Affirmed and Memorandum Opinion filed November 30, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00980-CV

IN THE INTEREST OF R.D.S., MINOR CHILD, Appellant

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2008-10043J

MEMORANDUM OPINION

In this accelerated appeal, a mother challenges the trial court's judgment terminating her parental rights to a minor child, asserting the evidence is legally and factually insufficient to support the termination and the finding that termination is in the best interest of the minor child. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Texas Department of Family and Protective Services (hereinafter the "Department") filed an original petition for protection of a child in December 2008, seeking temporary sole managing conservatorship of ten-month-old R.D.S. (hereinafter

"Rebecca"),[1] and termination of the mother's and father's[2] parental rights in a suit affecting the parent-child relationship. The Department cited a host of grounds in support of terminating the mother Jennifer's parental rights under the Texas Family Code, alleging that termination of Jennifer's parental rights would be in Rebecca's best interest.

The trial court granted the Department temporary managing conservatorship of Rebecca; the child was placed in foster care. Jennifer was required to perform the following tasks, as outlined in a family service plan:

- Contact the Mental Health and Mental Retardation Association for an evaluation, follow all recommendations, and provide verification of compliance;
- Participate in court hearings, family visits, permanency conferences, and other meetings requested by the Department;
- Maintain a safe and stable environment free from hazards or dangerous situations, maintain legal employment for more than six months, and demonstrate her ability to provide for her children's basic physical, medical, developmental, and education needs;
- Submit to random drug testing;
- Actively participate in parenting classes geared toward alternative discipline methods and submit a certificate of completion once the course is completed; and
- Attend individual therapy and follow all recommendations made by service providers.

At trial during October 2009, Jennifer testified that Rebecca was removed from her care when she was arrested and incarcerated for prostitution and child endangerment. Jennifer pleaded "guilty" to both charges. According to Jennifer, she left Rebecca and her two other children, both under four years of age, who are not subject to this appeal, in a hotel room with a babysitter while she engaged in prostitution. After her arrest for

[1] To protect the privacy of the parties in this case, we identify the child by a fictitious name and the mother by her first name only. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2008).

[2] The alleged father and the unknown father are not parties to this appeal. We include only facts relating to them that are germane to the disposition of this appeal.

prostitution, Jennifer and police officers returned to the hotel and discovered that the babysitter was not in the room. Jennifer claimed the babysitter left the room to get food while the children were sleeping. Jennifer could not recall the babysitter's full name, but indicated the babysitter's nickname was "Mo" and was someone she knew from her past. Other evidence indicates that Jennifer previously had told the Department that a person named "Misty" was babysitting the children and she did not know Misty's last name. Jennifer pleaded "guilty" to the charges for prostitution and child abandonment and was incarcerated for three months.

Jennifer acknowledged receiving a family service plan that required her to maintain a safe, stable environment and a job. At trial, Jennifer testified that she had neither a home nor a job. Jennifer stated she had a home that she recently left because of mold problems and that she would seek to buy another home when she found a job; in the meantime, she was living with a friend. Jennifer claimed to have had a job until recently, but was fired because she had to attend court and worked too many hours.[3] She indicated that she was steadily searching for another job and planned to attend nursing school in the future.

Jennifer claimed that she submitted to all requests for random drug tests, which she testified yielded negative results, and that she was currently participating in parenting classes. Jennifer testified that she did not receive a certificate for successfully completing individual therapy and that the Mental Health and Mental Retardation Association evaluated her, but had no services to offer her. She visited Rebecca at every opportunity and participated in court hearings unless she was incarcerated.

Jennifer stated that the Department had been conducting investigations with respect to her two older children since 2007 and that the Department had set a goal for Jennifer's reunification with those children. The evidence reflects that Jennifer's older

[3] Jennifer testified that she was working forty hours a week, and her employer wanted her to work twelve hours each week during the day time.

children had been returned to her and the Department was in the process of non-suiting claims stemming from the 2007 investigation of physical abuse and neglectful supervision when Jennifer was arrested in connection with the case sub judice. Jennifer testified that her situation has worsened since 2007 because she no longer has a home and a job.

Jennifer recognized that Rebecca had been in foster care for the last ten months (since Jennifer's 2008 arrest) and agreed that foster care is not an appropriate environment for children because it lacks permanency. Jennifer admitted at the time of trial that it was in Rebecca's best interest to remain in foster care, confirming that she could not provide a safe and stable environment for Rebecca at that time. But, Jennifer explained that with a little more time, she would be able to provide a safe place for Rebecca when she "got back on her feet." Jennifer indicated that, as Rebecca's mother, she could give Rebecca what she needs and let her know "where she comes from; who she is; and the people in her family." Jennifer believed that it would be in Rebecca's best interest to award the Department permanent managing conservatorship with the goal of working toward reuniting Jennifer and Rebecca.

