

Opinion issued November 26, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00899-CV

SALLY LIU, Appellant

V.

DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, Appellee

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2006-02615J

OPINION

In this accelerated appeal of a three week jury trial,¹ appellant, Sally Liu

¹ See TEX. FAM. CODE ANN. § 263.405(a) (Vernon Supp. 2008).

(“Sally”), challenges the trial court’s decree, terminating her parental rights to her minor child, R.L.² In two issues, Sally contends that the evidence is legally and factually insufficient to support the jury’s verdict that (1) she knowingly placed or knowingly allowed R.L. to remain in conditions or surroundings that endangered his physical or emotional well-being;³ (2) she engaged in conduct or knowingly placed R.L. with persons who engaged in conduct that endangered his physical or emotional well-being;⁴ (3) she had a mental or emotional illness or a mental deficiency that rendered her unable to provide for the physical, emotional, and mental needs of R.L. until his eighteenth birthday;⁵ and (4) termination of her parental rights was in the best interest of the child.⁶ We affirm.

Background

Sally is the biological mother of R.L., who was two and a half years old at the time of trial. Sally, who was born in China, suffers from schizophrenia, has been hospitalized numerous times due to her mental illness, and has been prescribed medication for her condition. Sally lived in Texas from the time that she arrived from

² Upon the jury’s verdict, the trial court also terminated the parental rights of R.L.’s father, William Bau. Bau signed an affidavit for voluntary relinquishment of his parental rights on July 3, 2007.

³ *Id.* § 161.001(1)(D) (Vernon Supp. 2008).

⁴ *Id.* § 161.001(1)(E) (Vernon Supp. 2008).

⁵ *Id.* § 161.003(a)(1)–(5) (Vernon 2002).

⁶ *Id.* §§ 161.001(2), 161.003(a)(5) (Vernon 2002 & Supp. 2008).

China at age 15 until 2002, when she moved to Arizona. While Sally lived in Arizona, a court appointed her mother, Situ H. Liu (“Situ”), and her sister, Connie Diep (“Connie”), co-guardians over her.⁷

Sally moved back to Houston in 2004 and, with some interruptions, lived in a condominium that her sister had purchased until approximately the time of trial.⁸ On February 22, 2005, Sally gave birth to R.L.

Before moving to Arizona, starting in 1999, Sally began receiving mental-health services, medication, and monitoring from the Mental Health-Mental Retardation Authority of Harris County (“MHMRA”). In September 2005, after Sally’s return to Texas, an MHMRA screening report indicated that Sally was experiencing “psychotic symptoms” and “stress from her baby boy” and that she was “suicidal and feels she wants to harm others if she does not take her medication.” An MHMRA treatment plan indicated that Sally was delusional, paranoid, and suspicious of others.

On October 6, 2005, while at an MHMRA appointment, Sally began cursing at Situ and would not let Situ care for R.L., who at the time was eight months old. Sally’s psychiatric assessment that day indicated that her “presenting problem”

⁷ On August 10, 2007, Connie requested that the Arizona court terminate her guardianship over Liu.

⁸ At some point, and for some period of time, Sally lived with a man whom she married in Texas. Shortly before trial, Sally lived in a group home following release from a hospital stay.

included “violent behavior” and noncompliance with medication. The Texas Department of Family and Protective Services (“DFPS”) was called after Sally’s mother had made a statement that Sally was not changing R.L.’s diapers properly and that she did not know whether Sally was providing R.L. with necessary medication or food. The DFPS case was assigned to Phyllis Charles (“Charles”), the family’s caseworker, on October 23, 2005. Sally was subsequently committed to in-patient care on an involuntary basis. The MHMRA treatment plan for Sally’s involuntary hospitalization reflected that Sally was a “[d]anger to herself [and] others.” The “Treatment Plan Review Results” noted that Sally was “delusional” and “paranoid” and that Sally’s compliance with her medication regimen was “questionable.”

In February 2006, Sally was again admitted to the hospital for attacking a grocery store clerk who Sally thought was trying to steal from her. While Sally was in the hospital, Charles attempted to visit Sally at home; being unsuccessful, she left a message on Sally’s door in English and Cantonese. Charles subsequently visited Sally in the mental-health facility to which Sally had been admitted. When Charles tried to speak to Sally at the facility, Sally proceeded to talk about Charles’s genitals. Sally then instructed her social worker to have sex with Charles and shouted obscenities. At that point, Charles determined that Sally did not appear able to care for R.L.

On March 7, 2006, Sally was transferred to Rusk Hospital. On March 8, 2006,

Charles and an interpreter made a home visit to see R.L. Charles spoke to Situ and Situ's other daughter, Ling Liu ("Ling"), explaining that it would not be in R.L.'s best interest for Sally to remain in their home with R.L. because of Sally's odd behavior. Situ stated that her daughter was a good parent and that Sally would not hurt R.L. because she loved the baby. According to Charles, both Situ and Ling stated that Sally would not have attacked the grocery store clerk had the clerk been nice to Sally and not made Sally angry.

DFPS removed R.L. on March 9, 2006 and was appointed R.L.'s temporary sole managing conservator. Charles asked Situ whether there were other relatives with whom R.L. could be placed. Situ called William Bau ("Bau"), R.L.'s father, who lived in Arizona. Charles spoke with Bau and told him that DFPS was taking custody of R.L. Bau told Charles that he did not understand why DFPS would remove R.L. from Sally and stated that he would be willing to go to the emergency removal hearing in Texas. R.L. was then placed in temporary foster care. Charles testified that none of R.L.'s family members were present at the emergency removal hearing and that, at the time R.L. was removed, DFPS did not have proof of Bau's paternity.

The termination case was tried before a jury in August and September 2007. Ten members of a 12-person jury voted to terminate Sally's parental rights to R.L., and the trial court rendered judgment on the jury verdict. The judgment granted Roy

and Melanie Young, R.L.'s foster parents, managing conservatorship of R.L.

