Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00754-CV

IN THE INTEREST OF BABY V., a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-PA-00239
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: March 29, 2017

REVERSED AND REMANDED

William H. appeals the trial court's order terminating his parental rights to his son, Baby V. In his first three issues, William contends the evidence is legally and factually insufficient to support the trial court's findings with regard to the two statutory grounds for termination and its finding that termination was in Baby V.'s best interest. In his fourth issue, William contends his trial counsel rendered ineffective assistance of counsel by failing to call his mother as a witness to testify at trial. We reverse the portion of the trial court's order terminating William's parental rights and remand the cause to the trial court for further proceedings.

BACKGROUND

William was arrested in July 2015 for intent to distribute methamphetamines and remained incarcerated in a federal facility for that offense at the time of trial. Prior to his arrest, William

testified he financially supported Baby V.'s mother, Amanda, and left Amanda his money when he was arrested. William testified he discovered Amanda was pregnant with Baby V. two months after he was arrested. At that time, William contacted a family friend, Karen. William and Karen both testified Karen allowed Amanda to live with her at William's request, and William testified Karen drove Amanda to doctor's appointments. Karen testified Amanda lived with her from July 2015 until November 2015, and Karen began to convert one of her bedrooms into a nursery for the baby. William testified Amanda lived with Karen until Amanda ran off.

Miriam Marin, an adoption caseworker and birthparent counselor with Adoption Angels, Inc., testified Amanda contacted her in late September 2015, and decided to proceed with adoption. Marin testified Amanda previously worked with the agency in placing another child for adoption. Marin provided Amanda with paperwork to complete and testified Amanda returned the paperwork about one month later. Although Marin testified she was in "somewhat consistent communication" with Amanda by phone or email, Marin also testified the agency did not provide Amanda with much assistance while she was pregnant because Amanda bounced around from place to place, including living at a motel with friends and later living with her mother. Marin stated her testimony was based on information Amanda provided to her and also stated she had spoken with Amanda's mother. Marin testified Amanda contacted her at the end of December 2015, because she was ill and wanted to go to the hospital. The agency provided Amanda transportation to the hospital. At that time, Amanda was in her thirty-sixth week of her pregnancy. Baby V. was born approximately one week later, and Amanda tested positive for Xanax at Baby V.'s birth. Marin admitted William contacted her immediately after Baby V.'s birth and informed her that he did not consent to the adoption.

Adoption Angels filed an original petition to terminate Amanda's and William's parental rights. Amanda previously executed an irrevocable affidavit to relinquish her parental rights.

William filed an answer and several additional court filings expressing his desire to retain his parental rights.

The trial court held a bench trial on October 27, 2016. At the conclusion of the trial, the trial court terminated Amanda's and William's parental rights. With regard to William, in addition to finding termination to be in the best interest of Baby V., the trial court also found William had:

> [1] voluntarily, and with knowledge of the pregnancy, abandoned the child's mother beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support of [sic] medical care for the mother during [the] period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; [and]
>
> [2] knowingly engaged in criminal conduct that will result in his conviction of an offense and confinement or imprisonment and inability to care for the child not less than two years from the date of filing this petition.

William appeals.

STATUTORY TERMINATION GROUNDS

In his first two issues, William contends the evidence is legally and factually insufficient to support the trial court's findings with regard to the two statutory grounds for termination. The appellee did not file a brief.

A. Standard of Review

To terminate parental rights pursuant to section 161.001 of the Code, the Department has the burden to prove: (1) one of the predicate grounds in subsection 161.001(b)(1); and (2) that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); *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.

In reviewing the legal sufficiency of the evidence to support the termination of parental rights, the court must "look at 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 at 266. "[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id.* "A corollary to this requirement is that a court should 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 to support the termination of parental rights, a court "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id.* "A court of appeals should consider whether 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, then the evidence is factually insufficient." *Id.*

B. Section 161.001(b)(1)(Q)

Under section 161.001(b)(1)(Q), a court may order termination of a parent-child relationship if the court finds by clear and convincing evidence that a parent has:

> knowingly engaged in criminal conduct that has resulted in the parent's:
>
> (i) conviction of an offense; and
>
> (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.

TEX. FAM. CODE ANN. § 161.001(b)(1)(Q) (West Supp. 2016). Although section 161.001(b)(1)(Q) requires the trial court to find the parent has been convicted of an offense, the trial court in this

case found only that William had "knowingly engaged in criminal conduct that ***will*** result in his conviction of an offense." (emphasis added). The trial court's finding is consistent with the testimony at trial. Although William was arrested in July 2015, he testified he had not been found guilty and was still in the process of negotiating a plea bargain. Because the evidence does not establish William had been convicted of the offense, the evidence is legally insufficient to support the termination of William's parental rights under section 161.001(b)(1)(Q).

C. Section 161.001(b)(1)(H)

Under section 161.001(b)(1)(H), a court may order termination of a parent-child relationship if the court finds by clear and convincing evidence that a parent has:

> [1] voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, [2] failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, ***and*** [3] remained apart from the child or failed to support the child since the birth.

Id. at § 161.001(b)(1)(H) (emphasis added). Because section 161.001(b)(1)(H) is written in the conjunctive, the evidence must support all three requirements by clear and convincing evidence. *A.W. v. K.R.*, No. 13-05-00312-CV, 2006 WL 2022517, at *3 (Tex. App.—Corpus Christi July 20, 2006, pet. denied) (mem. op.).

