Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00464-CV

IN THE INTEREST OF A.A.R., A.S.N., C.G.N., and J.A.G., Children

From the 63rd Judicial District Court, Val Verde County, Texas
Trial Court No. 30,953
Honorable Enrique Fernandez, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: January 20, 2016

AFFIRMED

Appellant L.G., whom we will refer to as "Mother," appeals the order terminating her parental rights to her children, A.R., A.N., C.N., and J.G. In one issue, she challenges the legal and factual sufficiency of the evidence to support the jury's findings of the statutory grounds for termination of her parental rights. We affirm the trial court's order.

PARENTAL TERMINATION: BURDEN OF PROOF AND STANDARD OF REVIEW

To involuntarily terminate parental rights pursuant to section 161.001 of the Family Code, the petitioner must: (1) establish one of the predicate grounds in subsection 161.001(b)(1); and (2) prove that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b)(1), (2) (West Supp. 2015); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). The applicable burden of proof is the clear and convincing standard. TEX. FAM. CODE ANN. § 161.206(a) (West 2014); *In*

re J.F.C., 96 S.W.3d 256, 263 (Tex. 2002). "'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). Due process demands this heightened standard because termination results in permanent, irrevocable changes for the parent and child. *In re J.F.C.*, 96 S.W.3d at 263; *see also In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007) (contrasting standards for termination and modification of conservatorship order).

In reviewing the legal sufficiency of the evidence to support the termination of parental rights, we view all the evidence in the light most favorable to the jury's findings to determine whether a reasonable trier of fact could have formed a firm belief or conviction that the findings are true. *In re J.F.C.*, 96 S.W.3d at 266. We assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, and we disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.*

In reviewing the factual sufficiency of the evidence, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id.* The inquiry must be "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *Id.* (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). We consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. 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.*

The Texas Department of Family and Protective Services correctly notes that Mother has failed to preserve her legal and factual sufficiency complaints because she did not file a motion for

instructed verdict or other post-trial motion in the trial court. *See In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003); *In re D.J.J.*, 178 S.W.3d 424, 426-27 (Tex. App.—Fort Worth 2005, no pet.); *see also* TEX. R. CIV. P. 324(b) & (b)(2). However, in the interest of justice, we will review Mother's sufficiency complaints on appeal. With the applicable standards in mind, we now review the record to determine whether the evidence presented at trial was sufficient to support the jury's findings.

TESTIMONY PRESENTED AT TRIAL

Mother testified that at the time of trial, she had five children: son A.R., aged 10; daughter A.N., aged 9; daughter C.N., aged 6; son J.G., aged 2; and son A.T.,[1] who was 11 months old. Mother stated that in November 2013, her mother was watching J.G. while she was at work. In her absence, J.G., who was about 6 months old at the time, fell off the bed onto a plywood floor. When Mother returned from work, she found J.G. with a bruised face and immediately took him to the emergency room. Thereafter, the Texas Department of Family and Protective Services (the Department) implemented a safety plan providing that J.G.'s maternal grandmother could not be alone with the children. Mother enrolled the children in daycare, and on some occasions her mother and brother would watch the children together.

The next month, around Christmastime, Mother took J.G. to the hospital where he was diagnosed with bronchitis and prescribed a medication. Mother's ex-boyfriend, "Roger," drove them to the hospital. Mother was pregnant with Roger's child, A.T. A few days later, Mother awoke during the night to a crying and fussy J.G. When she went to change his diaper, she noticed that J.G.'s leg was swollen. Mother thought that J.G. might be having a reaction to the medication, and took him to the emergency room. She stated that she called Roger for a ride to the hospital.

[1] A.T. is not the subject of this appeal.

X-rays revealed that J.G.'s leg was broken. Mother had no explanation for how the injury occurred. A safety plan was implemented requiring Mother's sister to supervise the children when they were in their mother's care.

Thereafter, Mother was referred to the Center for Miracles, where she took J.G. for a follow up examination in mid-January 2014. A skeletal survey was conducted which revealed that J.G. also had two fractured arms. Mother explained that J.G. might have gotten his foot stuck in a crib at daycare. On January 23, 2014, the Department filed an Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. All the children were placed with A.N.'s and C.N.'s paternal grandparents, and a service plan was created requiring Mother to complete a psychological evaluation, individual therapy, and parenting classes. She was also ordered to submit to a drug and alcohol assessment, maintain regular employment and housing, participate in visitation with the children, and keep in contact with the Department caseworker.