Sally timely filed a motion for new trial, a statement of appellate points, and a notice of appeal. Among the issues Sally identified in her statement of points were legal and factual sufficiency challenges to the predicate and best-interest findings supporting termination. The trial court denied Sally's motion for new trial and found Sally's appeal not to be frivolous. *See* TEX. FAM. CODE ANN. § 263.405(d) (Vernon Supp. 2008).

Legal and Factual Sufficiency Challenges

Sally does not dispute that she suffers from schizophrenia. Instead, she contends that DFPS has failed to establish by clear and convincing evidence (1) that she cannot meet the physical, emotional, and mental needs of R.L. and that she will remain incapable of providing for those needs until R.L. reaches the age of 18; (2) that she has engaged in any one of the acts or omissions listed in section 161.001 of the Texas Family Code; and (3) that termination of her parental rights is in the best interest of R.L. *See* TEX. FAM. CODE ANN. §§ 161.001(1),(2) (Vernon Supp. 2008), 161.003(a) (Vernon 2002).

Initially, we note that this case is not about the appointment of the Youngs as conservators, because Sally does not challenge this aspect of the judgment; rather, Sally challenges only the termination. This case is also not about whether Bau or Sally's family should have been appointed conservators, because, again, Sally does

not challenge the conservatorship ruling separately.⁹ Finally, this case is not about the emergency removal of R.L., language barriers, or whether Situ, the Dieps, Ling, or the extended family understood the CPS system because that issue is not before this Court to decide.

A. Standards of Review

The burden of proof at trial in a termination-of-parental-rights case is by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2008); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). ““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.” *Id.* § 101.007 (Vernon 2002); *In re J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review.

When determining legal sufficiency, we review 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 its finding was true.” *In re J.F.C.*, 96 S.W.3d at 266. To give appropriate deference to the factfinder’s conclusions, we must assume that the factfinder resolved disputed facts in favor of its finding if a

⁹ Also, and more importantly, Situ, Bau, and Ling did not intervene seeking conservatorship of R.L. Connie and her husband, Tony Diep (“Tony”), did intervene seeking termination of Sally’s parental rights and adoption of R.L., and were an alternative for the jury to choose, but have filed a motion with the trial court to dismiss their appeal of the order terminating Sally’s parental rights and appointing the Young’s as R.L.’s conservators.

reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* This does not mean that we must disregard all evidence that does not support the finding. *Id.* Disregarding undisputed facts that do not support the finding could skew our analysis of whether there is clear and convincing evidence. *Id.* Therefore, in conducting a legal-sufficiency review in a termination-of-parental-rights case, we must consider all of the evidence, not only that which favors the verdict. *See City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005).

In determining a factual-sufficiency challenge, the higher burden of proof in termination cases also alters the appellate standard of review. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). “[A] finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance.” *Id.* at 25. In considering whether evidence rises to the level of being clear and convincing, we must consider whether the evidence is sufficiently reasonable to form in the mind of the factfinder a firm belief or conviction as to the truth of the allegation sought to be established. *Id.* We consider whether disputed evidence is such that a reasonable factfinder could not have resolved that 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.

The natural rights that exist between parents and their children are of constitutional dimension. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Therefore, termination proceedings should be strictly scrutinized, and the involuntary termination statutes should be strictly construed in favor of the parent. *Id.* at 20–21. However, “[j]ust as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that the emotional and physical interests of the child not be sacrificed merely to preserve that right.” *In re C.H.*, 89 S.W.3d at 26.

B. Statutory Grounds for Termination

1. Texas Family Code Section 161.003

Section 161.003 of the Texas Family Code permits termination of parental rights due to the mental illness of the parent, provided that (1) the illness renders the parent unable to care for the child’s physical, emotional, and mental needs, (2) the illness will continue to render the parent unable to provide for the child’s needs until the child’s eighteenth birthday, (3) DFPS has been the temporary or sole managing conservator of the child for the six months preceding the filing of the termination petition, (4) DFPS has made reasonable efforts to return the child to the parent, and (5) termination is in the best interest of the child. *See* TEX. FAM. CODE ANN.

§161.003 (Vernon 2002).

2. Texas Family Code Section 161.001

In proceedings to terminate the parent-child relationship brought under section 161.001 of the Texas Family Code, DFPS must establish by clear and convincing evidence (1) that one or more of the acts or omissions enumerated under subsection (1) of section 161.001 exists and (2) that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. §161.001 (Vernon Supp. 2008). Both elements must be established, and termination may not be based solely on the best interest of the child. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). We note that, pursuant to the statute, there need only be proof of one predicate ground of parental misconduct under section 161.001(1) of the Family Code to support a judgment of termination when there is also a finding that termination is in the child's best interest. *See In re J.F.C.*, 96 S.W.3d at 261.

C. The Judgment

The judgment recites that the jury found by clear and convincing evidence that terminating Sally's parental rights was in R.L.'s best interest. The judgment further recites that the jury found, by clear and convincing evidence, that Sally:

1. knowingly placed or knowingly allowed [R.L.] to remain in conditions or surroundings which endangered the physical or emotional well being of R.L., or
2. engaged in conduct or knowingly placed [R.L.] with persons who engaged in conduct which endangered the physical or emotional

well-being of [R.L.], or

3. failed to comply with the provisions of a court order that specifically established the actions necessary for [Sally] to obtain the return of [R.L.] who has been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of [R.L.'s] removal from [Sally] under Chapter 262 (Procedures in Suit by Governmental Entity) for the abuse or neglect of the child, or
4. [Sally] has a mental or emotional illness or a mental deficiency that renders [Sally] unable to provide for the physical, emotional, and mental needs of [R.L.]; the illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render [Sally] unable to provide for [R.L.'s] needs until the eighteenth birthday of [R.L.], [TDFPS] has been the temporary or sole managing conservator of [R.L.], [Sally's] child for at least six months preceding the date of the hearing on the termination held in accordance with subsection (c), [TDFPS] has made reasonable efforts to return [R.L.] to [Sally].

