COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

		§	No. 08-22-00038-CV
IN THE INTEREST OF:		§	Appeal from the
G.C.S., JR.,		§	65th District Court
	a Child	§	of El Paso County, Texas
		§	(TC# 2020DCM6512)

D I S S E N T

I respectfully, dissent. In my view, the evidence is legally and factually insufficient to support termination of Father's parental rights under § 161.001(D). Therefore, I would reverse and remand to the trial court for proceedings consistent with this opinion.

However, I concur with the majority in affirming the trial court's judgment in terminating Mother's parental rights.

BACKGROUND

On December 15, 2020, DFPS was granted emergency custody of G.C.S., Jr. pending a hearing on December 28, 2020. An original petition for termination of Father's parental rights was filed on December 15, 2020. It sought termination for Father based on grounds in Texas Family Code § 161.001 (b)(1)(D), and (E). The address for Mother and Father was listed as 809½ Ochoa St., El Paso, Texas 79903.

A review of the clerk's record and exhibits shows Father was not personally served with the original petition filed on December 15, 2020. The first amended petition filed on October 13, 2021, recites service of the first amended petition was to be accomplished by serving his attorney of record. According to the May 20th permanency report, no method of service was listed for Father, however, it states Mother was served October 29, 2020. The admitted exhibits contain a citation for Mother reflecting she was served on August 18, 2021. That citation was issued on December 17, 2020.

A child support order dated June 28, 2018, filed as an exhibit by DFPS, states, "The court issues no orders regarding conservatorship, possession and access, child support and health insurance as the parties got married today, 6/28/18."

Termination Trial Testimony

According to DFPS investigator, Blair-Santaella ("Investigator"), G.C.S., Jr., was removed on October 15, 2020, and placed in DFPS custody. Mother was arrested for allegedly driving while intoxicated with G.C.S., Jr., who was about three years old. The removal of the children was based on Mother's arrest and a lack of a care giver. When the DFPS investigator arrived at the police station, all three children were there. At the time of her arrest, Mother was living in a home on Quail Avenue. Mother told the investigator her spouse was Father, and he is the father of G.C.S., Jr. According to the investigator, the police officers were concerned about the condition of the Quail house.

Mother told the investigator Father did not have a phone but could be found at Mata's Produce. The investigator called Mata's but was unable to contact him. Later that day, Father called the investigator. Father told the investigator he was unaware Mother was drinking or had a drinking problem.

On December 14, 2020, the trial court ordered the return of G.C.S., Jr., to Father. On that day, the investigator attempted to locate Father because she had never met him previously. The trial court ordered the return of G.C.S., Jr., because Father was not an alleged perpetrator. The investigator found him standing outside Mata's Produce. Father told her he was unaware of a hearing. The investigator accompanied Father to his home which was one block from Mata's Produce.

Father explained to the investigator "they hadn't fixed the apartment yet[.]" The investigator found the apartment had no heat and no working toilet. Father told the investigator he and Mother were living together, but because of Mother's stomach issues she was residing elsewhere.

The investigator testified she explained DFPS' concerns regarding the home and Mother living there. According to her, Father told her he was going to repair the home, fix the wiring, fix the heat and toilet. He stated Mother is his wife and they all should live together. Father also told the investigator, the apartment was not his but belonged to a friend of his living in Mexico, who allowed him to stay there.

The investigator did not contact Father's landlord regarding the status of the repairs. She did not attempt to help secure any government assistance for him, or job training opportunities. The investigator did not make efforts to assist Father in securing appropriate housing. She gave him a referral sheet listing different agencies in the community and their telephone numbers. Father told her he worked for tips in helping customers put groceries in their vehicles, but she did not ascertain his income level. She agreed he needed assistance in finding a better job, but she acknowledged she did nothing to help him.

According to the investigator, on December 14th, the child was unable to be reunified with his father due to the condition of the home and Mother's presence there. Father was validated for neglectful supervision of G.C.S., Jr.

Conrad, told the trial court G.C.S., Jr. was initially placed at the Child Crisis Center in October 2020. When he was removed on December 15, 2020, G.C.S., Jr. continued to remain at the Child Crisis Center until January 2021, when he was placed in a foster home in Dallas.

