Opinion filed January 8, 2009

In The

Eleventh Court of Appeals

No. 11-06-00228-CV

IN THE INTEREST OF M.N., A CHILD

On Appeal from the 326th District Court

Taylor County, Texas

Trial Court Cause No. 5969-CX

MEMORANDUM OPINION ON REMAND

On original submission, this court held that a trial court was without authority to extend the time for filing a statement of points on appeal in a case in which the parent-child relationship has been terminated. *See* TEX. FAM. CODE ANN. § 263.405(b) (Vernon Supp. 2008). The Texas Supreme Court has now instructed us otherwise and has remanded this case to us so that we might consider other points raised in this appeal. *See In re M.N.*, 262 S.W.3d 799 (Tex. 2008). In this nonjury case, because we consider the evidence both legally and factually sufficient to support the trial court's findings, we affirm.

Mandi Durham raises two issues on appeal. First, she claims that the evidence is legally and factually insufficient to show that she failed to comply with a court order regarding M.N. In her

second issue, she makes the same claim that the evidence is both legally and factually insufficient to show that termination of the parent-child relationship would be in M.N.'s best interest.

TEX. FAM. CODE ANN. § 161.001(1)(O) (Vernon Supp. 2008) provides that a court may order the termination of the parent-child relationship if that court finds by clear and convincing evidence that the parent:

> [F]ailed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under [TEX. FAM. CODE ANN. ch. 262 (Vernon 2002 & Supp. 2008)] for the abuse or neglect of the child.

There has been no dispute that there was a court order that specifically established those things that were necessary for Durham to regain custody of M.N. after the Texas Department of Family and Protective Services removed M.N. There has been no dispute that the Department had conservatorship over M.N. for not less than nine months as set out in the statute. The dispute arises over whether or not there is legally and factually sufficient evidence to support findings that Durham did not do those things that were necessary for her to regain custody and whether there is legally and factually sufficient evidence to show that termination of the parent-child relationship between Durham and M.N. was in M.N.'s best interest.

Durham is quite right in her statement to this court, citing *Santosky v. Kramer*, 455 U.S. 745, 758 (1982), that rights between a parent and that parent's child are "far more precious than any property right." She is also quite right in her observation that, in a termination case, the State is not simply limiting a parent's rights, it is seeking to end them. Therefore, the proof under Section 161.001(1)(O) must be clear and convincing, at least as to one statutory ground. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

Clear and convincing proof is that 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 (Vernon 2002); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994); *In re J.P.H.*, 196 S.W.3d 289, 292 (Tex. App.—Eastland 2006, no pet.). Even though it is

a fine one, there is a distinction between legal and factual sufficiency when the burden of proof is by clear and convincing evidence. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

When the burden of proof is by clear and convincing evidence and a reviewing court examines the evidence for legal sufficiency, 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 that the finding was true. *Id.* We must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. Further, we should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* But, we are not to disregard all evidence that does not support the finding. For instance, to disregard undisputed facts that do not support the finding could lead to a flawed analysis of the existence, or not, of clear and convincing evidence. *Id.* Further, when we view evidence in the light most favorable to the verdict, it cannot be viewed in "isolated bits and pieces divorced from its surroundings; it must be viewed in its proper context with other evidence." *AutoZone, Inc. v. Reyes*, No. 07-0773, 2008 WL 5105163, *2 (Tex. Dec. 5, 2008) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). After a review under these standards, if we determine that no reasonable factfinder could form a firm belief or conviction in the truth of the matter to be proven, then we must hold that the evidence is legally insufficient. *J.F.C.*, 96 S.W.3d at 266.

When a court of appeals undertakes a factual sufficiency review, it must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id.* at 263. We must also determine if the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations about which proof is sought. *Id.* at 266. We must also ask: Is the disputed evidence such that a reasonable factfinder could not have resolved that disputed evidence in favor of its ruling? *Id.* The evidence is factually insufficient if, on the record as a whole, 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 in the thing sought to be proved. *Id.*

M.N. was born on September 13, 2003. Durham is M.N.'s mother. M.N.'s father is Lance Nickels. Nickels agreed to a termination of his parental rights and is not a party to this appeal.