D. Sufficiency of the Evidence Supporting Termination Under Section 161.003 (Mental Illness)

Sally does not contest that she is mentally ill or that DFPS had been the temporary managing conservator of R.L. for the six months preceding the filing of the petition. However, under part of issue one, Sally asserts that the evidence is legally and factually insufficient to show (1) that Sally's mental illness renders her unable to provide for R.L.'s physical, emotional, and mental needs, (2) that Sally's mental illness would continue to render her unable to provide for R.L.'s needs until his eighteenth birthday, and (3) that DFPS made reasonable efforts to return R.L. to

Sally.¹⁰ See TEX. FAM. CODE ANN. § 161.003(a)(1), (2), (4).

1. Legal Sufficiency

In our legal-sufficiency review, we consider all of the evidence in the light most favorable to the three challenged findings to determine whether a reasonable jury could have formed a firm belief or conviction that the three findings were true.

See *In re J.F.C.*, 96 S.W.3d at 266.

a. Sally's ability to care for R.L.'s needs through his eighteenth birthday (Texas Family Code section 161.003(a)(1)-(2))

Mental illness of a parent is not, in and of itself, grounds for termination of the parent-child relationship. See *Carter v. Dallas County Child Welfare Unit*, 532 S.W.2d 140, 141–42 (Tex. Civ. App.—Dallas 1975, no writ). The issue is whether Sally's mental illness renders her unable to provide for R.L. now and, with reasonable probability, until his 18th birthday. *Salas v. Tex. Dep't of Protective & Regulatory Servs.*, 71 S.W.3d 783, 790 (Tex. App—El Paso 2002, no pet.) DFPS need not prove with certainty that the parent's mental disease will continue to render the parent unable to provide for the child's needs until the child's 18th birthday; rather, DFPS must show, by clear and convincing evidence, that the mental illness in all probability

¹⁰ We interpret Sally to challenge both the legal and factual sufficiency of the evidence, despite the fact that her prayer for issue one requests a rendition of judgment and that her argument does not distinguish between the two challenges, because (1) her issue one is phrased in terms of both types of sufficiency challenges and (2) she discusses evidence both that supports and that undermines the jury's verdict.

will do so. *Salas*, 71 S.W.3d at 790 “In all reasonable probability” does not mean beyond a reasonable doubt and does not require “scientific certainty” that the parent’s mental illness will continue until the child is 18. *Salas*, 71 S.W.3d at 790; *In the interest of C.D. and B.P.*, 962 S.W.2d 145, 148 (Tex. App.—Fort Worth 1998, no pet.).

In *Spurlock v. Tex. Dep’t of Protective and Regulatory Servs.*, the Austin Court of Appeals was confronted with a case involving a schizophrenic mother and two young children. 904 S.W.2d 152 (Tex. App.—Austin 1995, writ denied.) The court found that the Department had met its burden of establishing, by clear and convincing evidence, that Spurlock could not meet the physical, emotional, and mental needs of her children and that she would remain incapable of providing for those needs until the children reached the age of eighteen, and that termination was in the best interest of the children. *Spurlock*, 904 S.W.2d at 156. Spurlock had suffered from serious mental health problems for nine years. *Id.* at 157. Spurlock’s mental illness had forced her to be hospitalized numerous times and she had a history of noncompliance with her medication. *Id.* Spurlock’s doctor testified that her condition would not resolve itself with time, she could not meet her own needs or the needs of her children, and, if she discontinued her medication, she would need hospitalization again. *Id.* Moreover, a DFPS caseworker testified that, during Spurlock’s supervised visits with her children, Spurlock did not appear to be aware of their needs. *Id.* at

156. After considering and weighing these factors, the court concluded the evidence was both legally and factually sufficient to support the durational requirement. *Id.* at 156–57.

Similarly, the San Antonio Court of Appeals held that a parent’s refusal to follow the advice of a clinical psychologist and to take medication for her bipolar condition constituted sufficient evidence to support termination under section 161.003(a). *See In re B.G.S.*, No. 04-06-00562-CV, 2007 WL 1341401 (Tex. App.—San Antonio May 9, 2007); *see also In the Interest of B.L.M.*, 114 S.W.3d 641, 645–47 (Tex. App.—Fort Worth 2003, no pet.) (holding evidence was sufficient to support trial court’s finding that father’s mental illness rendered him unable to care for his children until they reached the age of 18 where psychologist testified that father suffered from paranoid schizophrenia, that schizophrenia was a prolonged illness, that consistent treatment and medication was essential to stabilize the disease, and that the unpredictability of the disease put the children at risk, and where father testified that he would never take medication for his illness in future); *Sawyer v. Tex. Dep’t of Protective and Regulatory Services*, No. 03-02-00286-CV, 2003 WL 549216, at *8 (Tex. App.—Austin Feb. 27, 2003, no pet.) (holding evidence supported finding that mother constructively abandoned her children where she failed to take prescribed medications for her mental health conditions that would enable her to comply with the responsibilities of parenthood).

With regard to the present case, the following evidence, viewed in the required light, supports the findings that (1) that Sally's mental illness rendered her unable to provide for R.L.'s needs and (2) that her mental illness would continue to render her unable to provide for R.L.'s needs until his 18th birthday.

Sally's sister, Connie Diep, testified that Sally had a mental illness that rendered her unable to provide for R.L.'s physical, emotional, and mental needs. Connie testified that she became Sally's guardian in Arizona in 2002 after Sally had refused to take her medication and was behaving unstably. Connie had to call the police on Sally about two or three times in Arizona, including once when Sally, who had just been released from a Texas hospital, got angry, flew to Arizona where Situ had taken R.L., and caused a scene. Additionally, Connie confirmed that Sally had gone off her medication after she came to Texas. Connie told R.L.'s guardian ad litem, Susan Diedrich, who was appointed in January 2007, that she had concerns about Sally's being around the Dieps' daughters because "Sally had a history of violent . . . and inappropriate behavior where she would, for instance, . . . take off all of her clothes and dance around the house." Connie also told Diedrich that Sally "has a very high temper when she gets mad and she gets mad very easily."

