Opinion filed March 28, 2017

In The

Eleventh Court of Appeals

No. 11-16-00291-CV

IN THE INTEREST OF R.S. AND J.S., CHILDREN

On Appeal from the County Court at Law No. 2
Ector County, Texas
Trial Court Cause No. CC2-3459-PC

M E M O R A N D U M O P I N I O N

This is an appeal from an order in which the trial court terminated the parental rights of the parents of R.S. and J.S. after a de novo hearing. The children's mother appeals. We affirm.

The mother presents six issues for review. In her first five issues, the mother challenges the legal and factual sufficiency of the evidence to support the termination of her rights and the appointment of the Department of Family and Protective Services as the permanent managing conservator. In her sixth issue, the mother asserts that the trial court violated her rights when it denied her a court-appointed attorney.

The termination of parental rights must be supported by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2016). To determine if the evidence is legally sufficient in a parental termination case, we review all of the evidence in the light most favorable to the finding and determine whether a rational trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). To determine if the evidence is factually sufficient, we give due deference to the finding and determine whether, on the entire record, a factfinder could reasonably form a firm belief or conviction about the truth of the allegations against the parent. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). To terminate parental rights, it must be shown by clear and convincing evidence that the parent has committed one of the acts listed in Section 161.001(b)(1)(A)–(T) and that termination is in the best interest of the child. FAM. § 161.001(b).

The trial court found that termination of the mother's parental rights would be in the best interest of the children and that the mother had committed three of the acts listed in Section 161.001(b)(1)—those found in subsections (D), (E), and (O). Specifically, the trial court found that the mother had knowingly placed or allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being, had engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being, and had failed to comply with the necessary provisions of a court order. *See* FAM. § 161.001(b)(1)(D), (E), (O). Because a finding that a parent committed one of the acts listed in Section 161.001(b)(1)(A)–(T) is all that is required under that statute and because we hold that the evidence is sufficient to support the trial court's finding under subsection (E), we need not address the mother's first and third issues, which relate to the trial court's findings under subsections (D) and (O). *See* TEX. R. APP. P. 47.1.

In her second issue on appeal, the mother challenges the legal and factual sufficiency of the evidence as to subsection (E). We hold that there was clear and convincing evidence from which the trial court could reasonably have formed a firm belief that the mother engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being. *See* FAM. § 161.001(b)(1)(E). Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child's well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *In re D.O.*, 338 S.W.3d 29, 33 (Tex. App.—Eastland 2011, no pet.). Additionally, termination under subsection (E) must be based on more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required. *In re D.T.*, 34 S.W.3d 625, 634 (Tex. App.—Fort Worth 2000, pet. denied); *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—Eastland 1999, no pet.). The offending conduct does not need to be directed at the child, nor does the child actually have to suffer an injury. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009).

The record shows that, at the time of removal, the children were ages nine and seven. Prior to the removal of the children, the mother had exposed them to domestic violence—"constant fighting with her paramours"—and had also left the children unattended. The mother had an extensive history with the Department for her neglectful supervision of the children, which appears to stem from her abuse of drugs. The removal of the children from the mother's care was a result of her neglect of the children, her use of drugs, and domestic violence that occurred in the children's presence. At the time of removal, the children were nasty and smelled horrible. The record from the intake, of which the trial court took judicial notice, reflected that the mother and her abusive boyfriend left the children alone for about ten hours. The children were locked out of the home during that time period. That night and more than once during the next couple of days, law enforcement and

emergency personnel were called to the home of the mother and her boyfriend based upon the occurrence of domestic violence. The record also shows that the mother's prior boyfriend also engaged in domestic violence. Based upon the evidence of neglectful supervision, repeated instances of domestic violence, and the mother's use of drugs, the court at the de novo hearing could have formed a firm belief that the mother had engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being. We overrule the mother's second issue.

In the mother's fourth issue, she argues that the evidence is legally and factually insufficient to support the trial court's finding as to best interest. With respect to the best interest of a child, no unique set of factors need be proved. *In re C.J.O.*, 325 S.W.3d 261, 266 (Tex. App.—Eastland 2010, pet. denied). But courts may use the non-exhaustive *Holley* factors to shape their analysis. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These include, but are not limited to, (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by these individuals or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *Id.* Additionally, evidence that proves one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *C.J.O.*, 325 S.W.3d at 266.

