IN THE
TENTH COURT OF APPEALS

No. 10-17-00060-CV

IN THE INTEREST OF A.C. AND S.C., CHILDREN

From the 21st District Court
Burleson County, Texas
Trial Court No. 28,210

MEMORANDUM OPINION

David C. appeals from a judgment that terminated his parental rights to his children, A.C. and S.C. After a bench trial, the trial court found that David had constructively abandoned the children, failed to complete his service plan, and that termination of his parental rights was in the best interest of the children.[1] *See* TEX. FAM. CODE ANN. § 161.001(b)(1) & (2) (West 2014). David complains that the evidence was legally and factually insufficient for the trial court to have found that he constructively abandoned the children, that the children were removed for abuse or neglect by him as

[1] The mother of A.C. and S.C. signed a voluntary relinquishment of her parental rights and her rights were terminated on this basis. She did not appeal the trial court's judgment.

required for a finding that he failed to complete his service plan, and that termination was in the best interest of the children. Because we find that the evidence was legally and factually sufficient, we affirm the judgment of the trial court.

STANDARD OF REVIEW

The natural right existing between parents and their children is of constitutional dimensions. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982). However, parental rights are not absolute, and the emotional and physical interests of a child must not be sacrificed merely to preserve those rights. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

The Family Code permits a court to terminate the parent-child relationship if the petitioner establishes (1) one or more of the statutorily-enumerated acts or omissions and (2) that termination of the parent-child relationship is in the best interest of the children. TEX. FAM. CODE ANN. § 161.001 (West 2014). Though evidence may be relevant to both elements, each element must be proved, and proof of one does not relieve the burden of proving the other. *See In re C.H.*, 89 S.W.3d at 28. While both a statutory ground and best interest of the children must be proved, only one statutory ground is required to terminate parental rights under Section 161.001. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Therefore, we will affirm the trial court's order of termination if legally and factually sufficient evidence supports any one of the grounds found in the termination order, provided the record shows also that it was in the best interest of the children for

the parent's rights to be terminated. *See id*.

Due process requires the application of the clear and convincing standard of proof in cases involving involuntary termination of parental rights. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see* TEX. FAM. CODE ANN. § 161.206(a) (West 2014). "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. This standard, which focuses on whether a reasonable jury could form a firm belief or conviction, retains the deference a reviewing court must have for the factfinder's role. *In re C.H.*, 89 S.W.3d at 26. We must maintain appropriate deference to the jury's role as factfinder by assuming that it resolved conflicts in the evidence in favor of its finding when reasonable to do so and by disregarding evidence that it reasonably could have disbelieved. *See In re J.F.C.*, 96 S.W.3d at 266.

In reviewing the legal sufficiency of the evidence supporting an order terminating parental rights, we 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 as to the truth of the allegations sought to be established. *In re J.F.C.*, 96 S.W.3d at 266. "To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id*. In other

words, we will disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id*.

When reviewing the factual sufficiency of the evidence supporting a termination order, we determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the [Department]'s allegations." *In re C.H.*, 89 S.W.3d at 25. In conducting this review, we consider whether the disputed evidence is such that a reasonable factfinder could not have resolved the 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*.

CONSTRUCTIVE ABANDONMENT

In his first issue, David complains that the evidence was legally and factually insufficient for the trial court to have found that he constructively abandoned the children pursuant to Section 161.001(b)(1)(N) of the Family Code. Section 161.001(b)(1)(N) permits termination on clear and convincing evidence in part that the parent committed the following act or omission:

> (N) 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 or authorized agency has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has

demonstrated an inability to provide the child with a safe environment.

TEX. FAM. CODE ANN. § 161.001(b)(1)(N). It is undisputed that the children were in the temporary managing conservatorship of the Department for more than six months. Rather, David argues that the Department failed to meet its burden regarding the other three required elements.

Reasonable efforts to return the children

David argues that the Department did not make reasonable efforts to return the children to him because he was not assigned a courtesy caseworker in the city in which he was residing which could have assisted him in seeking the return of the children. Case law has held that "[r]easonable efforts" to reunite a parent and child can be satisfied through the preparation and administration of a service plan. *In re D.S.A.*, 113 S.W.3d 567, 570-72 (Tex. App.—Amarillo 2003, no pet.); *In re K.M.B.*, 91 S.W.3d 18, 25 (Tex. App.—Fort Worth 2002, no pet.). David does not dispute that a service plan was prepared and administered and that he did not complete it. Nor does he explain how a courtesy caseworker would have been able to assist him in completing his service plan when he was able to maintain regular contact by phone with his caseworkers and those caseworkers were able to set up services for him since they were in the same region where David resided. The evidence was legally and factually sufficient for the trial court to have found that the Department made reasonable efforts to return the children to him through the service plan, which David did not complete.

Failure to visit or maintain significant contact

David also argues that the evidence was legally or factually insufficient for the trial court to have found that he did not regularly visit or maintain significant contact with his children because he maintained regular phone contact with the Department and visited with S.C. three times during the pendency of the case. The Department caseworkers testified that they had attempted to arrange visits at other times, but that David was unable to agree to the arrangements. David argues that it was too difficult for him to set up visits with A.C. because he was moved several times between residential treatment centers, therapeutic foster homes, and psychiatric hospitals. He had not seen A.C. since December of 2014, which was more than six months prior to the removal of the children by the Department.