A Department employee who was familiar with Rebecca's case explained that termination of Jennifer's rights was appropriate because Jennifer had not completed the service tasks required of her and could not provide a safe and stable environment for Rebecca. The Department had been investigating allegations against Jennifer since 2007 and indicated that Jennifer's participation in prostitution was conduct that was dangerous to her children's well-being. According to this employee's testimony, the Department was willing to work with Jennifer for the children to benefit from permanency.

In its decree for termination, dated October 12, 2009, the trial court found that clear and convincing evidence existed that Jennifer committed the following acts:

- Knowingly placed or knowingly allowed Rebecca to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, pursuant to section 161.001(1)(D) of the Texas Family Code;
- Engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child, pursuant to section 161.001(1)(E) of the Texas Family Code; and
- Failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child, pursuant to section 161.001(1)(O) of the Texas Family Code.

The trial court determined that clear and convincing evidence exists that termination of the parent-child relationship between Jennifer and Rebecca is in the child's best interest. The trial court awarded sole managing conservatorship to the Department, noting that appointment of a parent would significantly impair the child's physical health or emotional development.

ANALYSIS

In two issues, Jennifer challenges the legal and factual sufficiency of the evidence to support the trial court's parental termination finding and that termination was in the child's best interest. In her first issue, Jennifer claims the evidence is legally and factually insufficient to support the trial court's findings that she committed the acts set forth in subsections 161.001(1)(D), (E), and (O).

Because termination of parental rights is a drastic remedy, due process and the Texas Family Code require the Department to prove the necessary elements by the heightened burden of proof of "clear and convincing evidence." *See* TEX. FAM. CODE ANN. § 161.001 (West 2008); *In re B.L.D.*, 113 S.W.3d 340, 353–54 (Tex. 2003). "'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 2008). In this case, the Department had to prove by clear and convincing evidence that Jennifer engaged in the conduct specified in sections 161.001(1) (D), (E), or (O) of the Texas Family Code[4] and that termination of her parental rights is in Rebecca's best interest. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

In reviewing legal-sufficiency challenges to termination findings, we consider all of the evidence in the light most favorable to the termination findings to determine whether a reasonable factfinder could have formed a firm belief or conviction that these findings are true. *J.L.*, 163 S.W.3d at 85. Looking at the evidence in the light most favorable to the findings means that we presume the factfinder resolved disputed facts in favor of its findings if a reasonable factfinder could do so. *Id.* We disregard any evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.*

In reviewing factual-sufficiency challenges to termination findings, we give due consideration to evidence that the factfinder reasonably could have found to be clear and convincing. *J.F.C.*, 96 S.W.3d at 266. The factual-sufficiency inquiry is whether the evidence is such that the factfinder reasonably could form a firm belief or conviction about the truth of the Department's allegations. *Id.* We consider whether the disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *Id.* "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 about the truth of the petitioners' allegations, then the evidence is factually insufficient." *Id.* We give due deference to factual findings, and we do not supplant the factfinder's judgment with our own. *See In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

[4] Unless otherwise specified, any reference to a "section" pertains to the Texas Family Code.

When, as in this case, the trial court terminated the parent-child relationship on multiple grounds under section 161.001(1), we may affirm on any one ground because, in addition to finding that termination is in the child's best interest, only one predicate violation under section 161.001(1) is necessary to support a trial court's judgment for termination. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *In re E.A.K.*, 192 S.W.3d 133, 151 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Under section 161.001(1)(E), the trial court found that Jennifer engaged in conduct or knowingly placed Rebecca with persons who engaged in conduct that endangered the child's physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(1)(E). Under subsection 161.001(1)(E), the term "endanger" means the child was exposed to loss or injury or jeopardized. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

