COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00071-CV

IN THE INTEREST OF M.R.,
A CHILD

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-102828-16

MEMORANDUM OPINION[1]

Appellant L.S. (Mother) appeals the trial court's termination of her parent-child relationship with her son M.R. In two issues, she contends that (1) the trial court committed fundamental error by not providing statutorily-required warnings ("statutory warnings") at the status and permanency hearings and (2) the evidence is legally and factually insufficient to support the trial court's finding that

[1]*See* Tex. R. App. P. 47.4.

she constructively abandoned M.R. Because the evidence is legally and factually sufficient to support the trial court's constructive abandonment finding and Mother had ample notice of the statutory warnings, we affirm the trial court's judgment.

I. Reports of Mother's Unstable Behavior and Neglect and Mistreatment of the Infant M.R. Led to His Removal.

In a period of less than three months, the Texas Department of Family and Protective Services (TDFPS) received several reports of Mother's erratic behavior and mistreatment of infant M.R.

A. November 23, 2015

When M.R. was just over four months old and staying with Mother at the Dallas Night Shelter, the Dallas County Child Protective Services Division (CPS) of TDFPS received a report that:

- Mother was noncompliant on psychiatric medications;
- Mother was using crack cocaine;
- Mother was found at a crack house;
- Mother thought someone was trying to kill her; and
- M.R. and his half-sisters[2] were malnourished or underweight.

No case was opened in Dallas, and no investigation ensued there.

[2]M.R.'s half-sisters were living with their father in Louisiana when M.R. was removed; they are not part of this appeal.

B. January 5, 2016

About six weeks later, on January 5, 2016, when Mother and M.R. were staying at the Presbyterian Night Shelter in Fort Worth, Tarrant County CPS Investigator Daniella Valdez went to the shelter to interview Mother based on the November 2015 referral. Mother told Investigator Valdez that she had anxiety and depression but was not on medication.

C. January 6, 2016

TDFPS received another report the next day stating concerns for Mother's mental health and specifically relaying observations that Mother was:

- leaving M.R. crying alone for hours at a time;
- leaving M.R. sitting alone in his car seat with blankets and stuffed animals on top of him;
- talking to herself;
- anxious and making irrational statements; and
- walking around the shelter's restroom naked.

D. January 28, 2016

About three weeks later, on January 28, 2016, CPS Investigator Valdez spoke to the case manager at Presbyterian Night Shelter, Dreka Andrews. Andrews told Investigator Valdez that Mother

- had been having mental breakdowns and psychotic episodes;
- wanted to take a bus back to Louisiana; and
- might place M.R. in foster care.

Investigator Valdez testified that Mother was offered services at the shelter but did not participate in any.

E. February 4, 2016

On February 4, 2016, TDFPS received another report that Mother:

- had a mental breakdown but refused to be seen for psychological treatment;
- was telling Presbyterian Night Shelter staff that she was going to leave the shelter but leave M.R. there or let CPS take him;
- was talking to herself; and
- was seen pinching M.R. to keep him awake.

Investigator Valdez visited the shelter again. She examined M.R. but saw no marks or bruises. Mother told Investigator Valdez that when she talked to herself, she was usually praying and that talking to herself calmed her down. Mother denied leaving M.R. alone, wanting to leave him at the shelter, and wanting CPS to take him.

Mother told Investigator Valdez that M.R. was constipated "and that she thought a penis was coming out of his anus when he passed a bowel movement." Mother saved diapers containing feces from three days to show to the doctor, and she showed Investigator Valdez the diapers. After this discussion, Mother told Investigator Valdez that her appointment with MHMR was scheduled for February 17, 2016. Investigator Valdez called MHMR seeking quicker treatment, and Mother talked to MHMR personnel on the phone. The MHMR employee then told Investigator Valdez that Mother would have to wait

until her appointment; she did not qualify for the "crisis team" because she was not having suicidal or homicidal thoughts.

F. February 8, 2016

On February 8, Presbyterian Night Shelter Case Manager Andrews spoke with Investigator Valdez again. Andrews told Investigator Valdez that Mother had

- episodes over the weekend;
- told the staff she had nightmares of someone killing her and M.R.;
- been seen pinching M.R. again;
- said that she was scared of M.R. going to sleep; and
- said that she was having flashbacks of being raped.

Investigator Valdez and a TDFPS Family-Based Social Services (FBSS) worker went to the shelter. Investigator Valdez stated that Mother appeared confused, very anxious, nervous, and "at times did not make sense." Mother told Investigator Valdez that she had been having nightmares of someone killing M.R. and her and that she was having flashbacks of when she had been raped. Investigator Valdez again called MHMR and asked for Mother to be evaluated on the phone in hopes of quicker treatment, but after the phone evaluation Mother was again told to wait for her February 17, 2016 appointment. Mother declined FBSS and stated that she was meeting with an adoption agency the next day.

