Opinion issued February 23, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00424-CV

IN THE INTEREST OF A.W. AND B.M.W., CHILDREN

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2014-04355J

MEMORANDUM OPINION

In this appeal, we determine whether legally and factually sufficient evidence supports an order terminating J.D.W.'s parental rights to his two children. We affirm.

Background

The mother and father first came to the Department of Family Protective Services' attention in early 2013, when A.W. was a few months old and the family was living at a hotel. One day, the mother and father were using marijuana and began fighting. The paternal grandmother, who lived nearby, testified that police came to her home late that night looking for the father. She told police he was not there and that she had not had any contact from him. The paternal grandmother then checked her cell phone and found numerous texts from the father and a picture of his bruised and swollen face. After reviewing the texts, the police left to continue their search for the father. They found him in the bed of a truck parked near a motel. He was holding A.W., who was very dirty. He explained that he came to the motel to stay with a friend who lived there, but when he found his friend was not at home, he decided to wait for him in his truck.

This incident resulted in a referral to the Department for neglectful supervision. The Department brought suit against the parents and took A.W. into custody. The parents participated in the Family-Based Safety Services (FBSS) program, which included psychosocial assessments, domestic violence and anger management courses, and parenting classes.

A second child, B.M.W., was born during this period.

The parents completed the safety services program in July 2014, when B.M.W. was nearly three months old. The Department dismissed the suit and returned custody of A.W. to the parents.

Only a week later, in early August 2014, the parents had gone out for dinner and drinks to celebrate the mother's promotion at work. They picked up A.W. and B.M.W. from the grandmother, who cared for the children while the parents worked, and returned home. The mother and the grandmother had a very contentious relationship. Shortly after arriving home, the mother told the father that she had enrolled the children in day care and that they would not be staying with the grandmother during the day anymore. This sparked a heated argument. Shortly after the argument began, the father called the grandmother to have her pick up A.W. and B.M.W. so that they would not have to be around while the parents argued.

When the grandmother arrived, she saw broken glass in the entryway of the apartment. She picked up A.W. and the father got B.M.W., and they brought the children out to the grandmother's sport utility vehicle. They were strapping the children into their carseats when the mother came into the parking lot and demanded the baby's return. According to the grandmother, the mother appeared intoxicated and was yelling obscenities. The mother went over to the SUV, shoved the grandmother out of the way, and pulled out B.M.W.'s carseat, while B.M.W was not buckled into it. B.M.W. ended up on the pavement outside of the car seat. The

grandmother did not see whether B.M.W. fell or simply rolled out of the carseat, and the mother testified that she caught B.M.W. before she landed on the pavement.

The mother took B.M.W. back into the apartment, and the father followed her while shouting at the grandmother to call 9-1-1. The grandmother called 9-1-1 and went into the apartment to check on B.M.W., but the parents had locked the bedroom door and would not let her in. The grandmother went back outside to wait for the emergency responders. When the responders arrived, they also attempted to enter the bedroom but were rebuffed. Law enforcement was called in. They retrieved B.M.W., who was examined and found unharmed.

To explain the broken glass in the entry way, the father told the investigating officer that the mother broke a glass vase and cut herself. At trial, however, he explained that he inadvertently swung his arm and knocked a glass off the counter earlier that evening.

The Department initially placed the children with the paternal grandmother. They remained in the grandmother's home for several months, until shortly before trial, when the grandmother asked for the children to be placed in a foster home. She explained that she was being harassed by the mother, who kept sending her threatening text messages, and she also was concerned that she was too old to be able to care for them until they were grown; she did not want them to have to be

uprooted again. The Department placed the children with foster parents who planned to adopt the children.

Meanwhile, in late October 2014, the trial court ordered the parents to comply with the family service plan, which required, among other things, that the father pay child support, remain "sober/drug free," and submit to random drug testing.

The trial court presided over a bench trial in the proceeding on October 29, 2015 and signed a decree terminating the father's parental rights on December 1, 2015 based on subsections 161.001(1)(E) and 161.001(1)(O) of the Texas Family Code.

