At trial, the

TDPFS (the “Department”) social worker, Melin Hernandez, testified that the mother denied having a drug dependency issue throughout the case. While the mother was prohibited from having in-person visits with the children, the mother had virtual visits with the children. Note the dates involved – the case was filed during the COVID pandemic, and was subject to emergency orders issued by the Texas Supreme Court. According to Hernandez, the virtual visitations appeared to have a positive impact on the children.

The mother and father lived in separate households. Hernandez testified that the father had limited contact with the children prior to their removal. While the father was not involved in the initial case, in November 2021, he was arrested and remained incarcerated for several months pending placement in a drug rehabilitation program. He was released from jail in August 2022, having completed his rehabilitation program. Hernandez testified that the father’s interaction with the children was positive, albeit inconsistent. Hernandez also testified that the father wanted what was best for the children, and that the father acknowledged he could not provide for his children.

Hernandez also acknowledged that R.A.B., Jr. was living in an emergency shelter, and that the Department planned for him to be placed for adoption in the event the Department was named permanent managing conservator. R.A.B., Jr. did not want to be adopted, and made his opposition to adoption clear to Hernandez. By contrast, M.M.G.-B. was living in a foster home. The department planned for M.M.G.-B to remain in that foster home, and that the Department planned for the child’s foster parents to adopt her.

The trial court also heard testimony from Corine Dominguez, a licensed chemical dependency counselor who treated J.G. via an outpatient program. J.G. began work in the outpatient program on October 12, 2021, with ten to twelve individual sessions required. J.G. was also encouraged to attend group sessions, but she failed to do so. She was discharged from the program on February 23, 2022. Dominguez confirmed that the outpatient program did not perform any drug testing. However, J.G. self-reported that she had been sober for eight months at the time of her discharge. A CASA volunteer assigned to the case less than one month prior to trial met with the children and indicated that she had enough information to

formulate an opinion. The CASA volunteer testified at trial that termination of parental rights was in the children's best interests.

The mother testified at trial that her visits with the children had been twice per week, and further, that she had exchanged messages with her daughter via social media. J.G. testified that she wanted the family reunified. J.G. did not feel that termination of her parental rights would serve her children's best interests.

Danielle Fisher was R.A.B., Jr.'s psychiatric nurse practitioner. R.A.B., Jr. was on prescription medication, including a stimulant for his attention deficit disorder. Ms. Fisher opined that "there is always a concern" if a child was prescribed a stimulant while living with a person known to engage in drug use. R.A.B., Jr. was also on a mood stabilizer, to curb aggressive behavior. Fisher testified that while she planned to wean R.A.B., Jr. off the prescription medication, he would need substantial therapy first to help him regulate his behaviors. Two other counselors also testified, one opining that R.A.B., Jr. needed counseling for "self-awareness, coping skills, and self-processing of his experiences, thoughts, and emotions." The other counselor opined regarding the lack of an emotional connection between M.M.G.-B. and J.G.

Six issues were raised on appeal. Due process necessitates sufficiency of findings by the trial court. Tex.Fam. Code Section 161.001(b)(1) provides that a trial court may order that a person's parent child relationship may be terminated if the trial court finds by clear and convincing evidence that the parent has committed one or more of the acts set out by the statute, and that termination of the parent-child relationship is in the child's best interest. The fact finder must have sufficient proof to form a firm belief as to the truth of the allegations forming the basis of the case.