When analyzing a trial court's findings under subsection 161.001(1)(E) with respect to physical endangerment, we determine whether sufficient evidence exists that the endangerment of the child's physical well-being was a direct result of the parent's conduct, which includes both action or inaction that occurred either before or after the child's birth. *See In re A.S., D.S., & L.A.S.*, 261 S.W.3d 76, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Endangerment encompasses "more than a threat of metaphysical injury or possible ill effects of a less-than-ideal environment." *Boyd*, 727 S.W.2d at 533. Likewise, although endangerment under subsection 161.001(1)(E) often entails physical endangerment, the statute does not require that conduct be directed at a child or that a child suffer actual injury; it is sufficient if the conduct endangers the emotional well-being of the child. *See id.*; *In re U.P.*, 105 S.W.3d 222, 233 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Robinson v. Tex. Dep't of Prot. & Reg. Servs.*, 89 S.W.3d 679, 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Termination under subsection 161.001(1)(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. *See In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). In

considering whether a relevant course of conduct has been established, a court may properly consider evidence of conduct that occurred both before and after a child's birth. *See In re S.T.*, 263 S.W.3d 394, 401–402 (Tex. App.—Waco 2008, pet. denied). In addition, a court may consider evidence establishing that a parent continued to engage in endangering conduct after the child's removal by the Department after the child no longer was in the parent's care, thus showing the parent continued to engage in the course of conduct in question. *See id.* Although imprisonment, alone, does not constitute engaging in conduct that endangers a child, a finding for endangerment is supported if all the evidence, including imprisonment, demonstrates a course of conduct that has the effect of endangering the physical or emotional well-being of a child. *See* TEX. FAM. CODE ANN. § 161.001(1)(E); *Robinson*, 89 S.W.3d at 686.

The evidence indicates that Rebecca was left alone for an unspecified amount of time when Jennifer engaged in prostitution and when the babysitter left Rebecca and the other children alone in the hotel room. According to Jennifer, there is no evidence of abuse, neglect, poor medical care, poor hygiene, or drug abuse associated with this incident. However, parental neglect can be as dangerous to a child's well-being as physical abuse. *See In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996). Rebecca was nine months old at the time Jennifer was arrested on the charges of prostitution and child abandonment, to which she pleaded "guilty." Although Jennifer explained that she left Rebecca and the other children with a babysitter, the babysitter was not in the hotel room when Jennifer returned to the hotel with law enforcement authorities. Jennifer's conduct in leaving Rebecca with a person who left the child unattended and whose full name she did not know could form the basis for the trial court's determination that Jennifer failed to protect or supervise Rebecca, which jeopardized or exposed Rebecca to loss or injury. *See id.* (involving evidence that mother left baby home alone); *see also In re M.D.V.*, No. 14-04-00463-CV, 2005 WL 2787006, at *6 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.) (substitute mem. op.) (involving a mother who left young children unattended).

Furthermore, Jennifer held only temporary living arrangements in the ten months Rebecca was in Jennifer's care and admitted to frequently moving between an apartment, which she ultimately could not afford, and the homes of family members and friends since Rebecca's birth. *See In re C.A.B.*, 289 S.W.3d 874, 887 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (involving a parent who had only temporary living arrangements before incarceration). The evidence in the record indicates that Jennifer was incarcerated for three months following the criminal charges for prostitution. During her incarceration, Rebecca was supposedly in the care of an uncle and the child's alleged father, although Jennifer was unable to provide contact information to the Department for either of these individuals and indicated she did not know her child's whereabouts. Generally, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child. *In re K.R.L.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied). Finally, given the facts that the Department previously had investigated Jennifer for physical abuse and neglectful supervision of Jennifer's other two children, and those allegations were in the process of being non-suited by the Department, Jennifer engaged in conduct that endangered Rebecca by committing the offense of prostitution even though Jennifer was aware that her parental rights were in jeopardy. *See Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ) (providing that criminal activity before and after a child's birth is relevant to determining whether a child was endangered under subsection 161.001(1)(E)). When considered collectively, evidence of Jennifer's criminal activities while leaving Rebecca unattended, as well as her imprisonment and inability to provide a safe, stable environment for Rebecca supports a finding that Jennifer engaged in a course of conduct that endangered Rebecca's physical and emotional well-being. *See Boyd*, 727 S.W.2d at 533–34.