Standard of Review

"Because the natural right between a parent and his child is one of constitutional dimensions, termination proceedings must be strictly scrutinized." *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014) (internal citations omitted) (citing *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *Interest of G.M.*, 596 S.W.2d 846, 846 (Tex. 1980)). Due process in these cases "requires application of the clear and convincing standard of proof." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002)). The family code defines clear and convincing evidence as "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 heightened standard of proof carries the weight and gravity due process requires to protect the fundamental rights at stake. *Interest of A.C.*, 560 S.W.3d 624, 630 (Tex. 2018). "[D]ue process also requires a heightened standard of review of a trial court's finding under section 161.001(b)(1)(D) or (E), even when another ground is sufficient for termination, because of the potential consequences for parental rights to a different child." *Interest of N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam).

"Because of this high evidentiary burden at trial, we have concluded that appellate review in parental termination cases also warrants a heightened standard of review." *Interest of N.G.*, 577 S.W.3d at 235 (citing *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014)). "In conducting a legal-

sufficiency review, the reviewing court cannot ignore undisputed evidence contrary to the finding but must otherwise assume the factfinder resolved disputed facts in favor of the finding." *Interest of A.C.*, 560 S.W.3d at 630. "Evidence is legally sufficient if, viewing all the evidence in the light most favorable to the fact-finding and considering undisputed contrary evidence, a reasonable factfinder could form a firm belief or conviction that the finding was true." *Id.* "If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient." *In re J.F.C.*, 96 S.W.3d at 266.

"In a factual-sufficiency review, the appellate court must consider whether disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding." *In re A.C.*, 560 S.W.3d at 631. "Evidence is factually insufficient if, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of a finding is so significant that the factfinder could not have formed a firm belief or conviction that the finding was true." *Id.*

Endangerment

The trial court found "by clear and convincing evidence that [Father] knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child[.]".

To endanger is "to expose to loss or injury or jeopardize a child's emotional or physical health." *Interest of N.T.*, 474 S.W.3d 465, 476 (Tex. App.—Dallas 2015, no pet.). A parent may endanger a child either by acts or omissions that need not be directed at the child and it is not necessary that a child actually sustain an injury. *In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996) (per curiam); *Interest of N.T.*, 474 S.W.3d at 476.

"[W]e are to consider the child's environment before the Department's removal of the child." *In re M.D.M.*, 579 S.W.3d 744, 767 (Tex. App.—Houston [1st Dist.] 2019, pet. granted.); *see also Ybarra v, Texas Dep't of Human Servs.*, 869 S.W.2d 574, 577 (Tex. App.—Corpus Christi 1992, no writ); *Interest of A.G.*, No. 07-17-00440-CV, 2018 WL 1999171, at *5-6 (Tex. App.—Amarillo Apr. 27, 2018, pet. denied) (mem. op.); *In re J.R.*, 171 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2005, no writ); *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Endangerment Due to a Child's Environment

"'Environment' refers to the acceptability of living conditions, as well as a parent's conduct in the home." *Interest of J.E.M.M.*, 532 S.W.3d 874, 881 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see In re J.D.*, 436 S.W.3d 105, 114 (Tex. App.—Houston [14th Dist.] 2014, no pet.). When seeking termination under subsection D, the Department must show that the child's living conditions pose a real threat of injury or harm. *In re N.R.*, 101 S.W.3d at 776; *Ybarra*, 869 S.W.2d at 577. Conduct that demonstrates awareness of an endangering environment is sufficient to show endangerment. *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). TEX.FAM.CODE ANN. §161.001 (b)(1)(D). Conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child. *See A.S. v. Texas Dep't of Fam. and Prot. Servs.*, 394 S.W.3d 703, 712 (Tex. App.—El Paso 2012, no pet.); *Interest of M.R.J.M.*, 280 S.W.3d 494, 503 (Tex. App.—Fort Worth 2009, no pet.).

Termination under § 161.001(b)(1)(D) is permitted "because of a single act or omission." *A.S.*, 394 S.W.3d at 713; *see Interest of R.D.*, 955 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, pet. denied).

Subsection D is not a basis for terminating parental rights if the parent was unaware of the endangering environment. *In re Z.C.J.L.*, No. 14-13-00115-CV, No. 14-13-00147-CV, 2013 WL

3477569, at *12 (Tex. App.—Houston [14th Dist.] July 9, 2013, no pet.) (mem. op.); *see also In re T.H.*, 131 S.W.3d 598, 603 (Tex. App.—Texarkana 2004, pet. denied) ("[E]ven if clear and convincing evidence supported the trial court's finding that the environment posed a danger to T.H.'s well-being, the Department failed to show that [the father] knowingly placed or allowed T.H. to remain in such an environment."). However, a parent need not know for certain that the child is in an endangering environment; awareness of such a potential is sufficient. *Id.*; *see also In re C.L.C.*, 119 S.W.3d 382, 392 (Tex. App.—Tyler 2003, no pet.) ("It is sufficient that the parent was aware of the potential for danger to the child in such environment and disregarded that risk.").