Mother was questioned about her relationship with Roger. Mother stated that she and Roger began dating in October 2013, and that the relationship ended shortly thereafter "when the [termination] case began." Mother, however, conceded that she still maintained a friendly relationship with Roger, and that she helped out with his dog. At trial, Mother initially denied any abuse by Roger, but later admitted that he punched her on the head and on her side and pulled her hair the week before trial. Mother went to the emergency room after the assault. She admitted that the Department warned her that Roger was not a safe person for her children to be around. Mother disagreed that Roger was not safe, but stated that she would not allow the children to be around him if they were returned to her.

Dr. Teofilio Sanchez testified that he examined J.G. when he was brought to the emergency room on November 19, 2013. Dr. Sanchez did not believe that J.G. sustained the abrasions and

contusions to his face by falling off the bed, but instead opined that the injuries were caused by slapping or hitting. He also thought that the injuries were older than reported by Mother and her mother. Dr. Sanchez reported his suspicions to the Department.

Pediatrician James Lukahfer testified that he examined J.G. on December 13, 2013 at the Center for Miracles in San Antonio. The Center reviews and provides expert consultations on the medical aspects of child abuse investigations. Dr. Lukahfer reviewed the records, including photographs, from J.G.'s Del Rio emergency room visit on November 19, 2013. In Dr. Lukahfer's opinion, J.G.'s injuries were caused by physical abuse, specifically, a series of hand slaps to the face. He did not believe that the injuries were caused by a fall from the bed, because the bruising was on three sides of the face and not just one. A skeletal survey performed at this time revealed no injuries to J.G.'s bones.

Dr. Lukahfer again saw J.G. on January 17, 2014. At that time, J.G. presented with two fractures of the lower leg. A skeletal survey revealed three additional fractures: two near his right wrist and one near his left elbow. Dr. Lukahfer opined that the most likely explanation for the leg injuries was that J.G. was held by the ankle and the leg forcibly bent. He opined that the right arm injury was likely caused by someone grabbing the baby by the wrist and forcibly bending the wrist and hand forward. In regards to the left arm injury, he opined that the injury resulted from a blunt trauma. Blood work ruled out any vitamin or calcium deficiency in J.G. Dr. Lukahfer also stated there was a ninety percent chance that J.G. did not suffer from Osteo Genesis, or "brittle bone disease," which he explained is the abnormal formation of soft bones that fracture too easily. He conceded that the leg injuries could have been inflicted by a fall, although it was not likely.

Dr. Alice Castleberry is a psychologist who evaluated Mother on behalf of the Department. After conducting several tests, she concluded that Mother was at high risk in the areas of empathy, awareness of the needs of a child, parent-child role reversal, and "oppressing children's power and

independence." Dr. Castleberry found Mother to be defensive and to have problems acknowledging weakness. Dr. Castleberry recommended individual therapy, a drug assessment, and parenting classes. She noted that Mother has a very low IQ and a learning disability. She did not believe that Mother could improve her parenting skills through services.

Psychologist Russell Thompson testified that, contrary to the findings from a previous evaluation, Mother was not mentally retarded and instead had a below average IQ. Dr. Thompson conducted an evaluation and determined that Mother was experiencing very low stress, which indicated to him that Mother would not acknowledge that there was a problem even though her children had been removed from the home. Dr. Thompson stated that even if J.G.'s leg and arm injuries were accidental, he would expect Mother to be upset and to try to find out what had happened. Dr. Thompson stated that Mother told him that J.G. initially sustained injuries to his face when her mother slapped him. Dr. Thompson conceded that Mother had successfully parented for nine years without any problems, and that she worked hard as a single mother without any assistance from the fathers of her children. He stated that the previous nine years were "good evidence" of her "ability to parent." Dr. Thompson made no recommendation either way regarding reunification with the children.