On February 6, 2005, the Texas Department of Family and Protective Services became involved with this family. The involvement arose in connection with a report of physical abuse to M.N. At this point, M.N. was removed from Durham until a family safety plan could be imposed. As a part of this safety plan, Durham and her boyfriend Jason Mauney, who lived with Durham, were to take drug tests. She took hers and passed, but he refused to complete his. Durham signed a safety plan that included a provision that Mauney would not be in the home until the test was completed.

M.N. was returned to Durham on February 17, 2005, with the provision that M.N. would be in protective day care. She was not taken to day care on February 24, and on February 25, she returned to day care with visible bruising. The bruising was inconsistent with the explanation that Durham gave. M.N. was again removed and ultimately placed with Durham's aunt and uncle, the Blacks.

In March 2005, the Department initiated a service plan designed to reunite Durham with her daughter. This service plan involved Durham's completion of several tasks under the guidance and supervision of the Department. Durham at first worked under the plan, but in July 2005, she disappeared and ceased to have any contact with the Department.

Durham had been placed on community supervision for credit card abuse. Under the service plan, Durham was required to report to her community supervision department. When Durham disappeared in July 2005, she did not report as required and did not comply with monetary requirements of her community supervision. Her community supervision was revoked, and she was sent to the Taylor County Restitution Center. She was in the Taylor County Restitution Center at the time of the termination hearing.

Under the service plan, Durham was to attend counseling and parenting sessions. The record shows that she failed to complete these classes. The record also contains testimony that Durham did not obtain birth control as required. Durham was also required to maintain visitation with M.N., but from July 2005 until May 2006, she did not visit the child.

Durham was to obtain safe housing. Although she originally moved in with her father, Durham testified that she did so only for a few months and then began to live in various places for a period of time, including with her "ex" James Harrell who, at the time of the termination hearing, was "across the street" (in jail) charged with aggravated assault. The record shows that he had

stabbed someone. One of the concerns of the Department was Durham's failure to stay out of abusive relationships. One such abusive relationship was with Nickels, who at the time of the hearing was in prison after being convicted on a felony driving while intoxicated charge. Even though Durham's relationship with Nickels was also abusive, she corresponded with him while he was in prison, including a letter she wrote to him the night before she testified in the hearing in this case. She had also been involved with Mauney, who had a violent temper toward others. During the period of time that she was just "hanging out with friends," Durham, by her own testimony, did not contact her community supervision officer, did not attempt to visit her daughter, continued to be involved in abusive relationships, had no safe place for her daughter to live, did not have a job, and was just "hanging out with friends" and using crack and cocaine on a daily basis.

Under those standards of review and under the evidence that we have outlined above, we find the evidence to be both legally and factually sufficient to support the findings of the trial court that Durham failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Texas Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child. Durham's first issue on appeal is overruled.

We will now address the legal and factual sufficiency raised by Durham in her second issue that related to the best interest of the child. There are a number of factors that should be considered when determining whether termination is in the best interest of the child. These factors include, but are not limited to, what are known as the *Holley* factors. They are: (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals, (6) the plans for the child by these individuals, (7) the stability of the home, (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The list is not an exhaustive one. *Id*. The focus is on the child's best interest, not that of the parent. *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ).

The evidence in this case shows that, at the time of the hearing, M.N. had been in the home of the Blacks since April 2005. M.N. is well-adjusted and appears to have bonded with the Blacks. M.N. refers to Mrs. Black as "mommy." M.N. is in good health. There have been no questions leveled at the Blacks' parenting abilities. There is no issue regarding the future emotional and physical security of M.N. while with the Blacks. Unlike the testimony of the unstable homes provided for M.N. by Durham, the testimony shows that the Blacks have a safe, stable home and intend to add to that stability by adopting M.N. There is nothing in the record to indicate that it is necessary for the Department to provide programming to the Blacks. The evidence does show, however, that several programs were offered to Durham and that she either failed them entirely or stopped participating in them. Durham's acts in continuing to involve herself with persons who were engaging in criminal activities and who, in fact, were violent demonstrate that a parent-child relationship between M.N. and Durham would be improper and not in M.N.'s best interest. We find that the evidence is both legally and factually sufficient to support the findings of the trial court that termination of the parent-child relationship between Durham and M.N. is in M.N.'s best interest. Durham's second issue on appeal is overruled.

The judgment of the trial court is affirmed.

JIM R. WRIGHT
CHIEF JUSTICE

January 8, 2009

Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.