In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00170-CV

IN THE INTEREST OF J.L. AND J.L.

On Appeal from the 253rd District Court
Liberty County, Texas
Trial Cause No. CV0800951

MEMORANDUM OPINION

In 2008, a suit filed by the Texas Department of Family and Protective Services concluded with appellant being named sole managing conservator of his children, J.L., J.L., and K.L.L. The order in the suit affecting the parent-child relationship appointed the children's mother as a possessory conservator without any right to access or visitation with the children "due to [the mother's] drug use." Less than two months later, while babysitting the children at appellant's request, the children's mother murdered K.L.L. The Department filed termination proceedings against both parents. After a jury trial, the trial court terminated both parents' rights to the surviving children, and this appeal

followed.[1] Appellant contends that the trial court erred in denying appellant's request for a severance and that his trial counsel was ineffective. We affirm the judgment.

Appellant did not file a statement of points for appeal, but he did file a motion for new trial that included a complaint that "the termination trial was not severed." Although Section 263.405(i) prohibits review of appellate issues not raised in a statement of points, the statute cannot be applied in a manner that would deprive the appellant of due process. *In re B.G.*, 317 S.W.3d 250, 258 (Tex. 2010); Tex. Fam. Code Ann. 263.405(i) (West 2008). Given that counsel included the severance complaint in the motion for new trial, his failure to mention this issue in a statement of points could only be the result of an oversight. *See In re J.O.A.*, 283 S.W.3d 336, 343 (Tex. 2009). Our consideration of the complaints identified in appellant's motion for new trial as a "statement of points" for appeal avoids the due process concerns that are otherwise presented here. *See In re T.J.H.*, No. 13-06-00407-CV, 2009 WL 2624114, *4 (Tex. App.—Corpus Christi Aug. 26, 2009, pet. denied) (mem. op.). During the post-trial hearing in this case, the trial court considered appellant's motion for new trial in the same manner that the trial court would consider a statement of points. Thus, in this case, the motion for new trial functioned as a combined motion for new trial and statement of points. *See* Tex. Fam. Code. Ann. § 263.405(b)(2). We hold that Section 263.405(i) does not preclude appellate review of this issue. *See* Tex. Fam. Code Ann. § 263.405(i).

[1] The mother, C.S., filed a notice of appeal, but voluntarily abandoned her appeal before the submission of the case. *See* Tex. R. App. P. 42.1(a)(1). In this Opinion, "Appellant" refers only to C.L., the father of J.L. and J.L.

Before jury selection commenced, appellant objected that the mother, C.S., was wearing an inmate's orange jumpsuit.[2] Appellant motioned the trial court to sever his trial from C.S.'s, but the court denied his motion. Appellant raised this issue in his motion for new trial. On appeal, appellant argues that conducting the trial of his rights with those of C.S. prejudiced him because the jury would see her acts as his acts.

Rule 41 grants the trial court broad discretion to sever causes. *In re J.W.*, 113 S.W.3d 605, 611 (Tex. App.—Dallas 2003, pet. denied); *see* Tex. R. Civ. P. 41. The trial court may sever a claim "if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990). We review the trial court's ruling on a request for severance for abuse of discretion. *Id.* "The controlling reasons for a severance are to do justice, avoid prejudice and further convenience." *Id.*

The Department alleged that appellant endangered the children by entrusting their care to C.S. C.S.'s actions were clearly relevant to the allegations against appellant. *See In re J.W.*, 113 S.W.3d at 611-12. The trial court could determine that the allegations against the two parents involved the same facts and issues. *Id.* Furthermore, the trial was conducted almost eighteen months after the Department removed the children. Severing

[2] Counsel for appellant and counsel for the Department both indicated on the record that the orange jumpsuit had been a matter of strategy by the mother and her counsel.

the cause might not have been possible given the limited time to conduct a trial. *See* Tex. Fam. Code Ann. § 263.401 (West 2008). Appellant has not shown that the trial court abused its discretion in failing to sever the causes pursuant to Rule 41. *See* Tex. R. Civ. P. 41.