G. February 10, 2016: Removal of M.R.

On February 10, 2016, Investigator Valdez received a telephone call from the CPS liaison at Cook Children's Hospital in Fort Worth. The liaison told Investigator Valdez that Mother had taken M.R. in for treatment, and he was "doing fine," but Mother "seemed to be having a mental break down and had asked for an exorcism to be done on" M.R. Mother had asked the nurses for a person who knew voodoo. One nurse took her to an exam room. Mother had an outburst and ran out of the room saying that she was in a "third dimension" and needed someone to perform an exorcism on M.R. Mother's moods changed rapidly; one second she would be very calm, and then she would be very anxious.

Fort Worth police responded to Cook Children's call about Mother. Officer Hempstead stated that Mother told her that M.R. had "discharged bowel movements several times that look like penises." When Officer Hempstead asked Mother what happened when M.R. showed signs of being possessed with voodoo, Mother replied that he "pale[d], scream[ed], and curl[ed] up into a ball, often passing a stool that look[ed] like a penis." Mother told Officer Hempstead that the voodoo began in Louisiana. Mother also told the officer that she prayed when M.R. showed signs of voodoo and that the voodoo tempted her as well.

Officer E. Montgomery stated that Mother told the officers that

- she felt "out of herself at the shelter";
- M.R.'s "stool looked like a large penis";

- She could “go do what she need[ed] to do to get herself together” if “she could put the baby somewhere safe”; and

- M.R. was balled up and something was wrong even though he checked out fine.

Investigator Valdez reported that both officers stated that M.R. would be in serious danger if he remained with Mother.

Pat Ballard, R.N. Case Manager at the Homeless Initiative Program at Cook Children’s Hospital, stated that she had several conversations with Mother, who always refused help. Ballard was also aware of the problems that had occurred with Mother at the shelter. Ballard stated that Mother’s mental health was a danger to M.R.’s wellbeing.

CPS removed M.R. while he was in the x-ray room without Mother. Mother ran around the hospital crying and yelling when she learned of the removal.

II. The Evidence Is Legally and Factually Sufficient to Support the Trial Court’s Finding that Mother Constructively Abandoned M.R.

In her second issue, Mother contends that the evidence is legally and factually insufficient to support the trial court’s constructive abandonment finding. She does not challenge the trial court’s best interest finding.

A. Standards of Review

Termination decisions must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001(b) (West Supp. 2016), § 161.206(a) (West 2014); *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012). Evidence is clear and convincing if it “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); *E.N.C.*, 384 S.W.3d at 802.

1. Legal Sufficiency

In evaluating the evidence for legal sufficiency in parental termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that TDFPS proved the challenged ground for termination. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Here, we determine whether the trial court could have reasonably formed a firm belief or conviction that TDFPS proved that Mother constructively abandoned M.R. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N).

We review all the evidence in the light most favorable to the finding and judgment. *J.P.B.*, 180 S.W.3d at 573. We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved. *Id.* We consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.*

We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder's province. *Id.* at 573. And even when credibility issues appear in the appellate record, we defer to the factfinder's determinations as long as they are not unreasonable. *Id.*

2. Factual Sufficiency

We are required to perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support the termination of a parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In reviewing the evidence for factual sufficiency, we give due deference to the factfinder's findings and do not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). Here, we determine whether, on the entire record, the trial court could have reasonably formed a firm conviction or belief that Mother constructively abandoned M.R. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

B. Substantive Law

To establish constructive abandonment under section 161.001(b)(1)(N), TDFPS had to prove by clear and convincing evidence that: (1) Mother had "constructively abandoned [M.R.] who ha[d] been in [TDFPS's] permanent or temporary managing conservatorship . . . for not less than six months"; (2) TDFPS made reasonable efforts to return M.R. to Mother; (3) Mother had not regularly visited or maintained significant contact with M.R.; and (4) Mother had demonstrated an inability to provide M.R. with a safe environment. Tex. Fam. Code Ann. § 161.001(b)(1)(N); *see In re A.S.*, No. 02-16-00284-CV, 2017 WL 371496, at *5 (Tex. App.—Fort Worth Jan. 26, 2017, pet. denied) (mem. op.).

There is no dispute about three of the elements. The evidence showed that:

- TDFPS had been M.R.'s temporary sole managing conservator for more than eleven months by the time of trial, so the requirement that TDFPS have six months of managing conservatorship was satisfied;
- Mother had not seen M.R. for more than five months—close to one-third of his life—so the requirement that she had not regularly visited or maintained significant contact was satisfied; and
- Mother
  - (1) had untreated bipolar disorder and post-traumatic stress disorder throughout the case;
  - (2) did not have stable housing throughout the case;
  - (3) did not contact TDFPS for more than five months before trial;
  - (4) could not be reached by TDFPS during that period, either directly or indirectly; and
  - (5) did not attend trial.

