




5-2018

Children's Role in Termination of Parental Rights Proceedings

Makayla Okamura
makaylaokamura@gmail.com

Michael Kummerman
lilmikeyj@comcast.net

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

 Part of the [Arts and Humanities Commons](#), and the [Social and Behavioral Sciences Commons](#)

BYU ScholarsArchive Citation

Okamura, Makayla and Kummerman, Michael (2018) "Children's Role in Termination of Parental Rights Proceedings," *Brigham Young University Prelaw Review*: Vol. 32 , Article 16.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol32/iss1/16>

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

CHILDREN'S ROLE IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

Makayla Okamura¹ and Michael Kummerman²

We met Brandon Zelenak at his arraignment for a misdemeanor, and in speaking with him learned of his history with the Utah foster care system. Brandon was removed from his mother's custody and brought into the foster care system when he was five years old; his mother's parental rights were terminated when he was six. He then proceeded to spend the next ten years in various foster homes, in and out of the foster system until he was adopted at age seventeen. Although the termination of Brandon's mother's parental rights was intended to speed up the process of finding Brandon a permanent home and helping him become adopted, the fact that Brandon spent so many years in and out of foster homes illustrates that the termination didn't seem to improve his circumstances. Unfortunately, Brandon's story is not unique. The Child Welfare Outcomes report to Congress found that across the United States, only 4 percent of adoptions

1 Makayla Okamura will graduate from Brigham Young University in June 2018, with majors in economics and English language and a minor in editing. She plans to attend law school and pursue a career in child advocacy. She would like to thank Kris Tina Carlston and the prelaw review board for their assistance with this paper.

2 Michael Kummerman is a senior pursuing an undergraduate degree in political science at Brigham Young University and preparing to attend law school. His objective legal focus will be alternative dispute resolution, international child law, and judicial reform. He is a Language Facilitator for BYU's Foreign Language Student Residence and is experienced as an assistant special education instructor. He also volunteers for Utah Court Appointed Special Advocates for Children Organization.

occur within a year of a child entering foster care.³ Every year, roughly 60,000 children whose parental rights have been terminated sit in foster care waiting for permanent adoption.⁴

In our communication with Brandon, who is now an adult, we learned about the significant negative impact he believes the termination of parental rights (TPR) hearing had on the rest of his life. We also learned how powerless he felt in the instance of his mother's TPR as well as in legal proceedings that followed as he lived as a ward of the state in Utah's foster care system. Brandon began to formulate his wishes regarding his legal situation, but the courts did not give him a voice to express his wishes. He was never given personal legal representation, and his story highlights the shortcomings of the Utah foster care system. It is not hard to attribute his current difficulties with the law to his tumultuous childhood, and specifically to his feeling so powerless to change his circumstances as a child.

Currently in Utah, children are not considered a party in TPR proceedings in statutory code and as a result cannot have a significant voice in deciding whether their parents' rights are terminated, although such a decision heavily impacts their futures. Utah statute should be amended to explicitly define children as a party in proceedings regarding TPR, and to give children the right to their own attorney, either court-appointed or personal, who will represent their personal wishes in court regarding TPR.

Children should be able to exercise any understanding they might have of the legal system or of their legal rights as individuals. Although they should not need to understand the legal system, direct legal representation can still effectively serve their best interests. Instead of representing themselves in court, children are currently assigned a guardian ad litem (GAL), an attorney or appointed advocate who advocates in

3 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Child Welfare Outcomes 2010–2014 Report to Congress*, at iii (2017).

4 *Id.* at F-1.

court for the children's best interest.⁵ Children are not expected to be capable of sound legal decisions regarding their personal welfare. This is perhaps the main reason the current legal system uses a GAL instead of making the children party in the proceedings. "Parties" are described as those "who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding."⁶ This GAL system hopes to serve the children's best interests without placing an inappropriate amount of responsibility on their shoulders. In Utah particularly, children are not given party status in cases regarding their welfare, such as termination of parental rights (TPR) hearings. In cases concerning infants or toddlers, using the GAL system is usually most appropriate because such young children are most likely incapable of representing themselves as a legal party. However, older children who can comprehend their parents' mistakes and weigh the legal significance of TPR are capable of participating in legal proceedings. Although well-intentioned, the GAL system can easily overlook the children's personal feelings and desires, which are highly relevant to their welfare. Children's well-being would be better served by allowing them to become a party and play an active role in their case if they should choose to.