Dr. Rachel Goodman Yates is a therapist and psychotherapist who testified that Mother was referred to her by the Department for evaluation. Dr. Yates did not believe that Mother harmed J.G., but that she failed to protect him from others who injured him. She stated that Mother has had multiple relationships with males who have caused injury to either Mother or to other people. Dr. Yates had recently observed that Mother's shoulder was injured and that she was in pain and limping. Mother said she was assaulted but refused to discuss the issue further. Dr. Yates explained that Mother had a problem with responsibility and empathy. When asked whether the children should be reunified with Mother, Dr. Yates answered, "No." She explained that Mother

endangers her children by putting herself in risky relationships with other people and that she does not have good perceptive abilities when it comes to picking up danger signs and signals. Dr. Yates believed that Roger was a volatile person with a violent history and that Mother refused to acknowledge her relationship with him. Dr. Yates therefore came to the conclusion that it was not "a good idea" for Mother to parent. She did not believe that Mother has made enough personal changes in her choices to keep herself and her children safe. Dr. Yates believed that Mother was motivated to protect Roger and not to find who injured J.G.

Dr. Jacob Pickard, a psychologist, testified that he evaluated Roger for the Department. Dr. Pickard found Roger to be evasive and not forthcoming and noticed discrepancies in his descriptions of certain events. Dr. Pickard diagnosed Roger with chronic depression and speculated that he self-medicates with marijuana. Dr. Pickard further diagnosed Roger with a personality disorder with borderline traits and with antisocial traits. According to Dr. Pickard, a person with this disorder is quick to anger and lacks empathy for the feelings of others.

Adam Castilla is a counselor who conducted parenting classes that Mother participated in on referral from the Department. Castilla reported that Mother successfully completed the course and did "very well."

Sandra Carrizales is the director of the daycare facility that the children attended. She stated that J.G. was absent from daycare on the following dates in December 2013: 23, 24, 26, 27, and 30. He was also absent the following month on January 2, 3, 6, 7, and 10. The older three children were present on the days when J.G. was absent. Mother often picked the children up from daycare at the end of the day, and she was often accompanied by Roger. Carrizales stated that the daycare used bassinets without slats, so it was not possible for J.G.'s leg to get stuck in a crib as Mother had hypothesized. Carrizales noted that the children's learning and hygiene had improved since being removed from Mother's care.

Leticia R. is the paternal grandmother of A.N. and C.N. All four children were placed with Leticia after the petition for termination was filed, and had been living with her for about a year and six months at the time of trial. Leticia stated that the three older children told her that Roger pulled J.G. by the leg. A.R., A.N., and C.N. also told Leticia that Roger used to hit the children with a belt when they cried or when they woke up early and were hungry. She stated that the children have begun to improve their grades in school over the last year. When they first came to live with her, they were angry and wanted to go home with their mother, but now they do not want to go back home. Leticia stated that she was willing to adopt the children.

Melody Salazar, a caseworker assistant with the Department, testified that Mother was unable to hold her baby at her last visit because she was injured. Salazar asked Mother whether Roger hit her, and Mother said yes, but she did not want to talk about it. From her observations of visits between Mother and the children, Salazar opined that the older three children were bonded to their mother, but that J.G. was not.

Meghan Hennessy Martinez, the Department caseworker, testified that, in her opinion, Mother was endangering her children because she "remains in a relationship with a person who was named as the alleged perpetrator of the physical abuse of her son," J.G. She stated that even after the children were removed, Mother remained in a relationship with Roger, who Martinez described as "aggressive." Martinez personally observed Mother at Roger's residence on one occasion, and also observed Mother's car at Roger's residence on several occasions. Mother completed most of the assigned tasks on her family service plan, including maintaining employment and housing, completing parenting classes and participating in counseling, but Martinez testified that Mother did not complete her service plan because she failed to maintain frequent contact with her caseworkers. Martinez, however, noted that it had been awhile since she

had reached out to Mother. Martinez also noted that none of Mother's counselors recommended that Mother be reunified with her children.

The Department named Roger as the alleged perpetrator of the injuries inflicted upon J.G., and referred the matter to the Del Rio Police Department. Nonetheless, the Department's service plan did not dictate that Mother was not to have contact with Roger, or anyone else, for that matter. Martinez believed that the Del Rio Police Department conducted a preliminary investigation of the child abuse allegations, but did not refer the matter to the district attorney's office for criminal prosecution.

Fred Knoll was hired by Mother's counsel as a private investigator. He testified that, in his opinion, "it was very hard to make the conclusion that [Roger] was the [child abuse] suspect." He theorized that J.G.'s injuries were caused when he was dropped by one of his older siblings.

