In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00006-CV

IN THE INTEREST OF A.N.J., J.A.D., AND J.M.M.

On Appeal from the 88th District Court
Tyler County, Texas
Trial Cause No. 20,943

MEMORANDUM OPINION

This is an appeal by the Texas Department of Family and Protective Services (CPS) in a suit seeking termination of parental rights. CPS appeals the trial court's judgment notwithstanding the verdict (JNOV), in which the trial court did not terminate the parental rights of the children's mother or their fathers, but appointed CPS the managing conservator of the children.[1] We vacate the trial court's judgment in part and affirm the judgment in part.

[1] CPS also appeals the trial court's determination that an appeal by CPS would be frivolous. However, we ordered a full appellate record, and due to our disposition of CPS's other issues, we need not address the issue regarding the frivolousness finding, as it would not afford CPS greater relief. *See* Tex. R. App. P. 47.1.

BACKGROUND

Appellee is the mother of the children. Cedric is the father of A.N.J., J.A.D.'s father is unknown, and Gregory is the father of J.M.M.[2] Mother learned that A.N.J. had made an outcry of sexual abuse. The CPS investigator told Mother that Mother's boyfriend, Joshua, had sexually abused A.N.J. Joshua was eventually convicted of the aggravated sexual assault of A.N.J. after pleading guilty.

Mother testified that Cedric had joined the U.S. Army and was on active duty.[3] Miriam Stephenson, a conservatorship worker with CPS, testified that Cedric had been adjudicated by the Attorney General's Office as the father of A.N.J., and he had paid child support. According to Stephenson, Cedric was served by publication, but he had received some notices from CPS concerning the case. Stephenson testified that Cedric had filed an answer and was aware that he was named in the proceeding. Stephenson had several conversations with Cedric by telephone after he filed an answer.

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[2] Cedric and Gregory both filed *pro se* answers, but they did not appear at trial or file a brief with this Court.

[3] The Servicemembers Civil Relief Act provides "for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service-members during their military service." 50 U.S.C.A. Apx. § 502(2) (West Supp. 2010). When, as in this case, a servicemember has received notice of a civil proceeding, the trial court "may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days . . . ." *Id.* § 522(b)(1) (West Supp. 2010). The record does not reflect that Cedric filed a motion for stay; therefore, the trial court was authorized, but not required, to stay the proceeding. *See id.*

In addition, Stephenson explained that Cedric was "not current on his child support payments." Stephenson also testified that Cedric had not visited A.N.J. during a six-month period that she was in CPS custody. According to Stephenson,

> the contracted home study worker made numerous attempts to contact [Cedric] by telephone. She also set up an appointment to meet with him at his home. He was not at the residence when she arrived[,] and she made several more attempts to get in contact with him and she closed the home study and indicated in a letter . . . that they were not going to consider that as a placement because he did not comply with meeting with her.

Stephenson opined that CPS's efforts to arrange a home study with Cedric constituted a reasonable effort to place A.N.J. with him. Stephenson testified that CPS "made every effort to try to get [Cedric] in contact with his child and place the child with him." Stephenson testified that she explained to Cedric how to arrange for visitation with A.N.J., and that she did not recall Cedric ever attempting to request visitation. Stephenson explained that Cedric had indicated that he did not have a vehicle.

According to Stephenson, Cedric was not on active duty with the Army, and he had not yet been to boot camp. Stephenson testified that no one from the Army had notified CPS that Cedric was represented by counsel. Stephenson explained that Cedric could have attempted to prove indigence and could have asserted a position adverse to CPS's position. Stephenson testified that Cedric had never asserted indigence during their conversations.

Gregory filed an answer, in which he questioned the paternity of J.M.M., but stated that he would take responsibility for J.M.M. if genetic testing established his

paternity. Cedric and Gregory did not further appear in the case after filing their answers. Subsequent genetic testing determined that the probability of Gregory's paternity of J.M.M. was 99.99%; however, we find no indication in the record that Gregory was adjudicated to be J.M.M.'s father, and CPS does not raise an appellate issue concerning the lack of a default judgment against Gregory. Cedric filed an answer, in which he stated that he was in training in the U.S. Army, wanted to take custody and full responsibility for A.N.J. as soon as possible, and that his mother would care for A.N.J. until he returned as "permanent custodial guardian." Cedric was adjudicated to be the father of A.N.J.

The jury charge did not ask the jury to determine whether the rights of either Gregory or the unknown father of J.A.D. should be terminated. Although the trial court's JNOV noted that both Cedric and Gregory had defaulted after filing their answers, the trial court did not sign a default judgment against either Gregory or Cedric, and the trial court's JNOV named Cedric as a possessory conservator of A.N.J.

In its JNOV, the trial court found that there was not clear and convincing evidence that Cedric had constructively abandoned A.N.J. or that termination of the parent-child relationship between Cedric and A.N.J. was in A.N.J.'s best interest. The trial court appointed CPS as the managing conservator of A.N.J. and appointed Cedric as a permanent possessory conservator of A.N.J.