Analysis

Here, the relevant time-frame for clear and convincing evidence of G.C.S., Jr.,'s exposure of loss or injury or jeopardy is prior to the child's removal on December 15, 2020. *Ybarra*, 869 S.W.2d at 577. There was no evidence when G.C.S., Jr. lived with Father in his apartment prior to the removal of October 2020. At the time of the October removal the evidence was Mother was living with the children in a house on Quail Avenue. There was no evidence that Father was aware of the conditions of the Quail home. Further, there was no evidence of Mother's drinking, pattern of drinking or Father's knowledge of Mother's drinking prior to the October removal. In fact, the only evidence was the investigator's testimony Father was unaware of Mother's drinking which was unrebutted by the Department.

The Department's burden is to produce clear and convincing evidence that Father "knowingly placed or knowingly allowed" G.C.S., Jr. in an environment that endangered him. Because the Department failed to show the child had lived with Father at the Ochoa apartment on or before December 15, 2020, the evidence is legally and factually insufficient to support subsection D. Further, the lack of evidence to support Father's knowledge of Mother's home and her conduct endangering G.C.S., Jr. also is legally and factually insufficient.

Subsection D unambiguously requires proof that the father knowingly exposed the child to an endangering environment. *See In re J.R.*, 171 S.W.3d at 570. The record contains no evidence that Father knowingly exposed G.C.S., Jr. to such an environment or was even aware such potential existed. I would, therefore, conclude the evidence is legally and factually insufficient to support the termination of Father's parental rights under subsection D.

Additionally, the evidence was uncontradicted that Father did not attend the hearing on October 14, 2020. When the Department's investigator contacted Father, he was unaware Mother could not reside with G.C.S., Jr. There is no evidence Father was served or contacted by the Department regarding the October removal. The evidence showed Mother had resided with Father after October but prior to December 2020. In fact, on December 14th, the unrebutted evidence was Mother was not residing with Father.

Conservatorship

Father challenges the trial court's judgment naming the Department as sole managing conservator. However, his prayer only asks for the reversal of the Father's termination of his parental rights. The Texas Rules of Appellate Procedure require the relief sought to be clearly delineated in the prayer. TEX.R.APP.P. 38.1(i); 53.2 (j); 55.2(j). *See Hampton v. State Farm Mut. Auto. Ins. Co.*, 778 S.W.2d 476, 480 (Tex. App.—Corpus Christi 1989, no pet.) (court of appeals overturned judgment n.o.v. and reinstated jury verdict, but did not award prejudgment interest; on rehearing appellate court refused to award prejudgment interest because no complaint was raised and there was no prayer for prejudgment interest to be awarded by the court of appeals; further, court denied appellant opportunity to file supplemental brief requesting that relief); *Texas Fed. Sav. & Loan Ass'n v. Sealock*, 737 S.W.2d 870, 877 (Tex. App.—Dallas 1987), *rev'd on other grounds*, 755 S.W.2d 69 (Tex. 1988); *West End API Ltd. v. Rothpletz*, 732 S.W.2d 371, 374 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). *See generally Texas Prudential Ins. Co. v. Dillard*, 307

S.W.2d 242, 252 (Tex. 1957).

Given, Appellant prays only for reversal of termination of his parental rights, I would grant that relief but no other. The trial court is allowed to appoint the Department as managing conservator of a child without terminating parental rights if the court finds that: (1) appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; and (2) it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator. *See* TEX.FAM.CODE ANN. § 263.404(a). Here, the trial court made the required best-interest findings to support the appointment of the Department as sole managing conservator of the child. *See id.*; *In re J.A.J.*, 243 S.W.3d 611, 615-17 (Tex. 2007). In this context, a challenge to the appointment of the Department as sole managing conservator of the child is not subsumed in the father's challenge of the termination decision. *In re J.A.J.*, 243 S.W.3d at 615-17.

Accordingly, I would affirm the remainder of the trial court's judgment and remand to the trial court for further proceedings consistent with this opinion.

YVONNE T. RODRIGUEZ, Chief Justice

August 9, 2022

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