Rule 174 gives to the trial court discretion to order a separate trial of any claim, or of any separate issue, "in furtherance of convenience or to avoid prejudice[.]" Tex. R. Civ. P. 174. An abuse of discretion occurs if "all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby[.]" *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 683 (1956). From this record, it does not appear that the jury heard evidence that it would not have heard had the trial court ordered separate trials. Had the trial court tried appellant's case separately from C.S.'s case, the fact that C.S. had been convicted of capital murder would have been relevant to the issues before the jury and C.S. would have been a witness. *See In re A.M.M.*, No. 06-05-00039-CV, 2006 WL 42229, *7 (Tex. App.—Texarkana Jan. 10, 2006, no pet.) (mem. op.) (Although divorcing spouses were antagonists, separate termination trials were unnecessary absent a showing of a particularly unfair prejudicial attitude or testimony that would have been inadmissible in a separate trial.). Appellant might have benefitted from a separate trial, since he would have avoided C.S.'s presence in the courtroom throughout the trial, which

was a constant reminder to the jury of her incarceration. Thus, appellant identified some prejudice that could have been avoided by a separate trial. Nevertheless, the desire to avoid that prejudice must be weighed against the prejudice that could result from ordering a separate trial. *See Womack*, 291 S.W.2d at 683. The dismissal date for the suit had almost arrived at the time of the trial and the record does not indicate that the trial court could have conducted separate trials of the parents' rights. *See* Tex. Fam. Code Ann. § 263.401. The record does not show that the Department would not have been prejudiced by an order for separate trials. Appellant has failed to show that the trial court abused its discretion by not conducting separate trials pursuant to Rule 174. *See* Tex. R. Civ. P. 174. We overrule issue one.

Issue two contends appellant received ineffective assistance of trial counsel because counsel failed to include a challenge to the sufficiency of the evidence in a statement of points. Appellant had appointed counsel at trial. *See* Tex. Fam. Code Ann. § 107.013(a)(1) (West 2008). The statutory right to counsel in termination proceedings brought by the Department "embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). "[A]n ineffective assistance of counsel claim can be raised on appeal despite the failure to include it in a statement of points." *In re J.O.A.*, 283 S.W.3d at 339. Because counsel's unjustified failure to preserve a factual sufficiency complaint raises too high a risk of erroneous deprivation of due process, the "procedural rule governing factual sufficiency preservation must give way to constitutional due

process considerations." *In re M.S.*, 115 S.W.3d at 549. If the evidence to support termination were factually insufficient, and counsel's failure to preserve the complaint was unjustified and fell below being objectively reasonable, then counsel's failure to preserve the complaint would constitute ineffective assistance of counsel that would necessitate a new trial. *Id.* at 549.

The charge instructed the jury that for appellant's parental rights to be terminated as to each child it must be proven by clear and convincing evidence that: Appellant had either "knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children"; or that appellant "has engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children"; and that "termination of parental rights is in the best interests of the [] children." *See* Tex. Fam. Code Ann. § 161.001(1)(D), (E), and (2) (West Supp. 2010). Appellant notes that the Department sought termination of appellant's rights because C.S. killed K.L.L., the children's sibling.

Debbie Leonard, a Department caseworker, testified that during her five years with the Department, she had handled three cases concerning appellant's children. In 2006, she dealt with substance abuse issues with C.S. and appellant. C.S. completed Department services, and the children were returned to her. The next incident, in the summer of 2007, concerned substance abuse and domestic violence. During this time,

K.L.L. was born with cocaine in her system. After the Department's third intervention following the death of K.L.L., Leonard requested and received a judicial declaration of aggravated circumstances, which allowed the Department to bypass providing another service plan to the parents.

A Department caseworker named Mark Bradley testified that he first started working with appellant and C.S. in 2007. J.L., J.L., and an older half-sibling were brought into Department care due to an investigation regarding domestic violence and drug use. A hospital treated C.S. for injuries she received from appellant during a domestic violence incident. While at the hospital, C.S. tested positive for cocaine and amphetamines. A few weeks later, K.L.L. tested positive for cocaine at birth. During the eight to ten months that Bradley worked with the family, C.S. was discharged unsuccessfully from three drug rehabilitation programs and she never maintained sobriety. The case ended with appellant being named sole managing conservator of J.L., J.L., and K.L.L. C.S. retained her parental rights but by court order had no access to the children. Bradley admitted that during his time working with this family, he saw no indication from C.S. that she would be physically abusive towards the children. The trial court's order denying C.S. visitation stated that the order was necessary because of her drug use.