The father and mother both timely appealed from the decree. This court reviewed the mother's appellate complaints in a prior decision, concluding that the evidence supported the trial court's judgment terminating her parental rights. *In re A.W.*, No. 01-15-01030-CV, 2016 WL 3022824 (Tex. App.—Houston [1st Dist.] May 26, 2016, no pet.). The appellate attorney first appointed to the father moved to withdraw from representation and filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), asserting that the appeal lacked merit and the record presented no arguable grounds for reversal of the judgment. We disagreed with that assessment, so we severed the father's appeal, granted the motion to withdraw, and remanded to the trial court for the appointment of new appellate counsel to represent the father. 2016 WL 3022824 at *8. In this severed appeal, we

consider the record in light of the arguments of appellate counsel appointed after remand and the Department's responses.

DISCUSSION

On appeal, the father challenges the legal and factual sufficiency of the trial court's findings in support of terminating his parental rights.

A. Standard of review

A parent's right to the care, custody, and control of his child is a liberty interest protected under the Constitution, and we strictly scrutinize termination proceedings on appeal. *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Clear and convincing evidence must support an involuntary termination. *Holick*, 685 S.W.2d at 20 (citing *Santosky*, 455 U.S. at 747, 102 S. Ct. at 1391). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014).

In determining legal sufficiency in a parental-rights termination case, we review "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We assume that the factfinder resolved disputed facts in favor of the judgment if a reasonable

factfinder could have done so. *Id.* We disregard "evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* If a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true after conducting its legal-sufficiency review, the court must conclude that the evidence is legally insufficient. *Id.*

In determining factual sufficiency, we consider the entire record, including disputed evidence, to determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction" about the truth of the allegation sought to be established. *Id.* (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

We review the legal and factual sufficiency of the evidence in the context of the statutory grounds for termination. "The involuntary-termination statute sets out twenty different courses of parental conduct, any one of which may serve as a ground that satisfies the statute's first prerequisite for termination." *In re S.M.R.*, 434 S.W.3d 576, 580 (Tex. 2014) (citing TEX. FAM. CODE ANN. § 161.001(1)(A)–(T)). If the evidence supports either one of the predicate acts or omissions found by the

trial court, as well as its finding that termination is in the children's best interest, we will affirm.

B. The evidence is legally and factually sufficient to support the trial court's finding that the father materially failed to comply with the court-ordered family service plan.

The father challenges the sufficiency of the evidence supporting grounds for termination. The record supports the trial court's predicate finding that the father failed to comply with the family service plan. The family service plan requirements are designed to reunify a parent with a child who has been removed by the Department. *Liu v. Dep't of Family & Protective Servs.*, 273 S.W.3d 785, 795 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The Family Code supports termination if (1) the Department has been the child's temporary managing conservator for at least nine months, (2) the Department took custody of the child as a result of an emergency removal for child abuse or neglect, (3) the parent received an order establishing the actions necessary to obtain the child's return, and (4) the parent did not comply with the order. TEX. FAM. CODE ANN. § 161.001(b)(1)(O) (West Supp. 2016); *In re S.M.R.*, 434 S.W.3d at 584.

Each of the court-ordered plan requirements and the father's acts or omissions corresponding to those requirements follow.

- *Complete random urine analysis throughout the duration of the case*.

The father did not comply with the drug-testing requirement. The father tested positive for marijuana in September 2014 and May 2015. In addition, the father's August 2015 specimen tested positive for K2, showing that he had used the illegal drug within the previous five days. At trial, the Department's expert described K2 as a "very, very dangerous drug," that is hundreds of times more powerful than marijuana. The father testified that he consumed the drug by accident; he had asked a friend for a cigarette, and, without the father's knowledge, the friend gave him one that was laced with K2.

The trial court also heard evidence regarding the father's use of alcohol. The Department's drug testing expert explained that the threshold for a positive finding of alcohol is 250 nanograms per milliliter, and that the results would show alcohol exposure up to 80 hours before the test. The result for an average adult who had consumed one alcoholic beverage the night before the test would typically range from 2,500 to 4,500 nanograms.