Although no Utah statute currently declares children to be parties in their own welfare cases, there is both official and unofficial precedent for allowing children to play an active role in their cases. A Child Trends study found unofficial precedent when interviewing judges who hold TPR hearings; the study found that judges sometimes try to learn what the child's wishes are even though it is not required, and that all the judges that deal primarily with older children request to hear from the child.⁷ However, official statute is still necessary because not all judges

5 UTAH CODE ANN. § 78A-6-512 (2017).

6 *Parties*, BLACK'S LAW DICTIONARY (2nd ed. 1910).

7 RAQUEL ELLIS ET AL., CHILD TRENDS, *The Timing of Termination of Parental Rights: A Balancing Act for Children's Best Interests* 4 (2009).

choose to listen to children. Some judges assume children will be opposed to TPR even if it is clearly in their best interest, and as a result place little importance on the child's opinion. One judge is quoted saying that "no child actually enjoys being disconnected from his or her birth family,"⁸ and the study found that 75 percent of judges "do not require a child to consent to a goal of adoption."⁹

Official precedent exists in U.S. states other than Utah, including Georgia, Iowa, Virginia, and California.¹⁰ In these states, children at or above a specified age have legal authority to veto TPR.¹¹ In Georgia especially, statute explicitly acknowledges a child as a party in TPR proceedings and gives the child option of a personal attorney in addition to a GAL, making sure that a child has legal power to make his or her voice heard.¹²

I. BACKGROUND

The most recent federal legislation regarding TPR is the Adoption and Safe Families Act (ASFA), signed by President Clinton and enacted by Congress in 1997.¹³ The Act was designed to prevent foster children from returning to dangerous home situations, to enable children to return to a safe home or find permanent placement more quickly, and to increase the number of children being adopted and exiting the foster care system.¹⁴ The Act declared that after a child spends fifteen out of the past

8 *Id.* at 8.

9 *Id.* at 4.

10 Brent Pattison, *When Children Object: Amplifying an Older Child's Objection to Termination of Parental Rights*, 49 MICH. L. REV. 689 (2016).

11 *Id.*

12 GA. CODE ANN. § 15-11-262 (2017).

13 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

14 KATHERINE A. HORT, *Is Twenty-two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1896 (2001).

twenty-two months in foster care, the state must file for TPR unless compelling reason shows that TPR is not in the best interest of the child, this is known as the 15/22 policy.¹⁵ The Act also requires that in “aggravated circumstances,” such as parents who commit violent crimes against their child, the state should not try to reunify the child with their parents.¹⁶ The state must also hold “permanency hearings” every twelve months following, in which a permanent placement for the child is planned.¹⁷ ASFA encourages state services to simultaneously attempt reunification and search for alternative permanent placement, so that a child is not left without a permanent home if the parents are suddenly or unexpectedly found to be unfit for reunification.¹⁸

In response to ASFA, most states adopted the 15/22 policy.¹⁹ However, some states adopted an even shorter timeframe, further speeding up TPR proceedings.²⁰ A study from the University of Chicago found that states with shorter timeframe policies do not finalize adoptions faster than states that use the federal 15/22 timeframe, indicating that speeding up TPR does not cause faster adoptions.²¹

The current Utah statute regarding TPR is found in the Juvenile Court Act.²² The legislation requires that if reunification efforts are ordered by the court, a hearing must be held within six months of the child’s removal from their home to determine whether the Division of Child and Family Services is providing

15 Adoption and Safe Families Act of 1997 §103.

16 *Id.* at 101.

17 *Id.*

18 *Id.* at 201.

19 THE CENTER FOR STATE CHILD WELFARE DATA, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO, *Testing the Effect of Fast-Track Adoption Policy on Adoption Rates 2* (2015).

20 *Id.*

21 *Id.* at 3.

22 Utah Code Ann. § 78A-6-314(2016).

“reasonable efforts” to reunify the family and whether the parent is fulfilling the requirements for the reunification plan.²³ Within twelve months, the court must hold a permanency hearing; if the child is not returned to their parent’s care at the permanency hearing, the court should order termination of reunification services or else make a new plan regarding reunification or alternative placement for the child.²⁴ If reunification efforts are not ordered by the court, a permanency hearing must be held within thirty days of the child’s removal from their parents’ care to determine a permanent home for the child.²⁵

II. PROOF OF CLAIM

Some judicial and child welfare professionals feel that an accelerated timeline toward TPR is not in the best interest of some children. In 2009, the Child Trends organization published a research brief to address concerns regarding accelerated TPR, which occurs as a result of the federal Adoption and Safe Families Act.²⁶ The researchers performed telephone interviews with twenty judges from eighteen different U.S. States, asking judges about their experiences and perspectives regarding TPR.²⁷ About one-half of the judges reported that children appear at TPR hearings.²⁸ Sometimes the child attends only in specific circumstances, such as when they will be serving as a witness in the case.²⁹ If a child is not expected to be present at a hearing on TPR, they are not a party in the case regarding their parents’ rights. Because TPR has such a large impact on a child’s life,

23 Utah Code Ann. § 78A-6-312(2016).

24 § 78A-6-314.