The trial court also found in its JNOV that there was not clear and convincing evidence that Mother (1) knowingly placed or allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being; or (3) failed to comply with the provisions of a court order that specifically established the necessary actions for the children to be returned to her. The trial court's JNOV appointed Mother as a permanent possessory conservator of all three children. However, after trial, Mother signed an affidavit in which she voluntarily relinquished her parental rights to all three children to CPS. *See* Tex. Fam. Code Ann. § 161.103 (West 2008); *see also id.* § 161.001(K) (West Supp. 2010).

ANALYSIS

As previously stated, Mother executed an affidavit of voluntary relinquishment of her parental rights to all three children. *See* Tex. Fam. Code Ann. §§ 161.001(K), 161.103. Therefore, CPS's appeal of the JNOV as to Mother is moot. *See Bd. of Adjustment of the City of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002) (A case becomes moot if a controversy ceases to exist.). Accordingly, we vacate the trial court's judgment as to Mother and remand the case to the trial court as to Mother for entry of an order terminating Mother's parental rights to A.N.J., J.A.D., and J.M.M. *See id.*; *see also* Tex. Fam. Code Ann. § 161.001(K).

We now turn to the issue of the JNOV with respect to Cedric. Because involuntary termination of parental rights implicates fundamental constitutional rights and is both severe and permanent, the burden of proof at trial is clear and convincing evidence. Tex. Fam. Code Ann. § 161.001 (West Supp. 2010); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). "'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). Before parental rights may be involuntarily terminated, the trier of fact must find by clear and convincing evidence (1) that the parent committed one of the statutory grounds found in section 161.001(1) of the Family Code, and (2) that termination is in the children's best interest. Tex. Fam. Code Ann. § 161.001; *see also Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). The same evidence of acts or omissions used under section 161.001(1) may be probative in determining the best interest of the child. *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

A JNOV is proper only when a directed verdict would have been proper. Tex. R. Civ. P. 301; *Fort Bend Cnty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). The trial court should grant a motion for JNOV if there is no evidence to support the jury finding, or if an issue contrary to the jury finding was established as a matter of law. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Gallas v. Car Biz, Inc.*, 914

S.W.2d 592, 593 (Tex. App.—Dallas 1995, writ denied). When there is no more than a scintilla of evidence supporting a finding, it is no evidence. *Tabrizi v. Daz-Rez Corp.*, 153 S.W.3d 63, 66 (Tex. App.—San Antonio 2004, no pet.). In reviewing whether the trial court erred in granting a motion for JNOV based upon legal insufficiency of the evidence, an appellate court must consider only the evidence and reasonable inferences that support the jury's answers, disregarding all contrary evidence and inferences. *Tiller*, 121 S.W.3d at 713.

Under a legal sufficiency review, we consider "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). "We must view the evidence in the light most favorable to the verdict and 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'" *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010) (quoting *City of Keller*, 168 S.W.3d at 822, 827). Regarding an issue on which the appellant had the burden of proof, the appellant must show "that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

The parent-child relationship may be terminated if it is found by clear and convincing evidence that the parent has

> constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and

Protective Services or an authorized agency for not less than six months, and:

> (i) the department . . . has made reasonable efforts to return the child to the parent;
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> (ii) the parent has not regularly visited or maintained significant contact with the child; and
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> (iii) the parent has demonstrated an inability to provide the child with a safe environment.

Tex. Fam. Code Ann. § 161.001(1)(N); *see also In re D.T.*, 34 S.W.3d 625, 633 (Tex. App.—Fort Worth 2000, pet. denied). The trial court charged the jury that to terminate Cedric's rights, it was required to find that Cedric had constructively abandoned A.N.J., and instructed the jury that the burden of proof was clear and convincing evidence.

The jury found that Cedric's parental rights should be terminated, but the trial court found in its JNOV that there was not clear and convincing evidence of constructive abandonment. Stephenson testified that Cedric was not current on all of the child support payments he owed, and that he had not made an effort to visit A.N.J. However, there was no evidence concerning whether Cedric would be unable to provide A.N.J. with a safe environment if he retained his parental rights. *See* Tex. Fam. Code Ann. § 161.001(1)(N), 161.001(2). Instead, Stephenson testified that CPS had stopped trying to set up a home study with Cedric after a home study worker was unable to contact or meet with him. *See id*. Considering all of the evidence supporting the jury's answer to the question regarding termination of Cedric's rights, there was no evidence (or no more than a scintilla of

evidence) concerning whether Cedric would be unable to provide a safe home for A.N.J. if he retained his parental rights. Also, the paucity of evidence of constructive abandonment is so weak as to amount to no evidence. *See Tabrizi*, 153 S.W.3d at 66. Therefore, the trial court correctly granted a JNOV in favor of Cedric. *See* Tex. Fam. Code Ann. § 161.001(1)(N), (2); *Tiller*, 121 S.W.3d at 713. Accordingly, we overrule issue three and affirm the trial court's judgment notwithstanding the verdict as to Cedric. We vacate the trial court's judgment with respect to Mother and order the trial court to enter a judgment terminating Mother's parental rights in accordance with the affidavit. *See* Tex. Fam. Code Ann. § 161.001(K).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

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STEVE McKEITHEN
Chief Justice

Submitted on May 10, 2011
Opinion Delivered July 28, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.