Another Department caseworker, Michelle Monrose, testified that appellant was present when the trial court ordered that C.S. was to have no access to the children. After

the trial court dismissed the Department, Monrose met with appellant once, on September 26, 2008. Appellant went to the Department offices to pick up a copy of the order that he could use to stop child support withholding from his paycheck. While there, appellant mentioned that C.S. had flattened his tires and had tried to obtain access to the children without appellant's knowledge. Appellant also mentioned that he was in the process of obtaining a restraining order and stated that he was trying to keep C.S. away from the children. Appellant did not mention that he had a problem obtaining a babysitter. C.S. caused the fatal injuries to K.L.L. on the following day.

C.S. testified about her interactions with appellant and the children after the Department returned the children to appellant. According to C.S., appellant obtained a restraining order because she had threatened to cut his tires again. C.S. stated she entered appellant's home through a window. An argument ensued, which resulted in an agreement between the two that C.S. could see the children if she took and passed drug tests administered by appellant. C.S. claimed that appellant let her see the children for thirty minutes after she took and passed a drug test. Then appellant asked her if she could keep the children while he went to work. C.S. testified that she passed a drug test immediately before appellant went to work and left her with the children. They had agreed that she would not leave the house. J.L. and J.L. were present when C.S. committed the fatal assault on K.L.L.

C.S. ingested cocaine while she was pregnant with K.L.L. but there is no evidence in the record that C.S. had physically abused any of the children before. Appellant had no particular reason to anticipate that C.S. would beat K.L.L. to death if the children were left in C.S.'s care. Nonetheless, appellant need not have anticipated murder for the jury to form a firm belief that appellant knowingly placed the children with a person who engaged in conduct that endangered the physical or emotional well-being of the children. *See In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005). Appellant knew that C.S. was a drug addict and appellant knew that C.S. abused drugs during her pregnancy and thereby endangered K.L.L. Appellant was also aware that there had been a recent judicial determination that C.S. was unfit for any access to the children. Appellant was aware that C.S. had recently engaged in behavior that was both destructive and criminal. Appellant was sufficiently concerned about C.S.'s behavior to believe that a restraining order was appropriate. Notwithstanding this knowledge, appellant asked C.S. to babysit the children, then left the children completely unsupervised with C.S. for an extended period of time. Because the jury could reasonably form a firm belief or conviction about the truth of the Department's allegations, the evidence is factually sufficient to support at least one ground for terminating appellant's parental rights. *See In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

Likewise, the jury could reasonably form a firm belief or conviction that termination would be in the best interest of J.L. and J.L. *Id.* at 27-28. The jury could

consider appellant's endangering conduct and the fact that he left the children in the care of a person who had committed endangering conduct. *See In re J.O.A.*, 283 S.W.3d at 345-46. Appellant demonstrated his lack of parenting skill and his inability to safeguard the children's welfare by leaving the children in C.S.'s care.

Evidence in the record supports the Department's argument that its proposed placement of the children would provide the stability that the children required. Because J.L. and J.L. were present when their mother beat their sister to death, J.L. and J.L. received counseling therapy when they entered foster care. In February 2009, the Department placed the boys with a foster family that plans to adopt them. The children no longer require therapy. They have bonded with the foster parents and their children. The older child is in school and both children attend church and participate in extracurricular activities. Other than the evidence about what led to the removals and the fact that appellant completed a service plan after the second removal, the jury heard no testimony concerning specific details of how appellant provided care and discipline in the past or how he would do so in the future.

There was some evidence that did not support the jury's finding that termination would be in the best interest of J.L. and J.L. Appellant provided financially for the children. When he was offered a service plan following the second removal, appellant completed the plan. Although they had been rejected for home placement, other family members expressed their desire to assist with raising J.L. and J.L. Giving due

consideration to all of the evidence, the jury could reasonably form a firm belief that termination of appellant's parental rights was in the best interest of J.L. and J.L. The evidence is therefore factually sufficient to support the verdict. *In re C.H.,* 89 S.W.3d at 25.

The issue we must determine is whether, by failing to preserve an issue of factual sufficiency for appellate review by including the issue in a statement of points, counsel's performance fell below an objective standard of reasonable assistance. *In re M.S.,* 115 S.W.3d at 549. Because the evidence is factually sufficient to support the jury's verdict, we cannot conclude that counsel unjustifiably failed to preserve the factual sufficiency complaint for appeal. We overrule issue two and affirm the judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 9, 2011
Opinion Delivered February 24, 2011

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