Connie's husband, Tony Diep ("Tony"), testified that Sally had a violent temper and that he had heard people say that Sally was violent with children. Tony also said that when Sally was not on her medication, she was "in her own world," was

violent, and displayed inappropriate behavior. Tony confirmed that there had been occasions on which he had seen Sally and he believed that she had not taken her medication, although he estimated that it was “not very many different times.” Tony told Diedrich that when Sally had worked briefly in his restaurant in Arizona she had created a disruptive situation and scared customers, so much so that he did not want her anywhere near his business.

Tanya Bassett (“Bassett”), an MHMRA rehabilitation clinician who had Sally as a patient from September 2005 to May 2007, testified that (1) Sally was referred to the agency in September of 2005 because of her multiple hospitalizations; (2) Bassett knew of two or three more hospitalizations since Sally had begun going to MHMRA; (3) Sally was prescribed medication to keep her “stable”; (4) Sally admitted to Bassett about 10 times that she had failed to take her medication or hesitated to take it, despite Bassett’s having warned Sally about the consequences of not taking her medication, and that Sally had refused five or six times to take medication Bassett placed in her hand; (5) although Bassett had sometimes seen Sally “highly functional” when Sally was on her medication, she had also seen Sally at a low functioning level, during which her grooming and hygiene would go down, she would laugh inappropriately and be preoccupied with voices, and she could not take

care of herself or a young child;¹¹ (6) when Sally was not taking her medication, she would hear a female voice telling her negative things; and (7) when Sally was discharged from MHMRA in May of 2007 because she selected another doctor, her mental stability was “digressing” and was not “intact” because she was not taking her medication “as she should.” Bassett characterized Sally as severely mentally ill and opined that the mental illness would continue for the rest of Sally’s life; Bassett also testified that medication is usually a lifetime regimen for someone with Sally’s condition, although the psychiatrist ultimately makes such decisions. Finally, Bassett testified that Sally disagreed with Bassett “most of the time” when Bassett told Sally that she had to work on her temper.

In December 2006, Sally threatened to shoot Crisha Cotton, a caseworker at DFPS who was responsible for Sally’s case, Melanie Young, R.L.’s foster mother, and everyone else at DFPS.¹² Cotton testified that, throughout the entire time that she worked on Sally’s case, Sally never exhibited the ability to care for R.L.

Diedrich, the child’s ad litem, opined that she was “very concerned about Sally’s ability to care for [R.L.]” Diedrich also confirmed that Sally had been

¹¹ Despite Bassett’s testimony as to how Sally differed when on and off her medication, when Sally was asked whether she saw “any differences in your behavior, in your ability to function when you take the medication and [when] you don’t take the medication,” Sally responded, “The same.”

¹² Sally herself admitted to leaving a voice message for the foster parents, the Youngs, within six months of trial, that she was going to kill herself.

hospitalized between six and eight times over the course of the four years preceding trial¹³ and that the reason for her hospitalizations was noncompliance with medication. Diedrich concluded, “Sally is noncompliant with her medication and her history of violence, her history of inappropriate behavior and history of very bad decision making for herself . . . could be huge for [R.L].”

MHMRA records from 1999 forward supported the above testimony. For example, the records indicated that Sally was sometimes noncompliant with her treatment. In fact, one such record revealed that Sally, over her sister’s disagreement, desired to discontinue medication monitoring. An MHMRA report from 2005 indicated that Sally exhibited “agitation,” “walk[ed] outside nude with [R.L], and displayed “aggression towards her mother.” A 2006 report noted that Sally heard voices and had a history of psychotic symptoms. A report produced a few days later indicated that Sally was “suicidal and feels she wants to harm others if she does not take her medication” and was “at risk with her child, who is in foster care.” Multiple MHMRA reports from 2006 to 2007 indicated that Sally was noncompliant with her medication schedule, that she wished to discontinue taking her medication, or that her compliance was questionable.

For her part, Sally denied that failure to take medication had led to her

¹³ According to Sally’s testimony, she had been hospitalized two to three times in Texas and four or five times in Arizona over the past four years preceding trial. In fact, one or two weeks before trial, Sally had been released from the hospital again.

hospitalizations and that she had ever stopped taking her medication. When asked why she had been hospitalized, Sally responded, “I don’t know.” She also expressed that, if R.L. could live with her, her mental-health problems would be cured.

In sum, there was evidence, viewed in the required light, that Sally could not care for R.L. if she did not take medication, that Sally displayed inappropriate and dangerous behavior as a result of her mental illness, that she had a long history of hospitalization for mental illness, and that Sally repeatedly refused to take her medication. Additionally, Sally’s trial testimony, when viewed in the required light, could reasonably be interpreted as a refusal to acknowledge her noncompliance with medication and as an inability to appreciate what was required to treat her condition.

b. DFPS’s reasonable efforts to return R.L. to Sally (Texas Family Code section 161.003(a)(4))

Also under issue one, Sally argues that there is legally and factually insufficient evidence to support the jury’s determination that DFPS made reasonable efforts to return R.L. to Sally. *See* TEX. FAM. CODE ANN. § 161.003(a)(4). We disagree.

On March 7, 2006, Sally was admitted to Rusk Hospital after being transferred there under a temporary health commitment stemming from the assault of the grocery store clerk. At this time, Charles went to visit R.L.’s family with an interpreter. Charles explained to Sally’s sister and grandmother that it would not be in R.L.’s best interest to remain in the home because of Sally’s behavior. Sally’s family disagreed, stating “[R.L.] would cure [Sally] from her mental illness.” Based on this, Charles

testified that she felt the family would not be able to work with DFPS to implement a plan to minimize the risk of abuse or neglect of R.L. Another CPS worker, Crisha Cotton, testified that she did not believe either Ling Liu or Situ would be an appropriate placement for R.L. because they refused to protect R.L. from Sally.

Subsequently, at a permanency plan treatment (“PPT”) meeting attended by the Youngs, Situ, and Ling, Situ told Charles that she would allow Sally to live in the home with R.L. once Sally left the hospital. The grandmother also told Charles she thought it would be fine for DFPS to place R.L. with Sally, and that Sally’s mental illness would be cured if R.L. was placed with her. Charles testified that she and Liu’s family discussed the agency’s goal of having R.L. adopted outside of the family and that no other family members were offered by Situ or Ling as possible relatives for placement. An interpreter was provided for Situ during the meeting.

