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Children should have a voice in termination cases

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I have an unwritten rule, which I break on rare occasions, against writing about child custody disputes. They're ugly, excruciatingly personal ordeals where people who may be fit, loving parents can be driven to lie, twist facts and otherwise behave badly out of desperation to keep their kids.

Parents in this situation don't make very reliable sources for a newspaper column. And, in my opinion, they don't make very good representatives of their child's best interests.

That's doubly so in a case where one parent is trying to terminate the other's parental rights altogether. The child's voice, it seems, could only be fairly represented by a neutral party appointed by the court.

That didn't happen in the Montgomery County case I wrote about in 2011, in which Art Suarez Eden's ex-wife prevailed in severing his parental rights to their daughter. Neither Eden, who acted as his own attorney, nor the girl was represented by legal counsel. Despite the couple's hostile relationship, the judge in the case, Tracy Gilbert, found that an attorney wasn't necessary for the girl because the mother had "no interest adverse to the child."

Whether the judge erred on that point is one of the questions that several prominent attorneys and legal scholars are asking the Texas Supreme Court to consider. Justices recently asked for full arguments to help them decide whether to take up the case.

Eden is optimistic about the development, but he says, "We're still David versus Goliath, against all odds, fighting this."

Among those who have filed legal briefs is the court's own former chief justice, Thomas Phillips, on behalf of the Texas Access to Justice Foundation, a nonprofit that directs state and federal funds to legal aid for low-income Texans. Dallas appellate attorney Deborah Hankinson joined him in the brief.

"This is one of the most significant actions the state can take against an individual, short of taking their life," Phillips said of a judge's power to terminate parental rights. Many states, he said, don't allow it unless the state has initiated the termination itself. But in Texas, we let private citizens, such as former spouses, seek terminations.

"Oddly enough," Phillips said, "those private actions afford a lot less protection" for those involved than the state actions do. In Texas, if the state's child protective agency decides to terminate a parent's rights, it must appoint an attorney for the parent being challenged, and also representation for the child.

Fair say not a luxury

In private cases, the parent has no right to counsel and the child's right has been weakened over the years - mainly, it seems, because of lawmakers' concern about the cost during lean budget years. An older Texas statute led trial courts to almost always appoint children counsel, with appellate courts agreeing that the very nature of such cases required the father and mother to "litigate their personal interests" over their children's.

Current law calls for the judge to appoint an amicus attorney for the child "unless the court finds that the interests of the child will be represented adequately by a party to the suit whose interests are not in conflict with the child's interests."

But, shockingly, the law requires the judge to consider whether the parties can pay for an appointed attorney.

In effect, the law seems to consider the child's right to have a fair say in the case a luxury contingent on the parents' ability to pay for it.

Phillips' brief expresses no opinion on whether Eden's rights should have been terminated, nor whether the father should have been appointed a lawyer. It simply asks the high court to send the case back to the trial court because of Judge Gilbert's alleged errors.

Phillips notes that Gilbert didn't rule on the father's motion to appoint his daughter an attorney until the judge had already dissolved parental rights. And Gilbert's rationale for denial didn't hold water, even under the current statute, Phillips argues.

'Record of hostility'

"There was such a record of hostility between the parents in this case that there's no way one of the parents could have been an adequately neutral judge as to what's best for the child," Phillips told me.

The mother's Dallas attorney, David Mizgala, maintains that Gilbert followed the statute, which presumes that a fit parent - such as the mother in this case - acts in her child's best interest. Among his many other points, Mizgala argues that the Texas Department of Protective and Regulatory Services, a seemingly neutral party, testified that it was in the child's best interest to terminate Eden's rights.

But that doesn't impress Charles Childress, an attorney who ran a clinic in Travis County representing children in CPS cases and filed his own amicus brief in this case.

Childress says the state's child welfare agency doesn't have to do as much homework in private termination cases and "personal relationships will sometimes result in a caseworker from the department showing up on the side of one or the other."

Legal counsel critical

The only way to make sure a child's best interest is really considered is to make sure they have legal representation, just as they would in a CPS case, Childress told me: "It's no less critically important to the child, whether it's the state bringing the case or somebody else bringing the case, that it come out right."

And in the end, the most important party here is the child. Eden's case is a complex one, with many facts obscured by a sealed file. I have no opinion on whether he should have had his parental rights terminated.

For all I know, Eden's daughter may well have chosen to sever ties with her father. But at least, she should have had a voice in the matter.