In late August 2014, the test results for the father showed a positive finding of 74,500 nanograms of alcohol metabolites for the father. In February 2015, the father's test results showed more than 100,000 nanograms. In August 2015, the father's test results showed 456,000 nanograms, which, according to the expert,

showed that the father had consumed "an extreme amount of alcohol," whether he drank it "the night before or three days in a row."

The father failed to submit to testing on two occasions. In mid-August 2015, he was ordered to submit to testing, but he refused to provide the specimens required for analysis. He failed to comply with Department's request that he submit to testing the week before trial. The father explained that he missed the pre-trial testing appointment because his telephone was broken and he did not receive the message. Pursuant to the trial court's order, however, the father's failure to appear for or refusal to produce a specimen on a testing date supports an inference that the father would have tested positive for illegal substances on each of these dates.

- *Complete a psychosocial assessment and a drug and alcohol assessment and follow up on all recommendations*.

The father completed the assessments. He did not, however, follow up on any of the recommendations resulting from the drug and alcohol assessment.

- *Complete Department-approved parenting classes in parenting, drug and alcohol abuse, and violence and anger management*.

The father testified that he attended an online domestic violence course. He enrolled in but did not complete an online parenting class. The caseworker notified the father that the Department had not approved the online parenting course, and the father did not attend an approved course. The father failed to attend the required

courses addressing drug and alcohol abuse, domestic violence, anger management, and parenting.

- *Participate in individual therapy and family group therapy sessions*.

The father testified that he thought he had finished his individual therapy classes; according to the caseworker, however, the father was discharged because he missed scheduled appointments. The caseworker testified that the father had participated in some group therapy but did not complete the six required sessions. The father explained that he attended four of the sessions but was unable to complete family therapy because, as a result of the friction between the mother and the grandmother, the grandmother was unwilling to attend. The caseworker could not say whether the grandmother's attendance was necessary for the family therapy.

- *Attend scheduled family visits*.

According to the caseworker, the father satisfied the visitation requirement. The grandmother, though, testified that the father did not take advantage of the twice-weekly visits available to him: he rarely saw the children during the work week and did not visit them every weekend. She also testified that she had seen him impaired in the presence of the children.

- *Pay monthly child support*.

The father admitted that he failed to meet his monthly child support obligations. He stopped making payments in early 2015, when the mother lost her

job. The father did not inform the caseworker of this change in the parents' economic status, nor did he ask the court to reduce the amount of monthly child payments he was required to make.

- *Maintain stable employment; provide proof of employment throughout the case.*

The father did not provide the caseworker with monthly paycheck stubs. He provided the caseworker with stubs only from April and May 2015, which showed that he was earning about $5,000 monthly.

- *Maintain stable, hazard and drug-free housing; provide proof of residence throughout the case.*

The father provided a lease agreement at trial, but had not provided the caseworker with any proof of residence before then.

- *Make weekly contact with the caseworker*.

The caseworker testified that the father contacted her "[m]aybe a couple of times at most." The father explained that he maintained contact with the caseworker "as much as possible because I work out on the oil field."

The evidence shows that the father did not fulfill the family service plan requirements, which provides a basis for termination of parental rights under subsection 161.001(1)(O). *See In re C.M.C.*, 273 S.W.3d at 875. We therefore hold that the evidence is legally and factually sufficient to support the trial court's finding that the father failed to comply with the court-ordered family service plan.

C. The evidence is legally and factually sufficient to support the trial court's finding that termination is in the children's best interest.

The father next contends that the evidence is legally and factually insufficient to support the trial court's finding that it was in his children's best interest for his parental rights to be terminated. In addition to a predicate violation under section 161.001(1), the Department must establish by clear and convincing evidence that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(2).