25 *Id.*

26 ELLIS, *supra* note 7, at 1.

27 *Id.* at 1.

28 *Id.*

29 *Id.*

children's presence should always be required at TPR hearings.

In the research brief described above, judges' reports vary regarding children's feelings toward TPR.³⁰ One judge stated that no child ever wants TPR; two different judges reported that although children may object at first, such children stop objecting after they become adopted and reach permanency with another family.³¹ TPR is a necessary prerequisite for permanency with another family.³² Four judges said that older children usually experience "conflicted feelings" about TPR because they feel more of a connection to their birth parents.³³ However, two other judges said that older children are able to understand the need for TPR when their birth parents are not acting as suitable parents.³⁴ The judges' varying reports demonstrate that 1) children have strong feelings regarding TPR, and 2) children are sometimes capable of understanding that TPR is in their own best interest.

In Utah, any interested party, including a foster parent or social worker, may file a petition for TPR. In the petition, the interested party describes "the grounds on which termination of parental rights is sought."³⁵ After the petition is filed, any persons or agencies with custody of the child, or persons acting in loco parentis are notified of the time and place of the TPR hearing, which must occur within ten days.³⁶ All of the people notified of the hearing through a service of summons are considered party to the proceedings; notably, the children themselves

30 *Id.*

31 *Id.*

32 National Center for State Courts, NCSC | National Center for State Courts (2015), <http://www.ncsc.org/Topics/Children-Families-and-Elders/Adoption-Termination-of-Parental-Rights/Resource-Guide.aspx> (last visited Feb 23, 2018).

33 ELLIS, *supra* note 7, at 8.

34 *Id.* at 8.

35 Utah Code Ann. § 78A-6-505(2008).

36 Utah Code Ann. § 78A-6-506(2008).

are not included in the statute for those to be notified.³⁷ Utah statute does not recognize a child whose parents' rights are proposed for termination as a party in the legal proceedings.

A child's life is heavily impacted by the decisions made at a termination of a parental rights hearing. Yet, as pointed out by law Professor Erik S. Pitchall in the UC Davis Journal of Juvenile Law & Policy, "the one person at the center of the case is rarely present and, in most states, has no established right to be present."³⁸ The Pew Commission on Children in Foster care suggests that courts "be organized to enable children and parents to participate in a meaningful way in their own court proceedings."³⁹

In court cases involving a minor, including cases involving TPR, the court may appoint a guardian ad litem (GAL), who is responsible to represent the best interests of the child.⁴⁰ "It is the guardian ad litem's duty to stand in the shoes of the child and to weigh the factors as the child would weigh them if his judgment were mature and he was not of tender years."⁴¹ Presumably, a GAL is necessary because, depending on their level of maturity, children may often seem struggle to present their own best interests. However, the GAL presents what they personally believe to be in the child's best interest; this does not necessarily align with the child's true wishes.

Having no say in a case that impacts their lives so heavily can have a negative effect on a child. In divorce proceedings, another legal proceeding that heavily impacts children, "lack of expression is the aspect of divorce that results in the

37 *Id.*

38 Erik S. Pitchall, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. Davis J. Juv. L. & Pol'y 236 (2008).

39 Pew Commission on Children in Foster Care, *Recommendations for Strengthening the courts*, 6 (2004) <http://www.childrensdefense.org/library/data/pew-commission-children-foster-care-strengthening-court-recommendations-2004.pdf>.

40 Utah Code Ann. § 78A-6-902(2014).

41 *J.W.F. v. Schoolcraft*. 763 P.2d 1217,1222 (Utah App. 1988).

greatest amount of psychological problems and frustrations in children years after the proceedings have ended.”⁴² Although in both divorce and TPR proceedings, the GAL may take the child’s wishes into account, they might ultimately, especially without statutory direction or requirement to do otherwise, make a decision that is not in harmony with the child’s wishes. Brandon Zelenak reported feeling powerless and cheated when his mother’s rights were terminated, and it is reasonable to assume that other children would feel the same if their parents’ rights were terminated at a hearing in which they were not permitted to speak or invited to attend. Sometimes judges speak directly with the child regarding TPR proceedings, but it is not legally required that they do so.⁴³ Allowing children direct legal representation would require the judge to understand and acknowledge the child’s wishes regarding TPR.

