COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN THE INTEREST OF	§	No. 08-21-00220-CV
L.C.M.,	§	Appeal from the
A MINOR CHILD.	§	65th District Court
	§	of El Paso County, Texas
	§	(TC# 2020DCM2352)

O P I N I O N

Appellant J.C.M., Jr. ("Father"),[1] appeals a trial court's judgment terminating his parental rights to son L.C.M. We affirm the judgment of the trial court.

I. BACKGROUND

A. Procedural History

L.C.M. is the child of Father J.C.M. and Mother R.S. Mother R.S. had two other children by other fathers: K.I.S., whose alleged father is S.P.S. ("Sam"); and I.M., whose alleged father is N.R.O. The Department began its investigation in May 2020 and removed all three of Mother's children after receiving reports of drug abuse and domestic violence involving Mother and Sam.[2]

[1] We refer to the parties by pseudonyms. *See* TEX.R.APP.P. 9.8(b).

[2] Mother R.S. had her parental rights to all three children terminated in this case as well. She did not appeal. As such,

Father was incarcerated at the time the Department began its investigation, and he remained incarcerated for the majority of this case, only being released about one month before the June 2021 hearing in this case.

After holding final hearings on May 18, 2021, and June 15, 2021, the trial court terminated Father's parental rights under Subsection (N).[3] Father both appealed the judgment and filed a motion for new trial in the trial court. The Department and Father later reached an agreement as to the appeal's disposition before the appeal could be submitted, so we reversed the trial court's judgment and remanded for further proceedings in accordance with the parties' agreement. *See In re I.M.*, No. 08-21-00107-CV, 2021 WL 4129473, at *1 (Tex.App.—El Paso Sept. 10, 2021, no pet.)(mem. op.).

B. Factual History

On remand, the trial court held a final hearing on December 20, 2021, via videoconference. At the hearing, Department Caseworker Jessica Canales testified she worked the case from May 2020 to November 2021. Canales stated that at the beginning of the case in May 2020, she was unable to contact Father because he was incarcerated, and once he was released, Father's probation officer reported that she was not able to relate any of contact information to Canales. As such, Canales initially introduced herself to Father by letter, and she provided her contact information to Father's probation officer. Canales testified that in her letter, she informed Father that he could send letters, cards, or gifts to his son through her, and she would forward them to L.C.M., but Father never sent any communications.

Canales testified that she wrote up a safety plan for Father while he was incarcerated that

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we will focus our attention on the parental relationship between Father J.C.M. and son L.C.M. and limit our discussion of the facts accordingly.

[3] The reporter's records from those hearings were not made part of this appeal's record.

included requirements that he "demonstrate an ability to parent the children, meet their basic needs, adequate parenting skills, no use or involvement with substance abuse, and basically just learning about his current circumstances [so] that way we would be able to conduct an assessment." Canales further testified that Father was served with a service plan and was aware of CPS involvement and removal of child, but Father did not do anything in jail to try to cooperate with the service plan. Likewise, according to Canales, Father did not contact her after he was released from jail prior to the June 2021 final hearing to attempt to regain custody of L.C.M.

According to Canales, Father stated at the previous hearing that he wanted his sister, Paternal Aunt, to take custody of L.C.M., but Paternal Aunt agreed to take custody of L.C.M. only, and the Department opposed that plan because it would separate L.C.M. from his two half-siblings and the three children were already bonded and had been placed together in removal since May 2020. After the Department voiced its opposition to separating the siblings, Canales said that no other relative stepped up to take L.C.M.

Canales further testified that after the final hearing in June 2021, she attempted to contact Father, but she could only reach his sister. Canales stated that the Department conducted jail searches, ran a finder's search, and reached out to relatives in an attempt to contact Father, but they could not reach him, including through a phone number he gave to the Department at the previous final hearing. She asserted that Father made no attempt to contact the Department himself.

The next time Canales saw Father after the June final hearing was in the hospital intensive care unit in either September or October, after Sam had allegedly stabbed Father over ten times with a sword when Father showed up at Mother and Sam's home. The circumstances surrounding the stabbing are unclear, and Canales stated that Father gave her conflicting information. Canales testified that Father had told her he went to Mother's house at roughly 2 a.m. to "take care of the

children, to check on their well-being and pray for them" as well as to bring them food. Father also told Canales that he was scheduled to be at a job interview at 4 a.m. that same day. Canales testified that she found Father's explanations for being at the house to be odd.