With regard to the first requirement, the abandonment must be voluntary. *See id*.; TEX. FAM. CODE ANN. § 161.001(b)(1)(H). In various parental termination and adoption contexts, numerous courts have held mere imprisonment does not constitute intentional abandonment as a matter of law, but imprisonment is a factor the trial court can consider along with the other evidence. *See, e.g., In re J.A.M.*, No. 13-98-041-CV, 1999 WL 34973394, at *3 (Tex. App.—Corpus Christi May 13, 1999, no pet.) (not designated for publication) (holding "imprisonment alone is not a sufficient reason for terminating a parental relationship based on abandonment"

under section 161.001(1)(H));[1] *In re B.T.*, 954 S.W.2d 44, 49 (Tex. App.—San Antonio 1997, pet. denied) (noting "[m]ere imprisonment does not constitute intentional abandonment of the child as a matter of law" but "is a factor to consider along with the other evidence"); *In re S.D.H.*, 591 S.W.2d 637, 638 (Tex. Civ. App.—Eastland 1979, no writ) (holding evidence insufficient to support termination where father was incarcerated at time of child's birth because events occurring prior to a child's birth cannot constitute abandonment or the voluntary leaving of the child alone in the possession of another not the parent); *H. W. J. v. State Dep't of Pub. Welfare*, 543 S.W.2d 9, 11 (Tex. Civ. App.—Texarkana 1976, no writ) (noting mere imprisonment of father "does not constitute intentional abandonment of his children"); *Elliott v. Maddox*, 510 S.W.2d 105, 107 (Tex. Civ. App.—Fort Worth 1974, no writ) (holding criminal offense for which father was convicted and incarcerated prior to child's birth "could not have been an act of abandonment of anyone then not yet born"); *Jordan v. Hancock*, 508 S.W.2d 878, 881 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (noting imprisonment does not constitute abandonment as a matter of law but does not preclude a finding of abandonment where other evidence establishes a father's intention to abandon his children).

In this case, the evidence established William was arrested while Amanda was pregnant with Baby V., and he was not informed of Amanda's pregnancy until two months after he was arrested. Once he was informed Amanda was pregnant, William made arrangements with Karen who allowed Amanda to live in her home and began preparing a nursery for Baby V. Although Amanda subsequently ran off, William notified the adoption agency immediately upon Baby V.'s birth that he did not consent to the adoption. After the petition to terminate was filed, William filed numerous *pro se* pleadings in an effort to maintain his parent-child relationship, including a

[1] In 2015, section 161.001 was amended to add a subsection (a), so section 161.001(1)(H) became section 161.001(b)(1)(H).

statement of paternity. When William was subsequently appointed an attorney ad litem, he agreed to an order for genetic testing to prove he was Baby V.'s father.

The only other evidence in the record with regard to Amanda's pregnancy is Marin's testimony, which Marin admitted was largely based on information Amanda provided to her after Amanda contacted the agency in late September 2015. Marin testified the agency did not provide Amanda with much assistance during her pregnancy because she bounced around from place to place. Although Marin's testimony is some evidence to contradict William's and Karen's testimony that Amanda lived with Karen until November 2015, having reviewed the record as a whole, we hold the undisputed fact that William has been confined since July 2015 and the testimony of William and Karen regarding his actions upon learning of Amanda's pregnancy is so significant that the trial court could not reasonably have formed a firm belief or conviction that William voluntarily abandoned Amanda during her pregnancy. Accordingly, we hold the evidence is factually insufficient to support the termination of William's parental rights under section 161.001(b)(1)(H). *See 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.").

BEST INTEREST

In his third issue, William contends the evidence is legally and factually insufficient to support the trial court's finding that termination was in Baby's V.'s best interest. Although we have held the evidence is legally insufficient to support the trial court's finding under section 161.001(b)(1)(Q) and factually insufficient to support the trial court's finding under section 161.001(b)(1)(H), we still must address whether the evidence is legally insufficient to support the

trial court's best interest finding because it is a rendition issue.[2] *E-Z Mart Stores, Inc. v. Ronald Holland's A-Plus Transmission & Auto., Inc.*, 358 S.W.3d 665, 670 (Tex. App.—San Antonio 2011, pet. denied) (noting legal sufficiency is a rendition issue).

The Texas Supreme Court has enumerated the following factors to assist courts in evaluating a child's best interest: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future emotional and physical danger to the child; (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 held by the individuals seeking custody of the child; (7) the stability of the home of the parent and the individuals seeking custody; (8) the acts or omissions of the parent which 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. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The foregoing factors are not exhaustive, and "[t]he absence of evidence about some of [the factors] would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "A trier of fact may measure a parent's future conduct by his past conduct and determine whether termination of parental rights is in the child's best interest." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

Although William has not been convicted and sentenced, he anticipates his sentence will be five or seven years. After applying various sentencing credits that William also anticipates receiving, William believes he will be incarcerated for between 18-36 months after he is convicted. Although William testified his mother would care for Baby V. until his release, William's mother did not testify. William admitted he has a drug addiction and has only been sober for the period

[2] We need not address William's fourth issue because it only raises a remand issue. TEX. R. APP. P. 47.1 (providing opinions need only address issues necessary to final disposition of the appeal).

of time he has been in federal detention following his arrest. William previously served twelve years in prison for a different offense and was unable to provide any support for his oldest son during his incarceration. William also has another son for whom he does not provide any support.

After his birth, Baby V. was placed with the family who wants to adopt him. The same family previously adopted two other children from Adoption Angels, including the other child Amanda placed with the agency for adoption. Lore Carvalho, the agency's manager who has worked with adoption agencies for twenty-five years, testified the family is "one of the most incredible families I've ever met." Photographs of the family with the three adopted children were introduced into evidence.

The foregoing evidence is legally sufficient to support the trial court's finding that termination was in Baby V.'s best interest.

CONCLUSION

The portion of the trial court's order terminating William's parental rights is reversed, and the cause is remanded to the trial court for further proceedings.

Irene Rios, Justice