On July 27, 2006, Sally signed a family service plan with DFPS. A family service plan is designed to reunify the parents with their children who have been removed by DFPS. The service plan required Sally to attend parenting classes, and to verbalize the techniques she learned to her caseworker. It also required Sally to participate and complete a psychological evaluation and to follow its recommendations. Finally, the plan required Sally to attend the court hearings, PPT meetings, and family visits with R.L. as scheduled.

The Fort Worth Court of Appeals has held that DFPS’s preparation of several

service plans designed to help a parent regain custody of her child and the parent's failure to complete the requirements of the service plans constituted "reasonable efforts" on the State's part to return the child to the mother. *In re K.M.B.*, 91 S.W.3d 18, 25 (Tex. App.—Fort Worth 2002, no pet.); *see also In re S.A.*, No. 2-06-253-CV, 2007 WL 1441014, *12 (Tex. App.—Fort Worth May 17, 2007) (holding that where DFPS prepared several service plans designed to help mother regain custody of her child, but she failed to complete them, choosing instead to continue using drugs, fighting with father, changing residences, and remaining unemployed, DFPS had made reasonable efforts to reunite child with mother).

Moreover, the Austin Court of Appeals held that DFPS's attempts to reunite a child with her parent under 161.003(a)(4) were sufficient where the Department made efforts to provide the parent with parenting training, assistance with the parent's mental health needs, and information about community services, but the mother did not show significant improvement in her ability to care for the child due to her inability to provide for her own medical needs. *Rodriguez v. DFPS*, No. 03-05-00321-CV, 2006 WL 1358488 (Tex. App.—Austin 2006, May 19, 2006, no pet).

In the instant case, DFPS provided Sally with the aforementioned service plan, a requirement of which was that Sally follow the recommendations of her mental health service provider. However, Cotton testified that during her time working on the case, Sally did not complete the family plan of service. Moreover, Bassett

testified that, on numerous occasions, Sally admitted that she had not been compliant with her medication and that Sally was hospitalized for not having taken medication six to eight times in four years. Most importantly, Bassett testified that in May 2007, well after the implementation of the service plan, Sally was not taking her medication “as she should” and was therefore not “intact.” Thus, the jury could have reasonably formed a firm belief or conviction from this evidence that DFPS had made reasonable efforts to return R.L. to Sally based on the creation of a family service plan and the evidence indicating that Sally did not complete this plan and was a danger to R.L. because of her behavior when she did not medicate.

Sally also argues that, in lieu of returning R.L. to her, DFPS should have made reasonable efforts to unite R.L. with his relatives. However, section 161.003(a)(4) requires only that DFPS have made reasonable efforts to return R.L. *to Sally*; it does not require that DFPS have made reasonable efforts to place R.L. with other family members, like Situ, Ling, the Dieps or Bau.¹⁴ Nevertheless, we will also examine whether DFPS undertook reasonable efforts to make such a placement.

As discussed above, there was sufficient evidence, when viewed in the required

¹⁴ In support of her argument that none of R.L.’s relatives was fairly considered for placement, Sally cites *Horavtich v. TDPRS*, 78 S.W.3d 594 (Tex. App.—Austin 2002). In *Horavtich*, the Austin Court of Appeals held that the record contained factually insufficient evidence that termination of Horavtich’s parental rights was in the best interest of her children under section 161.001 of the Texas Family Code. *Horavtich*, 78 S.W.3d at 595. *Horavtich* is inapplicable to the instant case because it does not address DFPS’ reasonable efforts to return a child under TEX. FAM. CODE § 161.003(a)(4).

light, that Sally could not adequately care for R.L. when she did not medicate and that she repeatedly refused to medicate. Nonetheless, there was testimony that Situ or her other daughters had always been R.L.'s primary caregivers when Sally lived with them. As previously noted, Charles felt that Situ's statement that "[R.L.] would cure [Sally] from her mental illness," meant that the family would not be able to ensure that R.L. would remain free of abuse or neglect. Cotton was similarly concerned about the family's refusal to protect R.L. from Sally.

Testimony revealed that, at the PPT meeting, Situ also told Charles she thought that it would be fine for DFPS to place R.L. with Sally and restated her belief that Sally's mental illness would be cured if R.L. were placed with Sally. In fact, Situ told Charles that Sally could never get better and that her condition would worsen if she did *not* live with R.L. Situ also told Charles that Sally would not hurt R.L. because Sally "loves him so much." Sally's family's expressed goal for R.L. was to have him returned to his mother. Ling also behaved inappropriately both at the April 2006 PPT and at a subsequent family visit with R.L., yelling and screaming.

Cotton did not consider Ling to be an appropriate placement for R.L. because Ling had stated that she would not keep Sally from R.L. Cotton had the same concerns about R.L.'s placement with Situ: even after CPS had explained the situation fully to Situ, Situ continued stating that her daughter "was fine" and that R.L. "belonged with his mother." Diedrich echoed Cotton's assessment, opining that

Situ would not protect R.L. from Sally because Situ minimized Sally's mental-health issues. Diedrich concluded that it would be dangerous for whoever had custody of R.L. to allow him to have contact with Sally because "Sally has a history of violent behavior when she's not taking her medication" and "[s]he has a history of not taking her medication." Likewise, Charles opined that a safety plan—which would allow the child to stay in the home—was not possible for R.L. because of these things.