In *Holley v. Adams*, the Texas Supreme Court provided a nonexclusive list of factors that the trier of fact in a termination case may use in determining the best interest of the child. 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include (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.* These factors are not exhaustive, and there is no requirement that the Department prove all factors as a

condition precedent to parental termination. *See In re C.H.*, 89 S.W.3d at 27; *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In favor of the father, the evidence shows that he attended visits with the children, is bonded with the children, and had appropriate and attentive visitation with them. The father showed that he had a lease on a condominium with enough room for the children and that his income would be adequate to meet the children's needs. The paternal grandmother had the children in her home for more than a year, however, testified that the father was impaired on "many occasions" and had been impaired "while in the presence of the children." She further testified that the parents "could visit one day over the weekend and once during the week." Regarding those visits, she stated that, "[t]hey only visited during the week if it was a holiday. And I believe it all averaged out that it was every other week and—that they would visit."

The children are too young to voice their preference regarding their caretakers. The children are doing well, however, in their adoptive placement and the children seemed very bonded with the foster parents. The caseworker testified that the foster parents provided a stable home and a more suitable placement for the children. She related that the children were doing much better there than they were when the Department took them into custody. The younger child had become more social. The elder child's school performance had improved. Both the caseworker and the

grandmother opined that termination of the father's parental rights was in the children's best interest. This evidence concerning needs of and plans for the children and the abilities of the individuals caring for them weighs in favor of the trial court's termination decision.

Evidence that the parent has relinquished parental rights to other children may be relevant to his parenting abilities. *See In re Z.L.W.*, No. 01–12–00736–CV, 2013 WL 396270, at *5 (Tex. App.—Houston [1st Dist.] Jan. 31, 2013, no pet.). The father has three older children, one of whom lives in another state. The father voluntarily relinquished his parental rights to the two other children just two weeks before trial commenced in this case. He told the trial court that "he had no choice," and that the mother "wanted more child support." The grandmother testified that the mother of the two children did not want them to have contact with the father. Because these relinquishment decisions do not implicate any of the reasons for the termination proceedings involving A.W. and B.M.W., this evidence is neutral as it pertains to whether termination is in the children's best interest.

There is no evidence that either of the children has ever suffered physical injury or harm because of the parents' conduct. The grandmother testified, though, that the father has a problem with alcohol and that she had seen the father impaired while in the presence of his children. The father denied having a drinking problem, but his random drug and alcohol testing results fall short of the service plan's stated

goal that he demonstrate "an ability to stay sober/drug free and in recovery." In addition to the positive test results during the service plan period, the father tested positive for marijuana in August 2013, while participating in the family service plan, demonstrating a longer-term problem with illegal drug use that he had not been able to correct. The caseworker expressed her concern that the parents were still drinking; the family service plan did not specifically require the father to abstain from alcohol, but it did require the father to "demonstrate an ability to stay sober/drug free." This evidence weighs in favor of termination. *See In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (concluding that past and ongoing drug use weighed in favor of conclusion that termination of parental rights was in child's best interest).

The caseworker testified that she saw no signs that the parents had adequately addressed their drug and alcohol issues. She similarly testified that she had not seen any signs that the parents had made any significant progress in addressing their domestic violence issues and that returning the children to their parents would jeopardize their physical and emotional well-being. The father denied that his conduct around the children would pose any such risks. The evidence that he did not demonstrate any significant improvement in correcting alcohol and drug issues after that period of counseling and services supports the trial court's decision that termination is in the children's best interest.

Viewing all of the evidence in the light most favorable to the judgment, we conclude that a factfinder could have formed a firm belief or conviction that termination of the father's parental rights was in the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(2); *J.F.C.*, 96 S.W.3d at 265–66. Viewing the same evidence in a neutral light, the disputed evidence is not significant enough to prevent a reasonable factfinder from forming a firm belief or conviction that termination of the father's parental rights was in the children's best interest. *See* TEX. FAM. CODE ANN § 161.001(2); *J.F.C.*, 96 S.W.3d at 265–66. As a result, we hold that the evidence is legally and factually sufficient to support the trial court's finding that termination of the father's parental rights was in the children's best interest.

CONCLUSION

We hold that the evidence is legally and factually sufficient to support the termination of the father's parental rights. We therefore affirm the portion of the trial court's judgment terminating J.D.W.'s parental rights.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Jennings.