According to Canales, Father initially told her that he had not had any contact with Mother, but later stated that they had been calling and texting, but that Sam had hacked in Mother's Facebook, took her phone, and did not give her permission to talk to anybody else. Canales testified that Father told her after he arrived at the house, Sam stabbed him ten to fifteen times with a sword in front of two of the children.

Canales testified that she made contact with Father at the hospital, but Father told her he was in poor condition and did not want to speak with her, and he asked her and the investigator to leave because he was in a great deal of pain. He reported to Canales that he was living with his mother at an address in El Paso, but he did not give her his phone number when asked.

Canales testified that she created a new service plan for Father after he was released from jail that required him to take "[p]arenting classes, substance abuse treatment and drug testing" as well as demonstrate an ability to meet the basic needs of the children, along with "[g]iving us basic information, his address, phone number, maintaining contact with the Department, visiting with the children, [and] giving us more information to assess" his situation. She attempted to go over the service plan with Father in the hospital, but he did not agree to speak with her. Canales testified that she left the service plan on the table next to Father at the hospital, along with her business card, and left. When Canales went to the address Father gave her, she was unable to speak with any of the house residents. She returned to the hospital again but was denied entry to see Father because she was not family, so she left her card up front with the staff.

Canales left her employment with the Department on November 12, 2021. She testified

that Father never contacted her before she left, and so she was unable to determine if he had a car, home, job, or stable living situation. Father also never participated in any drug testing. She opined that it would be in L.C.M.'s best interest for Father's rights to be terminated, saying that L.C.M., who was three years' old at the time of the hearing, was bonded with his siblings and was doing well in his foster home placement.

Department Caseworker Angela Reyes took over Father's case from Canales following her departure and had worked the case for a little over a month at the time of the hearing. Reyes confirmed that L.C.M. was doing well in his foster placement, was hitting all developmental milestones, and was bonded with his other siblings. Reyes testified that she had contact with Father earlier in the morning on the day of the hearing at the El Paso Jail Annex. Reyes said Father told her that before being incarcerated again, he had gone to Mississippi in an attempt to get away from certain people that were negative influences in his life and to try and better himself by attending a drug treatment program, though Reyes did not know what the treatment plan entailed.

Father appeared at the hearing and testified. He stated that after leaving jail, he entered a four-month long program because he was preparing himself to be a better parent, though he did not specify details. Father further testified that he had been residing in Mississippi while receiving treatment. Father testified that he had not seen his son since almost the day he was born because Father had been incarcerated.[4]

Father testified that when the case began in May 2020, he was not in jail but was in a special probation program where he served nine months in the program and six months in the jail annex, but he agreed he was not free to leave under the program. Father denied receiving the initial May 2020 letter from Canales, and he testified that he did not recall receiving any letters from Canales

[4] Father's answers to some questions were difficult to follow at times, and the trial court sustained multiple nonresponsive objections raised by counsel during the course of Father's testimony.

at all. Instead, he learned of the Department's investigation through his attorney. He did confirm that he received a letter from the Department, but it was concerning one of L.C.M.'s half-siblings. Father acknowledged that "they sent me a bunch of letters" while he was incarcerated, but he could not recall if any of them told him that L.C.M. was in Department custody. Father was released on November 14, 2020. According to Father, he attempted to contact the Department to inquire about L.C.M. post-release but was unable to connect.

When asked about the stabbing incident, Father testified that he had no contact with Mother and that he had to go to Mother's house because her boyfriend "had her hostage," "wouldn't let her use the phone," and "was using . . . drugs and he was . . . really aggressive towards her." Father admitted to going to Mother's house at 1 a.m. to confront Mother's boyfriend rather than calling the police about the alleged abuse. Father referred to all three children as "my kids" and said he raised them and has "been the father since day one," though he admitted he had not done a DNA test to see if they were biologically his. Father testified that he was making efforts to prepare to "get help" so he could have his son back.

Father admitted that Canales may have left her card with him when she visited him in the hospital. However, Father denied receiving a service plan from Canales stating what he needed to do to get his son back. Father testified that he never heard anything about a service plan and that when Canales went to visit him in the hospital, he was "laced out" and not in "a good state of health" after having two surgeries to his stomach, though he did tell Canales that he would pray for her.

Father testified that he was out of the hospital for about a month before he was rearrested and reincarcerated for a probation violation, which he stated was a "misunderstanding." Father testified that he did call Canales one time after he left the hospital and may have left a voicemail.