As for the Dieps, Charles testified that it would pose a risk of abuse to R.L. if the Dieps were to allow Sally around him, and Connie testified in deposition that she would allow Sally to visit R.L. if Sally took her medication; she also admitted that she would allow Bau to visit R.L. even though she thought that it was not in R.L.'s best interest to allow Bau to see him. Diedrich echoed Charles's concern about placement with the Dieps because, twice when Diedrich had asked Connie what she would do if Sally "just showed up at her house" if the Dieps had R.L., Connie said that "she did not know." Diedrich was concerned that the Dieps would allow Sally to visit with R.L. if they obtained custody because "it became clear to me that Sally has severe mental health issues." Diedrich also believed that Connie was minimizing Sally's mental illness because Connie expressed that Sally's illness "is really not that bad," that Sally "just gets angrily easily," and that Sally's poor relationship with her siblings was not due to Sally's mental illness, but instead existed because Sally "was jealous that her brothers and sisters were doing better than she was."

Bau did not timely complete paternity testing, and DFPS rejected his home-study done by Arizona authorities because Bau himself had translated for his live-in girlfriend during that visit, and he had represented that that girlfriend would be caring for R.L. in his home; because Bau failed to provide his tax returns from the last two years, raising concern over his ability to care for R.L. financially; and because Bau had visited his son only twice in the child's life. More importantly, Bau told Cotton that he wanted R.L. back so that he could give R.L. to Sally; likewise, through Ling's and Situ's comments to Cotton, Cotton came to believe that they wanted R.L. placed with Bau so that he would return R.L. to Sally. Diedrich confirmed this by testifying that Connie "gave [her] information about how [Bau] was going to give [R.L.] back to the family." Diedrich was concerned because, if Bau did so, "the family had nothing in place to protect [R.L.] from Sally."

On these facts, we cannot surmise what other steps DPRS could have taken to reunite Sally and R.L., and there was ample evidence on which the jury could conclude Sally's other family members were unsuitable placements for R.L. Accordingly, we hold that there was legally sufficient evidence to support the jury's implicit finding under section 161.003(a)(4).

c. Best interest of R.L. (Texas Family Code section 161.003(a)(5))

In issue two, Sally contends that there was legally and factually insufficient

evidence that termination of her parental rights was in R.L.'s best interest.

In determining whether termination of Sally's parental rights was in R.L.'s best interest, we may consider several factors, including (1) the child's desires, (2) the current and future physical and emotional needs of the child, (3) the current and future physical danger to the child, (4) the parental abilities of the persons seeking custody, (5) whether programs are available to assist the persons seeking custody in promoting the best interests of the child, (6) plans for the child by the persons seeking custody, (7) the stability of the home, (8) acts or omissions of the parent that may indicate that the parent-child relationship is not proper, and (9) any excuse for acts or omissions of the parent. *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)). Not all of these factors need be decided against the parent in order to find that termination is in the child's best interest. *See Salas* at 791.

1. The current and future physical and emotional needs of the child

Connie testified that it was not good for R.L. for Sally to go in and out of psychiatric hospitals. Diedrich concurred, opining that Sally's inconsistencies in medicating herself and her hospitalizations would disrupt R.L.'s permanency, stability, and sense of security, all of which were "very important to a child, particularly to a young child such as [R.L.]." Bassett observed that R.L. did not

readily come to Sally at DFPS visits and that it was hard for Sally to interact with her child because R.L. was young and established with the Youngs, his foster family. Cotton, who supervised visits between R.L. and his family, said that, on some visits, R.L. had no problems interacting with Sally, but other times, he preferred the Youngs. She testified that when R.L. would become upset at visits, only the Youngs could calm him. Diedrich observed that R.L. did not appear to bond with Sally at visits.

2. *The current and future physical danger to the child*

Cotton testified that, on one visit, Sally became so frustrated with R.L. that she said that she never wanted to see him again; it was at this visit that Sally threatened to shoot Cotton, Mrs. Young, and everyone else at DFPS. Furthermore, the MHMRA records revealed that Sally exhibited “agitation,” “aggression,” and had a history of psychotic symptoms. Most importantly, the records reveal Sally was suicidal, “feels she wants to harm others if she does not take her medication,” and was “at risk” with R.L.

3. *The stability of the home or proposed placement*

Bassett felt that Sally did not have a support group because she was not close to Ling, Ling’s husband did not like Sally, her mother had gone back to Arizona, Sally’s current husband was often out of town, and her family was not “really supportive of her.” Moreover, there was much testimony that neither Bau, Situ, or Ling, would protect R.L. from Sally.

With regard to R.L.'s home with the Youngs, Diedrich described it as "lovely," "kid-oriented," and as a safe and loving environment. Dietrich stated that R.L. considers Melanie Young to be his mother and that R.L.'s relationship with Roy Young is "loving" and "bonded." R.L. calls Melanie "mommy" and Roy "daddy." Melanie Young testified that R.L. is bonded to her and that she loves him and wants to adopt him.

4. *The acts or omissions of the parent that may indicate that the parent-child relationship is not proper*

During a few visits with R.L., Sally was disruptive, yelling and screaming at the supervisor or foster parents that "it was unfair, her son belonged to her, that she needed her son." Moreover, as previously detailed, Sally has displayed other inappropriate and violent behaviors and numerous witnesses testified that Sally is not capable of caring for R.L. Finally, numerous MHMRA records indicate that Sally often displays "very poor judgment" which could "compromise her safety." An MHMRA "progress note" reflects that Sally married her husband so that he could obtain a green card and that Sally wanted to have a baby immediately, despite her doctor's advice that she needed to remain on her medication.

Connie testified that it would be in R.L.'s best interest for Sally's parental rights to be terminated. After having "examined the records and Sally's mental health issues, her hospitalizations, her violent history, her noncompliant [sic] with her meds historically," Diedrich also concluded that it would be in R.L.'s best interest for

Sally's parental rights to be terminated and for him to be placed with the Youngs because R.L. would be at risk if he were placed with Sally.

5. Summary

Viewing the evidence in the light most favorable to the verdict, we hold that the jury reasonably could have formed a firm belief that termination of Sally's parental rights was in the best interest of R.L.