Viewing the evidence in the light most favorable to the trial court's judgment, a reasonable factfinder could have formed a firm belief or conviction that Jennifer engaged in the conduct described in section 161.001(1)(E). *See M.C.*, 917 S.W.2d at 270; *K.R.L.*,

129 S.W.3d at 739. Under the relevant standards of review, the evidence is legally and factually sufficient to support the trial court's finding that Jennifer engaged in the conduct enumerated in section 161.001(1)(E) to warrant termination of Jennifer's parental rights. *See* TEX. FAM. CODE ANN. § 161.001(1)(E); *M.C.*, 917 S.W.2d at 270; *K.R.L.*, 129 S.W.3d at 739. Because we conclude the evidence is legally and factually sufficient to support the trial court's findings that Jennifer engaged in the conduct prescribed in section 161.001(1)(E), we need not reach Jennifer's arguments regarding the sufficiency of the evidence to support the trial court's findings for termination under subsections 161.001(1)(D) or (O). *See In re A.V.*, 113 S.W.3d at 362 (providing that reviewing court may affirm trial court's judgment for termination on any one ground because, in addition to a best-interest finding, only one predicate violation under section 161.001(1) is necessary to support a trial court's judgment for termination); *In re E.A.K.*, 192 S.W.3d at 151 (same). We overrule Jennifer's first issue.

A statutory act or omission under section 161.001(1) also must be coupled with a finding that termination of the parent-child relationship is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001; *Yonko v. Dep't of Family & Prot. Servs.*, 196 S.W.3d 236, 242 (Tex. App.—Houston [1st Dist.] 2006, no pet.). In reviewing the sufficiency of the evidence to support the second prong, a reviewing court examines a number of factors, including (1) the desires of the child, (2) the present and future physical and emotional needs of the child, (3) the present and future emotional and physical danger to the child, (4) the parental abilities of the persons seeking custody in promoting the best interest of the child, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by the individuals or agency seeking custody, (7) the stability of the home or proposed placement, (8) acts or omissions of the parent which may indicate the existing parent-child relationship is not appropriate, and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). A finding in support of "best

interest" does not require proof of any unique set of factors, nor does it limit proof to any specific factors. *Id.*

Because of Rebecca's very young age, she was unable to articulate her desires at trial. The evidence reflects that Jennifer visited Rebecca at every opportunity. According to testimony from the Department employee, Rebecca was placed in a safe environment with her siblings, and continues to live with a foster family who has bonded with the child and who is willing to adopt all of the children together. In contrast, Jennifer admitted that she was unable to provide a safe, stable environment for Rebecca; Jennifer indicated that she moved frequently in the ten months Rebecca was in Jennifer's care and did not have a home. Jennifer indicated that she had little means of financial support without a job; at the time of trial, Jennifer had no job, but she was regularly searching. A parent who lacks stability, income, and a home is unable to provide for a child's emotional and physical needs. *See In re C.A.J.*, 122 S.W.3d 888, 894 (Tex. App.—Fort Worth 2003, no pet.) (concluding evidence was sufficient to support best-interest finding for mother who admitted being unable to care for child, had no stable source of income or permanent home). This undisputed evidence weighs in favor of the trial court's finding.

The Department claimed to have attempted to work with Jennifer in order to reunite Rebecca and Jennifer. However, the evidence reflects that Jennifer did not comply with the requirements set forth in the family service plan, including maintaining a home and job and successfully completing individual therapy.[5] Jennifer admitted that until she could "get back on her feet," she could not provide a safe, stable home for

[5] To the extent Jennifer argues that the family service plan was not ordered by the trial court, the record contains a family service plan filed by the Department on February 13, 2009. The trial court approved and adopted the family service plan without modification in a status hearing order signed on the same date. Although the family service plan was not an order from the court, the trial court's approval and adoption of the family service plan established that compliance with the requirements of the family service plan was necessary for Jennifer to be reunited with Rebecca. *See In re E.S.C.*, 287 S.W.3d 471, 475 (Tex. App.—Dallas 2009, pet. denied); *see also In re K.L.A.C.*, No. 14-08-00960-CV, 2010 WL 184152, at *4 (Tex. App.—Houston [14th Dist.] Jan 21, 2010, no pet.) (mem. op.).

Rebecca even though that requirement was a condition for reuniting the mother and child. On this basis, the evidence weighs in favor of the trial court's finding. *See M.D.V.*, 2005 WL 2787006, at *8.

When weighing the evidence as it relates to the *Holley* factors, a factfinder could reasonably form a firm belief or conviction that the termination of Jennifer's parental rights is in Rebecca's best interest. *See J.L.*, 163 S.W.3d at 88. Under the clear and convincing standard, the evidence is legally and factually sufficient to support the trial court's findings that Jennifer engaged in the conduct prescribed in subsection 161.001(1)(E) and that termination of the parent-child relationship is in Rebecca's best interest. *See* TEX. FAM. CODE ANN. § 161.001; *C.A.J.*, 122 S.W.3d at 894. Therefore, we overrule Jennifer's second issue.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Seymore.