He also stated that he gave the number to his mother and his sister, and that they were working to get the children back on his behalf. Father testified that he had two addresses, one in El Paso and one in Mississippi. He further testified that he had a job when he got out of prison with his grandfather at a landscaping company in El Paso.

At the conclusion of the final hearing, the trial court issued a judgment terminating Father's parental rights on Subsection (N)(constructive abandonment) and Subsection (O)(failure to follow a court order) grounds. This appeal followed.

II. DISCUSSION

Father raises three issues on appeal. In Issue One, Father asserts that the Department failed to establish constructive abandonment under Subsection (N) with legally and factually sufficient evidence. In Issue Two, he contends the evidence underpinning the failure to comply with a court order ground under Subsection (O) is also legally and factually insufficient. Finally, in Issue Three, Father maintains that the trial court erred by not naming Father as L.C.M.'s permanent managing conservator because he is a non-offending parent entitled to the parental presumption on issues of custody.[5]

We find that the Department established constructive abandonment through legally and factually sufficient evidence. As such, termination was warranted, and Father was not entitled to be named L.C.M.'s permanent managing conservator.

A. Standard of Review and Applicable Law

The natural right of a parent to the care, custody, and control of their children is one of constitutional magnitude. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see also Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)(acknowledging that a parent's rights to "the companionship,

[5] Father does not contest the trial court's findings on best interest in this appeal.

care, custody, and management" of their children are constitutional interests, "far more precious than any property right"). However, although parental rights are of constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). "Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *Id*.

Parental rights may be involuntarily terminated through proceedings brought under Section 161.001 of the Texas Family Code. *See* TEX.FAM.CODE ANN. § 161.001. We review parental rights termination appeals under the clear and convincing evidence standard. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). In applying this standard, "the reviewing court must undertake 'an exacting review of the entire record with a healthy regard for the constitutional interests at stake.'" *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014).

When reviewing the legal sufficiency of the evidence in a termination case, we consider all of the evidence in the light most favorable to the trial court's 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.P.B.*, 180 S.W.3d at 573. [Internal quotation marks omitted]. We give deference to the fact finder's conclusions, indulge every reasonable inference from the evidence in favor of that finding, and presume the fact finder resolved any disputed facts in favor of its findings, so long as a reasonable fact finder could do so. *In re K.A.C.*, 594 S.W.3d 364, 372 (Tex.App.—El Paso 2019, no pet.). We disregard any evidence that a reasonable fact finder could have disbelieved, or found to have been incredible, but we do not disregard undisputed facts. *Id*.

In a factual sufficiency review, the inquiry is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the challenge findings. *See In re K.A.C.*, 594 S.W.3d at 372. We must give due consideration to evidence that the fact finder could

reasonably have found to be clear and convincing. *Id*. A court of appeals should consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its finding. *Id*. If the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id*.

To obtain termination of parental rights, the petitioner must (1) establish one or more of the statutory acts or omissions enumerated as grounds for termination, and (2) prove that termination is in the best interest of the children. *Id*. at 371.

B. Analysis

The Department asserts that it proved Father constructively abandoned J.C.M. for more than six months under Subsection (N) with legally and factually sufficient evidence. We agree.

Section 161.001(b)(1) of the Texas Family Code sets out the list of predicates for terminating parental rights. Subsection (N) provides that a trial court may order termination if it finds, by clear and convincing evidence, that the parent has:

> [C]onstructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
>
> (i) the department 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).

Each of Subsection (N)'s three subparts must be proved by clear and convincing evidence before the trial court may terminate parental rights on constructive abandonment grounds. *In re*

A.L.H., 468 S.W.3d 738, 744 (Tex.App.—Houston [14th Dist.] 2015, no pet.). "The first element focuses on the Department's conduct; the second and third elements focus on the parent's conduct." *Id*.

In his Appellant's brief, Father focuses his argument entirely on the Department's conduct, contending that the termination judgment should be reversed on legal and factually insufficiency grounds because the Department failed to show it made reasonable efforts to return L.C.M. to him as required by TEX.FAM.CODE ANN. § 161.001(b)(1)(N)(i). Specifically, he highlights purported defects with the Department's service plans, noting that although Department Caseworker Canales testified that she created a service plan for Father, the service plans contained in the appellate record either do not mention Father at all or else do not comply with the minimum requirements for a service plan set out in TEX.FAM.CODE ANN. § 263.102.