Officer Rolando Carbajal testified he spoke to both Mother and Roger the night that J.G. was brought to the emergency room with what was discovered to be a broken leg. Roger told Carbajal that he had spent the night at Mother's house, and was there when she awoke to J.G. crying.

At the conclusion of the five-day trial, the jury found that Mother's parental rights should be terminated pursuant to Texas Family Code sections 161.001(b)(1)(D), (E), and (O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O) (West Supp. 2015). The jury also found that termination of the parent-child relationship was in the best interest of the children. The trial court signed an order terminating Mother's parental rights in accordance with the jury's findings. Mother now appeals, challenging the sufficiency of the evidence to support the jury's findings of the statutory grounds for termination of her parental rights.

DISCUSSION

A trial court may order termination of the parent-child relationship only if the court finds by clear and convincing evidence one or more statutory grounds for termination and that termination is in the child's best interest. *Id.* § 161.001(b)(1), (2). In this case, a jury found by clear and convincing evidence that Mother had:

> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
>
> (E) 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; and
>
> (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services 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[.]

Id. at § 161.001(b)(1)(D), (E), (O).

Mother argues that the evidence is insufficient to support termination of parental rights under the endangerment grounds because she is a victim of family violence and as such, she did not knowingly place her children or allow her children to remain in endangering conditions or place them with people who endangered them. Instead, she "found herself there, with no way out."

"Endanger 'means to expose to loss or injury, to jeopardize.'" *In re E.A.G.*, 373 S.W.3d 129, 141 (Tex. App.—San Antonio 2012, pet. denied) (quoting *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.)). "Although endanger means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the parent's conduct be directed at the child or that the child actually suffers injury." *In re E.A.G.*, 373 S.W.3d at 141-42. "Under subsection 161.001(b)(1)(D), the inquiry is related to whether the environment of the children is the source of endangerment to the children's physical

or emotional well-being." *Id.* at 142. "It focuses on the suitability of the child's living conditions or surroundings." *Id.* "The inquiry under subsection 161.001(b)(1)(E) relates to whether the endangerment of the child is the direct result of the parent's conduct." *Id.* Conduct by the parent may include acts, omissions, or failures to act. *See In re J.T.G.*, 121 S.W.3d at 125. A factfinder may infer from past conduct endangering the well-being of a child that similar conduct will recur if the child is returned to the parent. *In re D.J.H.*, 381 S.W.3d 606, 613 (Tex. App.—San Antonio 2012, no pet.).

We have detailed all of the evidence that was presented to the jury. Even though infant J.G. was taken to the emergency room on two occasions and ultimately found to have five fractured bones, Mother continually denied knowing how J.G. was injured. She also denied that Roger was ever alone with the children, even though there was testimony that Roger was in the home with J.G. on the night it was discovered that his leg was broken. There was also testimony that Roger hit the three older children with a belt when they cried or were hungry, and that Roger dragged J.G. by the leg. The jury was free to disbelieve Mother's testimony and to instead accept all of the medical testimony indicating that J.G.'s injuries were inconsistent with an accidental fall or dropping. *See In re J.P.B.*, 180 S.W.3d 570, 574 (Tex. 2005) (noting that it is within the jury's province to judge witness's demeanor and to disbelieve testimony); *In re J.D.*, 436 S.W.3d 105, 116 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (same).

We emphasize that under subsection (E), the cause of the danger to the child must be the parent's conduct alone, as evidenced not only by the parent's actions but also by the parent's omission or failure to act. *See P.A.G. v. Tex. Dep't of Family & Protective Servs.*, 458 S.W.3d 595, 609 (Tex. App.—El Paso 2014, no pet.). Here, evidence was presented from which the jury could infer that Mother allowed the children to be around a person who was dangerous to their physical well-being. *See In re J.P.B.*, 180 S.W.3d at 574. Applying the appropriate standards of

review, we hold that the disputed evidence is not so significant that a reasonable factfinder could not have formed a firm belief or conviction that Mother engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the children's physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Because termination of Mother's parental rights may be predicated on any of the statutory predicate grounds found by the jury, we need not address subsections 161.001(b)(1)(D) and (O). *See In re A.V.*, 113 S.W.3d at 362.

CONCLUSION

Having concluded that at least one of the statutory grounds for termination is supported by sufficient evidence, we overrule Mother's sole issue on appeal and affirm the order of the trial court terminating Mother's parental rights.

Rebeca C. Martinez, Justice