2. Factual Sufficiency

a. Sally's ability to care for R.L. through his eighteenth birthday (Texas Family Code section 161.003(a)(1)-(2))

Under part of issue one, to support her factual-sufficiency challenge to these elements, Sally argues that (1) the medical records show that Sally is not a danger to R.L., and there was no other evidence that Sally "abused, neglected, mistreated, hit, spanked, scratched, dropped or engaged in violent behavior toward R.L."; (2) two separate November 1995 MHMRA medication maintenance reports indicated that Sally was "stable on meds," well-groomed, cooperative, and exhibiting normal behavior; (3) "[a]t the worst, Sally has had a few lapses with respect to taking her medication," as indicated by her medical records, which Sally argues "reveal that medication management and symptom management are ongoing goals" for her and that she "succeeds in achieving" those goals "90% of the time";¹⁵ (4) Bassett testified

¹⁵ Sally does not cite to the record for support for the 90% statistic.

that Sally was noncompliant with her medication only “a couple of times”; (5) Sally’s doctor after MHMRA, Dr. Mike Yuan, wrote a letter stating that Sally had been stable under his care for 12 months, from January 2006 to January 2007; (6) “there was no evidence about the possible duration of Sally[’s] . . . mental illness”; and (7) the only evidence of Sally’s violent temper was the one incident of her having slapped a store clerk.

As for argument (1), the legal standard is not whether Sally was a danger to or injured R.L., but whether she was “unable to provide for the physical, emotional, and mental needs” of R.L. Regardless, the jury could have chosen to believe the testimony of Diedrich, who concluded that it would be dangerous for whoever had custody of R.L. to allow him to have contact with Sally because “Sally has a history of violent behavior when she’s not taking her medication” and “[s]he has a history of not taking her medication.”

As for argument (2), although some of Sally’s MHMRA medical records from office visits indicated that she was compliant with medication, stable, and functioning adequately for those visits, other records (set out under our legal-sufficiency discussion) indicated that she was noncompliant with medication, was unstable, was suicidal, exhibited functional impairment, or showed anger or stress at those visits. The jury reasonably could have considered the record entries showing non-compliance with medication and suicidal, angry, or unstable behavior in reaching its

implied finding on Sally's ability to care for R.L.'s needs.

Concerning arguments (3) and (4), there was disputed evidence as to whether Sally had repeatedly failed to take her medications. Sally denied ever having missed her medication, and, during some of the MHMRA visits, she behaved appropriately and indicated that she was compliant with medications. Nonetheless, Bassett said that Sally told her about 10 times of Sally's noncompliance with medication, Bassett recounted times that Sally appeared not to be functioning well, and Sally was hospitalized for not having taken medication six to eight times in four years. Again, the jury could reasonably have believed the evidence indicating that Sally had failed repeatedly to take her medications regularly.

As for argument (5), the jury was entitled to believe the testimony of Bassett, who opined that Sally had not been stable for the entirety of the year in which Dr. Yuan had stated that she had been, as well as the evidence that Sally had been hospitalized during that 12-month period. The jury was also entitled to discount Dr. Yuan's letter because Sally had left MHMRA in order to find a doctor who, as Bassett testified that Sally had said, "would help her get her baby back," specifically, who "could stretch the truth a little bit" and "would bend the truth and say that she could get [the] baby back and get the baby back for her."

Although Sally contends, in argument (6), that there was no evidence of the possible duration of her illness, Bassett opined that Sally's mental illness would

continue for the rest of Sally's life.

Finally, contrary to Sally's contention in argument (7) that the only evidence of Sally's violent behavior was the one incident in which she slapped a clerk, Tony, Bassett, Diedrich, and even Connie (through others' testimony) described Sally as having exhibited a violent temper or behavior, and Sally threatened to kill herself and to shoot Cotton, Mrs. Young, and the CPS staff.

In sum, we hold that a reasonable factfinder could have resolved the conflict in any disputed evidence on which Sally relies in favor of its implied finding that Sally would be unable to provide for the physical, emotional, and mental needs of R.L., in all reasonable probability, until his eighteenth birthday. *See In re J.F.C.*, 96 S.W.3d at 266. That is, we hold that the evidence set out in our previous discussion of legal sufficiency is reasonably sufficient to form in the factfinder's mind a firm belief or conviction of the truth of this implied finding. *See In re C.H.*, 89 S.W.3d at 25.

b. DFPS's reasonable efforts to return R.L. to Sally (Texas Family Code section 161.003(a)(4))

Under part of issue one, to support her factual-sufficiency challenge to this element, Sally argues only:

The evidence speaks . . . to [DFPS's] intent never to return R.L. to Sally . . . and to [DFPS's] prejudices directed at confused Chinese immigrants and those suffering from mental illness. [Cotton] testified that [DFPS] did not want to place R.L. with the Dieps because [DFPS] believed that there was a conspiracy among family members to return R.L. to Sally

. . . . [Cotton] could not articulate a reason why [DFPS] took R.L. and what was the basis for removing him from Situ and Ling Cotton then agreed there was no emergency to remove R.L. from his home.

The first assertion is not supported by record references. The second sentence, concerning the Dieps and the family conspiracy that Cotton perceived, was only one reason given by witnesses as to why the Dieps were not an appropriate placement for R.L.; the other reasons having been set out above. Also, as previously noted, whether the Dieps were a suitable placement alternative is not an issue before this Court. The last two sentences concern only the bases for DFPS's initial removal of R.L. on an emergency basis, rather than the statutory criteria of whether DFPS made reasonable efforts to return R.L. to Sally thereafter. Nonetheless, after having reviewed the entire record, we hold that a reasonable factfinder could have resolved the conflict in any disputed evidence on which Sally relies in favor of its implied finding that DFPS made reasonable efforts to return R.L. to her. *See In re J.F.C.*, 96 S.W.3d at 266. That is, we hold that the evidence set out in our previous discussion of legal sufficiency is sufficient reasonably to form in the factfinder's mind a firm belief or conviction of the truth of this implied finding. *See In re C.H.*, 89 S.W.3d at 25.

c. Best interest of R.L. (Texas Family Code section 161.003(a)(5))

To support her factual-sufficiency challenge to this element, Sally contends that the evidence supporting termination of her parental rights is "less than paltry" and that there was "absolutely no evidence that [Sally] might be a danger to R.L."