A few states have statutes addressing a child’s objection to TPR. In Iowa, for example, the court may choose not to terminate if a child over age ten objects to the termination; in California the law is the same for children over age twelve; and in Virginia, a fourteen-year-old child can choose to veto the termination if they choose.⁴⁴ A prevalent cultural belief in Utah is that children can be held accountable for their actions at age eight.⁴⁵ This manifests itself in the community, such as when students eight years old and older are required to sign a document acknowledging the

42 Rebecca Hinton, *Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes*, 65 LA. L. REV. 1540 (2005).

43 ELLIS, *supra* note 7, at 11.

44 Pattison, *supra* note 10.

45 The Mormon religion, which composes the majority of the population, teaches that children can be held accountable for their wrongdoings at eight years old. PEW RESEARCH CENTER: RELIGION AND PUBLIC LIFE, <http://www.pewforum.org/religious-landscape-study/state/utah/>; Topical Guide, Accountability, Age of, <https://www.lds.org/scriptures/tg/accountability-age-of?lang=eng> (last visited Nov 25, 2017).

school bullying policies.⁴⁶ Perhaps eight years old would be a suitable guideline for judges as to when to grant children party status in TPR. However, ultimately whether to grant party status to a child should be left up to the judge's discretion to decide on a case-by-case basis. If a judge determines a seven-year-old to be unusually competent, he or she could offer the child party status. Also, if a teenager is diagnosed with a mental disability that the judge determines makes them incompetent for legal proceedings, he or she should not be granted party status.

Georgia is an example of a state that allows its children to play a more active role in TPR proceedings. Georgia statute recognizes a child as a defined party in a TPR, and gives all parties, including the child, the right to their own attorney.⁴⁷ Also in Georgia if a child is age fourteen or older, they receive an individual summons to the TPR proceeding.⁴⁸ The court appoints an attorney for a child as soon as possible. The child's attorney and the GAL may be the same person, but it is not necessary, especially in cases when "there is a conflict between child's attorney duty to the child and the attorney's considered opinion of the child's best interests as guardian ad litem."⁴⁹

The adjustments to the Georgia Juvenile Code regarding TPR were made in 2013.⁵⁰ The Governor's Special Council on Justice Reform recommended adjustments to legislation that would clearly define and outline a "juvenile's right to procedural due process, family preservation and proper representation

46 Marjorie Cortez, *Utah students age 8 and up will sign document acknowledging school bullying policies*, KSL.com (2017), <https://www.ksl.com/?sid=43440427&nid=960> (last visited Oct 14, 2017).

47 Georgia Juvenile Code §15-11-262 (2015).

48 Georgia Juvenile Code §15-11-160 (2014).

49 Georgia Juvenile Code §15-11-103 (2015).

50 SIGNIFICANT REFORMS TO JUVENILE JUSTICE CODE PASSES GEORGIA STATE SENATE, (Mar. 21, 2013), <http://www.senate.ga.gov/spo/en-US/PressReleases.aspx> (last visited Feb. 27, 2018).

based on the specific reason for juvenile court intervention.”⁵¹

Utah statute should be adjusted to be similar to the statute in Georgia. Children should have the option of an additional attorney representing their wishes in addition to a GAL representing what they perceive to be the child's best interest.

Sometimes, such as in cases of abuse, a child may object to TPR even though most members of the court likely agree that termination is in the child's best interest. In another instance, a child might advocate for TPR even though their parents are suitable parents. Such cases emphasize the need for a GAL in addition to an attorney representing only the child's wishes. In such situations, the GAL can communicate their understanding of the situation to the judge to prevent a decision that would not result in the child's best interest. However, in cases in more gray areas where the GAL might still recommend TPR, such as issues involving substance abuse, giving children's preferences significant weight and treating them as a party in the TPR proceedings should always be in their best interest.

It may be important to consider that giving children party status and direct legal representation in TPR proceedings could open a door to giving children the same rights in other legal proceedings. Such proceedings could include, but are not limited to, legal or medical emancipation, cases of child abuse and neglect, and custody disputes. Opening such a door could have both positive and negative effects. The Utah statute should be amended to define children as a party in TPR proceedings and to give children the right to their own attorney, but policymakers should consider adding further specifications if they anticipate the statute will have unintended negative consequences.

III. CONCLUSION

When a child feels powerless in a decision as impactful as TPR, such a proceeding can negatively impact their life in the

51 *Id.*

long term. Current Utah statute gives children no legal power in TPR proceedings. Although judges sometimes inquire as to the children's opinion regarding a case, their wishes are not always given significant weight. Although children's GAL are trusted to represent their best interest, it is not unusual for a child to feel that their best interest is different than what the GAL believes. Utah statute should be amended to give children a legal channel to voice their opinions in court, by explicitly granting them party status in the proceedings and allowing them an option of a personal attorney representing their wishes, distinct from the GAL representing their opinion of a child's best interest.