The record shows that, at the time of the de novo hearing, the termination proceeding had been pending for twenty-two months. The mother's testimony at the

de novo hearing reflected that she had changed since the original termination hearing. She had obtained steady employment and, with the help of a charitable organization, had obtained an apartment.

The record also shows that the mother had a criminal history that included several misdemeanor crimes. In the past, she had had some problems with drugs, including methamphetamine, Xanax, and synthetic marihuana, and had been dependent on the men in her life. She also had a history of being in relationships with abusive men and living a lifestyle that did not provide the children with a safe and stable home environment.

The conservatorship program director for Ector County and one of the caseworkers testified that the children were doing very well in the home of their foster parents and that the foster parents desired to adopt both children. Testimony showed that the children wanted to remain in the home of their foster parents and did not want to live with their aunt or be returned to their mother. Although the children loved their mother, they were afraid of the men with whom the mother tended to associate. The children were happy and felt safe with their foster parents and had developed a loving relationship and a bond with them. The foster parents had a safe, stable home and could offer stability to the children. The Department's goal for the children was termination of the parents' rights and adoption by the foster parents. The children's guardian ad litem and the conservatorship program director both believed that termination of the mother's rights and adoption by the foster parents would be in the best interest of the children. We note that, near the end of the de novo hearing, the trial court visited with the children in chambers. The trial court noted on the record that both children recalled specific incidents where the mother had endangered them.

Based on the evidence presented at trial with respect to the emotional and physical needs of the children, the emotional and physical danger to the children, the

parental abilities of the individuals seeking custody, the programs available to assist these individuals to promote the best interest of the children, the plans for the children by these individuals and by the Department, the stability of the home or proposed placement, the acts or omissions of the mother with respect to the children, and any excuse for such acts or omissions, the trial court could reasonably have formed a firm belief or conviction that termination of the mother's parental rights would be in the best interest of each of the children. *See Holley*, 544 S.W.2d at 371–72. We cannot hold that the finding as to best interest is not supported by clear and convincing evidence. Because the evidence is both legally and factually sufficient to support the finding that termination of the mother's parental rights would be in the children's best interest, we overrule the mother's fourth issue.

In her fifth issue, the mother asserts that the evidence is legally and factually insufficient to support the trial court's appointment of the Department as the children's permanent managing conservator. We disagree. Under this issue, the mother reiterates her challenge to the sufficiency of the evidence to support termination under Section 161.001(b)(1) and states that the Department "presented little or no expert testimony regarding the Department's or the relative's ability to care for the children." *See* FAM. § 153.131 (West 2014). We disagree. The findings necessary to appoint a nonparent as sole managing conservator need only be established by a preponderance of the evidence. *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990). Consequently, we review a trial court's conservatorship decision under a less stringent standard of review than the standard for termination. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). A conservatorship determination is subject to review for an abuse of discretion and may be reversed only if that determination was arbitrary and unreasonable. *Id.* As we held above, the trial court's finding that termination of the mother's parental rights would be in the best interest of the children was supported under the higher, clear-and-convincing burden of

proof. The record shows that the mother had demonstrated an inability to safely parent the children; that the Department's goal for the children was adoption by the foster parents; and that the children were doing well in the care of the foster parents, wanted to remain in the home of the foster parents, and did not want to live with their aunt. The trial court did not abuse its discretion with respect to the appointment of the Department as the children's permanent managing conservator. The mother's fifth issue is overruled.

In her final issue, the mother argues that her constitutional and statutory rights were violated when the associate judge initially denied the mother's requests for a court-appointed attorney. *See* FAM. § 107.013(a)(1). At the time of the trial de novo, the mother had been represented by court-appointed counsel for almost eleven months. Counsel did not object to the untimely appointment but, instead, announced ready for trial. Consequently, we do not believe that the mother has preserved the issue for review. *See* TEX. R. APP. P. 33.1(a); *In re O.R.W.*, No. 09-15-00079-CV, 2015 WL 4760159, at *5 (Tex. App.—Beaumont Aug. 13, 2015, no pet.) (mem. op.). Moreover, although the associate judge may have erred when she denied the mother's initial requests for an attorney, we do not believe that the error affected the trial de novo or that it constitutes reversible error. *See* TEX. R. APP. P. 44.1. We overrule the mother's sixth issue on appeal.

We affirm the trial court's order of termination.

JIM R. WRIGHT
CHIEF JUSTICE

March 28, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.