On appeal, the mother argued that there were insufficient grounds to substantiate a claim for child endangerment pursuant to subsections (D) and (E). The appellate court notes that "endangerment means more than a threat of a metaphysical injury or the possible ill effects of an unideal family environment. . ." but the parent's conduct need not be "directed at the child" nor "that the child suffer actual injury." The appellate court holds that "a parent's use of illegal drugs and the effect on her life and parenting ability may establish an endangering course of action under

subsection (E). Citing [In re K.A.C., 594, S.W.3d](#) at 373, the appellate court notes “[f]urther, evidence that the parent continued to use illegal drugs even though the parent knew her parental rights were in jeopardy is conduct showing a voluntary, deliberate, and conscious course of conduct, which by its nature, endangers a child’s well-being.” In the instant case, the mother not only continued to engage in drug use, her children had tested positive for drugs at the time of their removal. The appellate court notes that the mother argues that the drug test results were suspect and invalid. Yet, the drug tests were admitted at the trial court level. No objections were made at trial as to the admission of the drug tests – the only concern noted was as to a typographical error in the October, 2022 drug test results. As the mother failed to object at trial, she waived any objections as to the drug test results on appeal.

The appellate court views the evidence in a manner acknowledging the trial court’s position as factfinder, gatekeeper and “sole arbiter of the witnesses’ credibility and demeanor,” finding that “J.G. knowingly placed the children in an environment that endangered their physical and emotional well-being.” Given the fact that the appellate court found legally sufficient evidence to support termination of parental rights under Subsections (D) and (E), there was no need to address the sufficiency of evidence under subsections (O) and (P).

Abuse and neglect have broad meanings under the Texas Family Code. Pursuant to [Chapter 262](#), the child’s environment can be interpreted to pose the risk of abuse or neglect. At trial, J.G.’s testimony as to her ailing mother failed to constitute a sufficient explanation for her failure to complete the parenting plan, or why she continued to test positive for illegal drugs. J.G. failed to prove by a preponderance of the evidence that she was unable to comply with the parenting plan/court order. Nor did the mother show that she made a good faith effort to comply with court orders, and that her failure to comply was not due to her own acts or omissions. In any event, such a defense cannot be lodged for the first time on appeal.

In its analysis of the facts of the instant case, the appellate court considers the [Holley v. Adams](#) factors, including:

A. The desires of the child;

- B. The emotional and physical needs of the child now and in the future;
- C. The emotional and physical danger to the child now and in the future;
- D. The parental abilities of the individuals seeking custody;
- E. The program's available to assist these individuals to promote the best interests of the child;
- F. The plans for the child by these individuals or by the agency seeking custody;
- G. The stability of the home or proposed placement;
- H. The acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- I. Any excuse for the acts or omissions of the parent.

As both children, at some level, expressed a desire to interact with their mother in the future, the appellate court weighed the children's expressed desire against their best interests, concluding that the trial court had sufficient evidence to conclude that the children's mother would "continue to endanger the well-being of the children." Moreover, while the mother argued at trial that the Department's actions reflected poor parenting ability as evidenced by R.A.B., Jr.'s weight loss (30 pounds in one year), and her failure to proffer any explanation as to the child's weight prior to his removal. Moreover, evidence reflected that the child's caregivers had been instructed to provide J.G.'s son with double portions of food and to supplement his diet with multivitamins.

Considering the programs available to assist J.G., while she had been ordered to participate in in-patient drug rehabilitation, the mother had not complied with certain court orders. Moreover, she failed to demonstrate and to maintain sobriety during the pendency of the underlying case. J.G. also failed to present testimony at trial as to her plans for the children other than her desire to have them returned to her home.

Here are some important takeaways:

1. Objections need to be timely raised at trial.

2. If one is to challenge positive drug results, simply providing testimony from the parent who was the subject of the test results is insufficient. Find an expert who can opine as to why certain test results may be invalid.
3. If outpatient treatment is sought by a parent who presents with the appearance of being a drug addict, assure that some type of drug testing is part of the treatment protocol.
4. If drug testing is not part of outpatient drug rehabilitation, assure that the parent presents for independent drug testing.
5. As an *ad litem*, assure that the child is not being exposed to physical or emotional danger if and when the child is being made available for virtual and/or in-person visits with a parent.
6. As a parent's *ad litem*, assure that your attempts to apprise the parent as to how the parent's acts or omissions may impact their case are well documented.

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