Father argues that since the Department's preparation and administration of a service plan constitutes evidence that the Department made a reasonable effort to return a child, *see M.C. v. Tex. Dep't of Family & Protective Servs*., 300 S.W.3d 305, 309 (Tex.App.—El Paso 2009, pet. denied), the *absence* of a properly executed service plan in the record before us suggests the Department *did not* make reasonable efforts in this case by negative implication. In its response brief, the Department does not directly refute Father's assertion that the service plans contained in the appellate record may be defective under the statute. However, the Department maintains that while the implementation of a service plan is generally considered a reasonable effort to return a child, such evidence is not "absolutely required" to prove constructive abandonment under Subsection (N). *See In re J.G.S.*, 550 S.W.3d 698, 704-05 (Tex.App.—El Paso 2018, no pet.).

This Court's prior precedent supports the Department's contention, particularly in situations like this one where constructive abandonment is alleged against an incarcerated parent.

In *In re J.G.S.*, it was undisputed that the Department failed to create or implement a service plan for a parent who was incarcerated. *Id*. at 704-05. Nevertheless, this Court affirmed termination on constructive abandonment grounds. The Court identified a split in authority among our sister courts as to whether, in a constructive abandonment case, the Department is excused from proving it made reasonable efforts to return a child to a parent when the parent was incarcerated. *Id*. (citing cases). Assuming for the sake of argument that the reasonable elements effort still applied in constructive abandonment cases involving incarcerated parents, this Court held that the Department's undertaking of reasonable reunification efforts "does not necessarily mean the child must be physically delivered to the incarcerated parent." *Id*. at 704. [Internal quotation marks omitted]. Instead, the Court held that proof the Department made "efforts to place the child with relatives may constitute legally and factually sufficient evidence to support the trial court's finding that the Department made reasonable efforts." *Id*. at 705. Applying this rule, the Court found that although the father in that case was incarcerated, the Department had made reasonable efforts to reunify by undertaking efforts to place the daughter with relatives on both the maternal and paternal sides of her family and eventually placing the daughter with a paternal aunt. *Id*.

Here, the evidence shows that the Department did explore the possibility of placing L.C.M. with Father's other relatives. However, the placement could not be made because the relative only wished to adopt L.C.M., which would result in the separation of the three bonded half-siblings. Under our prior precedent in *In re L.C.M.*, the Department's efforts to place the child with relatives constitutes legally and factually sufficient evidence that reunification was attempted.

Additionally, other parts of the record also show the Department did attempt to engage with Father multiple times. Canales testified that while Father was incarcerated, she introduced herself by letter, but there was no response. Father denied receiving a letter from Canales, though

he did later acknowledge he had received many letters from the Department. To the extent Father's testimony conflicted with that of Canales, the trial court was empowered to decide which version to credit as a credibility and demeanor matter. Furthermore, after Father was released and the Department consented to an agreed reversal of the termination judgment to allow Father time to engage with the Department, Canales attempted to follow up with Father personally while he was in the hospital. Although Father would not permit Canales to be added to the visitor's list, Canales left her card twice, and Father acknowledged receiving Canales card and attempting to call. Canales attempts to reach Father at the address and phone number he provided also failed. Father also moved briefly to Mississippi without apparently informing the Department of his move. Canales' testimony establishes that the Department went beyond merely perfunctory efforts to contact Father and actively attempted to engage Father directly. *Compare In re A.L.H.*, 468 S.W.3d 738, 743 (Tex.App.—Houston [14th Dist.] 2015, no pet.)(evidence was legally insufficient to demonstrate reasonable efforts to return child where there was no service plan and the Department's only efforts with respect to father were serving father with suit and obtaining a paternity order, but never making face-to-face contact).

In sum, the trial court could have found that the Department made reasonable efforts to return the child to Father under the circumstances based on the evidence presented. Father's Issue One is overruled. Because the evidence is legally and factually sufficient to uphold the termination judgment on Subsection (N) grounds, we need not address Father's Issue Two, the alternative Subsection (O) ground. *See* TEX.R.APP.P. 47.1 (court of appeals need not address issues that are unnecessary to the resolution of the appeal). Furthermore, because Father does not challenge the trial court's best interest finding, we hold that the trial court did not err by ordering termination. As such, Father cannot succeed in showing that the trial court erred by failing to name him as

L.C.M.'s permanent managing conservator, since, on the contrary, termination of his rights were warranted under the circumstances. Father's Issue Three is overruled.

III. CONCLUSION

The judgment of the trial court is affirmed.

May 13, 2022

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.)(Sitting by Assignment)