This evidence satisfied the requirement that Mother had demonstrated an inability to provide M.R. with a safe environment. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N)(ii)—(iii).

Appellant challenges the remaining element—whether TDFPS "made reasonable efforts to return the child to the parent." *Id.* § 161.001(b)(1)(N)(ii). TDFPS's preparation and administration of a service plan for a parent constitutes evidence that TDFPS made reasonable efforts to return a child to his parent. *In re M.R.J.M.*, 280 S.W.3d 494, 505 (Tex. App.—Fort Worth 2009, no pet.) (op. on reh'g), as does evidence that TDFPS made efforts to place a child with relatives.

See H.N. v. Dep't of Fam. & Protective Servs., 397 S.W.3d 802, 810 (Tex. App.—Fort Worth Mar. 13, 2013, no pet.).

Here, the evidence shows that TDFPS made reasonable efforts to return M.R. to Mother. TDFPS conservatorship worker Kimberly Rayford testified that:

- She discussed the service plan with Mother in July 2016;
- Mother had already received the service plan and already knew its contents;
- Mother understood what she was being asked to do but told Rayford that she did not have time to work any of the services because she was looking for housing;
- On August 2, 2016, Rayford discussed the plan with Mother again; and
- Mother again rejected the idea of working services, stating that she did not have time to focus on anything other than "trying to get herself settled."

Rayford testified that TDFPS also attempted placement with relatives.

From this evidence, the trial court could have reasonably formed a firm belief or conviction that TDFPS had made reasonable efforts to return M.R. to Mother, satisfying the remaining element of constructive abandonment. *See* § 161.001(b)(1)(N)(ii); *H.N.*, 397 S.W.3d at 810; *M.R.J.M.*, 280 S.W.3d at 505. We therefore hold that the evidence is legally and factually sufficient to support the trial court's constructive abandonment finding and overrule Mother's second issue.

III. Mother Had Notice That Her Parent-Child Relationship with M.R. Was at Stake.

A. Statutory Warnings

In her first issue, Mother contends that "[t]he trial court committed fundamental error by not providing the termination warnings at the status and permanency hearings as mandated by" section 263.006 of the family code. Section 263.006 provides,

> At the status hearing under Subchapter C1 and at each permanency hearing under Subchapter D2 held after the court has rendered a temporary order appointing the department as temporary managing conservator, the court shall inform each parent in open court that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the child with a safe environment.

Tex. Fam. Code Ann. § 263.006 (West 2014).

B. Mother Did Not Preserve Her Complaint.

Mother had the burden of presenting a record showing that she did not receive the warnings. *In re J.D.B.*, No. 2-06-451-CV, 2007 WL 2216612, at *3 (Tex. App.—Fort Worth Aug. 2, 2007, no pet.) (mem. op.) No reporter's record was made of the hearings at issue—the April 6, 2016 status hearing or the August 10, 2016 permanency hearing. Mother points to nowhere in the appellate record where she objected in the trial court to the absence of the records of the hearings or the alleged failure of the trial court to give the statutory warnings. She therefore did not preserve a complaint about the absence of the records or the trial court's alleged failure to provide the statutory warnings. *See* Tex. R.

App. P. 13.1 (requiring a court reporter to attend court hearings and make a full record unless excused by agreement of the parties); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783 (Tex. 2005) (stating that when no record is made, it "implies an agreement that no record was made because none was needed"); *Reyes v. Credit Based Asset Servicing & Securitization*, 190 S.W.3d 736, 740 (Tex. App.—San Antonio 2005, no pet.) (holding that court reporter's failure to make full record of all proceedings absent agreement of parties is error but party must object to that failure to preserve error for appeal); *accord In re J.H.*, No. 02-16-00009-CV, 2016 WL 3162045, at *7 (Tex. App.—Fort Worth June 2, 2016, no pet.) (mem. op.) (holding appellant forfeited error by failing to object to reporter's failure to record trial court's alleged comments).

C. Mother Does Not Convince Us that the Alleged Error is Fundamental.

Error is not forfeited if it falls within the narrow category of "fundamental error," which requires no trial court predicate for appellate review. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003), *cert. denied*, 541 U.S. 945 (2004). Fundamental error exists in rare instances in which error directly and adversely affects the interest of the public generally, as that interest is declared by the statutes or constitution of our state, or instances in which the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006).