Sporadic visits have been found sufficient to support a finding of lack of significant contact under section 161.001(1)(N). *See, e.g., In re N.R.T.*, 338 S.W.3d 667, 673-74 (Tex. App.—Amarillo 2011, no pet.); *In re H.R.*, 87 S.W.3d 691, 699 (Tex. App.—San Antonio 2002, no pet.). *See also In re J.J.O.*, 131 S.W.3d 618, 628-29 (Tex. App.—Fort Worth 2004, no pet.) (holding evidence sufficient to support finding that mother had not regularly visited or maintained significant contact with child when mother made only twelve visits during a nine-month period); *In re P.R.*, 994 S.W.2d 411, 416 (Tex. App.—Fort Worth 1999, pet. dism'd w.o.j.) (finding evidence sufficient under 161.001(1)(N) where mother sporadically visited child, used drugs, and failed to comply with service plan). The

caseworkers testified that when they attempted to set up visits with David he always had an excuse for why he could not attend, citing conflicts with work and transportation issues. The caseworkers were willing to meet David halfway or to bring S.C. to Austin to visit, but those visits did not take place because David was not available. Even if David maintained regular contact with the caseworkers, his argument would not defeat the ground for termination because the Department was required to prove that David did not regularly visit or maintain significant contact with the children, not that he lacked the desire to visit them or communicated with the Department regularly regarding issues not always related to visitation. The evidence was legally and factually sufficient for the trial court to have found that he failed to maintain contact with the children.

Inability to provide a safe environment

David also argues that the evidence was legally and factually insufficient for the trial court to have found that he had demonstrated the inability to provide the children with a safe environment. David argues that because the caseworker did not visit his daughter's two-bedroom apartment where he was residing with her husband and two young children and because he had full-time employment during the pendency of the case, the Department did not meet its burden to show that he had demonstrated an inability to provide the children with a safe environment.

During the pendency of the case, David lived in four separate residences and was living with his daughter because he did not like living by himself. David testified that he

had looked into getting his own apartment but the one he had looked at was not ready for tenants. David believed that it would be sufficient for him to bring A.C. and S.C. into his daughter's apartment with her family, even though there were only two bedrooms in the apartment. David did not have a driver's license and had made no attempts to get one. He relied solely on buses for transportation even though that made it difficult for him to get around at times. David had the opportunity and financial ability to establish a residence that would be suitable for his children, but he chose not to do so during the proceedings. We find that the evidence was legally and factually sufficient for the trial court to have found that David demonstrated an inability to provide the children with a safe environment.

Because we have found that the evidence was legally and factually sufficient for the trial court to have found that David had committed each of the actions set forth in the three subsections of Section 161.001(b)(1)(N), we overrule issue one. Because we have found the evidence sufficient regarding one predicate act in Section 161.001(b)(1), we do not address David's second issue regarding the failure to complete his service plan pursuant to Section 161.001(b)(1)(O).

BEST INTEREST

In his third issue, David argues that the evidence was legally and factually insufficient for the trial court to have found that termination was in the best interest of the children. There are several nonexclusive factors that the trier of fact in a termination

case may consider in determining the best interest of the child, which include: (a) the desires of the child, (b) the emotional and physical needs of the child now and in the future, (c) the emotional and physical danger to the child now and in the future, (d) the parental abilities of the individuals seeking custody, (e) the programs available to assist these individuals to promote the best interest of the child, (f) the plans for the child by these individuals or by the agency seeking custody, (g) the stability of the home or proposed placement, (h) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, and (i) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These factors are not exhaustive. *In re C.H.*, 89 S.W.3d at 27. Some listed factors may be inapplicable to some cases while other factors not on the list may also be considered when appropriate. *Id*.

The evidence supporting the statutory grounds for termination may be used to support a finding that the best interest of the children warrants termination of the parent-child relationship. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re P.E.W.*, 105 S.W.3d 771, 779 (Tex. App.—Amarillo 2003, no pet.). A best-interest analysis may also consider circumstantial evidence, subjective factors, and the totality of circumstances as well as the direct evidence. *In re D.S.*, 333 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.).

The evidence established that David had little or no relationship with his children even before they were removed from their mother. No explanation was given as to why

David did not have a relationship with the children. During the pendency of the case, David did little to establish a relationship with either child. The three visits with S.C. took place after court hearings, and David did not make himself available for other visits with the children.

David testified that he was making $2,000-2,500 per month but had made no progress toward establishing his own residence, getting a driver's license, or a vehicle. He had moved four times during the proceedings. David testified that he did not like living alone so he had not attempted to move out of his daughter's residence. David believed it would be appropriate to bring his two boys, ages 11 and 7 at the time of the final hearing, into a two-bedroom apartment to live with him, his daughter, her husband, and her two young children.

Additionally, during the pendency of the proceedings, David was hit by a car one night when he walked out in front of it after getting off of a bus. David was highly intoxicated at the time. David had a prior DWI conviction in 2006. The hospital's social worker, David's therapist, and the psychological evaluation recommended that David complete alcohol treatment but he did not do so. David also did not take any random drug or alcohol tests during the proceedings. David attended only three therapy sessions.

S.C. was placed in a basic care foster home and the Department believed that he would be adoptable. A.C. had behavioral issues that were being addressed through his placement in an RTC, and had harmed S.C. by burning him with a lighter which led to

the removal of the children from their mother. David did not believe that A.C. had any issues that required intervention. The caseworker testified that A.C. was improving and would hopefully be moved to a therapeutic foster home and be available for adoption with a family that would be able to meet his special needs.

Based on our review of the record, and giving appropriate deference to the trial court as the factfinder, we find that the evidence was legally and factually sufficient for the trial court to have found by clear and convincing evidence that termination was in the best interest of the children. We overrule issue three.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed July 12, 2017
[CV06]