Moreover, Sally asserts there was “no evidence” that she could not parent R.L. and would not be able to in the future.

These assertions do not so outweigh the evidence supporting the jury’s finding that termination of Sally’s parental rights is in the best interest of R.L. In reviewing the decision for factual sufficiency, we have considered ample evidence that the parent-child relationship was not a proper one. The acts on the part of Sally which warrant this conclusion, as set forth in our previous discussion of legal sufficiency, are: 1) her history of violence; 2) her threats of suicide; 3) her lack of sensitivity to the needs of R.L. as evidenced by her inappropriate behavior around R.L.; and 4) her inability, now and in the future, to care for R.L. because of her repeated failure to take her prescribed medication. Thus, we hold that the jury’s determination of R.L.’s best interest is supported by clear and convincing proof that is factually sufficient.

E. Sufficiency of the Evidence Supporting Termination Under Section 161.001(1)(O), 161.001(2) (Failure to Comply with Provisions of Court Order, Best Interest of Child)

Although we have held that termination in this case is supported under section 161.003 of the Family Code, we also hold that termination is supported under subsection (O) of section 161.001(1) and section 161.001(2).

Pursuant to section 161.001(1)(O) of the Texas Family Code, the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has “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 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." TEX. FAM. CODE ANN. § 161.001(O) (Vernon Supp. 2008). Under section 161.001(2), termination must also be in the child's best interest. *In re J.F.C.*, 96 S.W.3d at 263.

The provisions governing service plans are located in Chapter 263 of the Family Code. That chapter provides that "not later than the 45th day after the date the court renders a temporary order appointing the department as temporary managing conservator of a child under Chapter 262, the department . . . shall file a service plan." TEX. FAM. CODE ANN. § 263.101 (Vernon 2002).

Among other requirements, the service plan must (1) be specific and (2) be in writing in a language that the parents understand, or made otherwise available. TEX. FAM. CODE § 263.102(a)(1)(2) (Vernon 2002). The court may render appropriate orders to implement or require compliance with an original or amended service plan. TEX. FAM. CODE ANN. § 263.106 (Vernon 2002).

In the instant case, it is undisputed that R.L. was removed under Chapter 262 of the Family Code and was in DFPS's custody for more than nine months. However, Sally claims there is insufficient evidence that she failed to comply with a court order

specifying the actions she had to take for DFPS to return R.L. to her. We disagree.

The July 27, 2006 service plan signed by Sally required her to attend parenting classes, and verbalize the techniques she learned to her caseworker. It also required Sally to participate and complete a psychological evaluation and to follow its recommendations, which in this case included “attend[ing], participat[ing], and successfully complet[ing] the services.” Finally, the plan required Sally to attend the court hearings, PPT meetings, and family visits with R.L. as scheduled. Sally has not alleged that she did not understand the terms of her service plan.

On March 23, 2006, the trial court signed the parties’ “Agreed Temporary Order Following Adversary Hearing” which required Sally, pursuant to section 263.106 of the Texas Family Code, “to comply with each requirement set out in the Department’s original, or any amended, service plan during the pendency of this suit.”

Although there is some evidence in the record that Sally completed some parenting classes, went to MHMRA, and secured housing, as previously noted, numerous MHMRA records made a part of this appeal reflect Sally’s noncompliance with her medication since the court’s order was signed on March 23, 2006. Specifically, on September 22, 2006, the MHMRA records indicate that Sally’s full compliance was “questionable” and that she had difficulty accepting her mental illness. A notation on October 6, 2006, indicates that her compliance was “partial”

and that Sally was exhibiting “psychotic symptoms.” Again, on October 23, 2006, the records indicate Sally’s compliance with her medication was “partial” and that Sally “admitted auditory hallucinations when off meds [sic].” On November 21, 2006, records indicate partial compliance and that Sally was experiencing auditory hallucinations when she was off her medication. Finally, on January 31, 2007, the MHMRA records indicate that Sally was, at that time, stable on her medication but that her “history of noncompliance/partial compliance has affected management and patient remains at risk.” On May 11, 2007, Sally discontinued her care with MHMRA.

Again, the jury could reasonably have considered the record entries showing noncompliance with medication in reaching its finding that Sally failed to comply with the court’s order establishing the actions necessary for the return of R.L. Furthermore, the jury was entitled to believe the testimony of Bassett regarding Sally’s noncompliance with medication and Cotton’s testimony with regard to Sally’s failure to complete the family plan of service.

In light of these facts, we hold that Sally’s failure to successfully complete the terms of her service plan, constitutes a material violation of the court’s order sufficient to support a finding for termination under subsection (O). *See In re J.F.C.*, at 277–78 (holding that, among other omissions, failure to complete all scheduled counseling sessions with therapist ordered by court to avoid termination of parental

rights constituted a material violation of the court's order sufficient to support a finding of termination under subsection (O)).

Consequently, the evidence, viewed in the light most favorable to the section 161.001(1)(O) finding, was sufficiently clear and convincing that a reasonable factfinder could have formed a firm belief or conviction that Sally failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of R.L. We further conclude that, viewed in the light of the entire record, any disputed evidence could have been reconciled in favor of the section 161.001(1)(O) finding or was not so significant that the factfinder could not reasonably have formed a firm belief or conviction that Sally failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of R.L.

With regard to the second prong of section 161.001, that termination is in the best interest of the child, we hold that the evidence set out in our previous discussion of best interest is reasonably sufficient to form in the factfinder's mind a firm belief or conviction that termination of Sally's parental rights is in the best interest of R.L. for the purposes of section 161.001(2).¹⁶ Accordingly, we hold that the evidence was legally and factually sufficient to support the section 161.001(O) finding.

¹⁶ See discussion *supra* at (D)(1)(c).

Conclusion

Based on the foregoing reasons, the trial court's judgment is affirmed.

Davie L. Wilson
Justice

Panel consists of Justices Keyes, Higley, and Wilson.¹⁷

¹⁷ The Honorable Davie L. Wilson, retired Justice, First Court of Appeals, participating by assignment.