Because of "strong policy considerations favoring preservation," however, the supreme court has called fundamental error "a discredited doctrine." *B.L.D.*, 113 S.W.3d at 350 (quoting *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam)). Again, it is applied in civil cases only rarely, such as when the record shows on its face that the court lacked jurisdiction, and in juvenile delinquency cases. *Id.* Fundamental error is applied in juvenile delinquency cases based on the "quasi-criminal" nature of those cases; thus, "this rationale does not support applying the criminal fundamental-error doctrine to parental rights termination cases." *Id.* at 351 (declining to extend the fundamental-error doctrine to unpreserved charge errors in termination cases); *see also In re L.M.I.*, 119 S.W.3d 707, 708 (Tex. 2003), *cert. denied*, 541 U.S. 1043 (2004) (stating that in the context of parental rights termination, "adhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose").

Mother does not cite any cases applying fundamental error to support her contention that the trial court's alleged failure to orally recite the statutory warnings is fundamental error. *See* Tex. R. App. P. 38.1(i). Based on the law cited above, we decline to extend the doctrine to this case. *See In re A.L.W.*, No. 02-11-00480-CV, 2012 WL 5439008, at *11 (Tex. App.—Fort Worth Nov. 8, 2012, pet. denied) (mem. op.) (choosing not to apply the doctrine of fundamental error in parental termination case to parents' unpreserved issues).

D. The Record Contains Evidence That Mother Had Notice of the Warnings and Notice That Termination of Her Parent-Child Relationship Was at Risk.

In the interest of justice, however, we point out that Mother had notice of the statutory warnings and knew that she risked the termination of her parental rights to M.R. The original petition provides,

> **17. Statutory Warning to Parents**
>
> The Department requests that the Court inform each parent in open court as required by §§ 262.201(c) and 263.006, Texas Family Code, at the adversary hearing, at the status hearing, and at each subsequent permanency hearing that parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the child with a safe environment.

Mother's waiver of service, signed and filed on February 11, 2016, almost a year before the trial, acknowledges that she received a copy of the petition.

On March 14, 2016, Mother appeared in person and through counsel at an adversary hearing. The following provision appears in the temporary order resulting from that hearing:

> **10. Finding and Notice**
>
> **THE COURT FINDS AND HEREBY NOTIFIES THE PARENTS THAT EACH OF THE ACTIONS REQUIRED OF THEM BELOW ARE NECESSARY TO OBTAIN THE RETURN OF THE child, AND FAILURE TO FULLY COMPLY WITH THESE ORDERS MAY RESULT IN THE RESTRICTION OR TERMINATION OF PARENTAL RIGHTS.**

In TDFPS's status report to the court filed March 22, 2016, it is noted that Mother "was given a copy of the family plan on 03/10/2016." The March 10, 2016 family service plan in the clerk's record includes the following provision:

> **2. TO THE PARENT: THIS IS A VERY IMPORTANT DOCUMENT. ITS PURPOSE IS TO HELP YOU PROVIDE YOUR CHILD WITH A SAFE ENVIRONMENT WITHIN THE REASONABLE PERIOD SPECIFIED IN THE PLAN. IF YOU ARE UNWILLING OR UNABLE TO PROVIDE YOUR CHILD WITH A SAFE ENVIRONMENT, YOUR PARENTAL AND CUSTODIAL DUTIES AND RIGHTS MAY BE RESTRICTED OR TERMINATED OR YOUR CHILD MAY NOT BE RETURNED TO YOU. THERE WILL BE A COURT HEARING AT WHICH A JUDGE WILL REVIEW THIS SERVICE PLAN.**

At the April 6, 2016 status hearing, the trial court found that Appellant had reviewed but not signed the service plans filed by TDFPS. The plans on file (including the March 10, 2016 plan containing the language above) were incorporated by reference and made an order of the court.

Conservatorship worker Kimberly Rayford testified that she first discussed the service plan with Mother in July 2016, within days of being newly assigned to the case. Rayford stated that Mother had already received the service plan and already knew its provisions. On August 2, 2016, Rayford discussed the plan with Mother again.

On December 8, 2016, about six weeks before trial, the trial court held a permanency hearing before the final order. Appellant appeared through counsel. The service plans on file (including the March 10, 2016 plan containing the language recited above) were again incorporated by reference and made an order of the court.

We hold that this evidence is sufficient to show that Mother had notice of the statutory warnings and knew that she faced the termination of her parent-

child relationship with M.R. *See J.D.B.*, 2007 WL 2216612, at *4. Further, to the extent that Mother "did not receive the statutory warnings in open court at the required times, nothing in the record suggests that the error probably caused the rendition of an improper judgment or prevented [her] from properly presenting her case to this court." *Id.* at *4, n.21; Tex. R. App. 44.1(a). We overrule Mother's first issue.

IV. Conclusion

Having overruled Mother's two issues, we affirm the trial court's judgment.

PER CURIAM

PANEL: PITTMAN, J.; LIVINGSTON, C.J.; and WALKER, J.

DELIVERED: August 10, 2017