

Opinion issued October 30, 2008



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-08-00309-CV

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**REBECCA ESPINOSA, Appellant**

**V.**

**TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES,  
Appellee**

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**On Appeal from the 306th District Court  
Galveston County, Texas  
Trial Court Cause No. 07CP0035**

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## **MEMORANDUM OPINION**

Rebecca Espinosa appeals the trial court's order terminating her parental rights to her daughters A.O. and A.E. In five issues, Espinosa contends that the evidence was legally and factually insufficient to support the following findings: (1) that she engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the children; (2) that she constructively abandoned the children while they were in the temporary conservatorship of the Department of Family and Protective Services; (3) that she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of her children; (4) that she used a controlled substance in a manner that endangered the health and safety of the children and failed to complete a court-ordered substance abuse treatment program; and (5) that the termination of the parent-child relationship between Espinosa and her daughters is in the best interests of the children. We conclude that the evidence is legally and factually sufficient to support the trial court's order and therefore affirm.

### **Background**

In April 2007, the Texas Department of Family and Protective Services (TDFPS) of Galveston County removed A.O. and A.E. from the

custody of their maternal grandmother after the grandmother's drug test was positive for cocaine. Rebecca Espinosa had voluntarily left her children in her mother's care and had given her mother a power of attorney over the children. TDFPS later determined that the conditions of the grandmother's home were dangerous for the children due to the grandmother's drug use, allegations that the girls were unsupervised and underfed, and that the grandmother was selling their food stamps to buy drugs. TDFPS placed the girls in temporary foster care while case workers searched for a relative to care for the children. Following the children's removal, in April 2007, TDFPS and Rebecca agreed to a family service plan that required Rebecca to pay \$80 per month in child support, have a psychological and a parenting assessment, submit to random drug testing, and maintain stable housing. From April 2007 until September 2007, Rebecca did not comply with the plan other than to submit to three or four drug screenings.

After a month in foster care, in May 2007, TDFPS placed the girls with Danny and Tessa Sendejas, Rebecca's biological father and step-mother. During the time the girls were with the Sendajases, Rebecca rarely called or visited and never paid child support. She tested positive for drugs three times between April and September 2007, and she admitted in her own testimony that she used drugs until September 2007. The girls stayed with

the Sendejases until November 2007, when TDFPS placed them with Eugene De Los Santos and his girlfriend Elizabeth Waite. De Los Santos is Rebecca Espinosa's former boyfriend, who once thought that he was A.E.'s biological father, though this was later proven incorrect. While the girls were with De Los Santos, Rebecca rarely paid child support and saw them infrequently, citing problems with getting in touch with De Los Santos and getting De Los Santos to cooperate with her. In January 2008, TDFPS removed A.O. from the De Los Santos home at De Los Santos's request and placed her in temporary foster care because of behavior problems at home. At the time of the termination hearing, A.E. remained with De Los Santos and Waite, and A.O. remained in foster care.

Rebecca entered inpatient drug rehabilitation program in November 2007, after reportedly stopping her drug use in September 2007. She completed two weeks of inpatient treatment and was released, and began outpatient care but was discharged for non-attendance. Thereafter, she attended a few parenting classes, as required in the service plan, but failed to complete them.

Rebecca has had her parental rights terminated with respect to another child because she used drugs while she was pregnant with the child, and failed to comply with a TDFPS service plan. Rebecca was also pregnant at

the time of trial.

On April 7, 2008, after a bench trial, the court terminated Rebecca Espinosa's parental rights with respect to A.O. and A.E. The trial court relied upon Sections 161.001(1)(E), (M), (N), (O), and (P) of the Texas Family Code. *See* TEX. FAM. CODE ANN. §§ 161.001(1)(E), (M), (N), (O), (P) (Vernon 2007).

### **Standard of Review**

The natural right that exists between parents and their children is one of constitutional dimension. *See In re J.F.C.*, 96 S.W.3d 256, 273 (Tex. 2002) (examining constitutional implications of terminating parental rights). A parent's right to "the companionship, care, custody and management of his or her children" is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972)). Thus, in a case terminating parental rights, we carefully scrutinize the proceedings and strictly construe the law in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

In proceedings brought under Section 161.001 of the Family Code, TDFPS must establish one or more of the acts or omissions enumerated under the first subdivision of the statute and must also prove that termination

is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (Vernon 2007); *In re J.L.*, 163 S.W.3d 79, 84 (Tex.2005); *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Due process requires that clear and convincing evidence support a finding of termination. *Santosky*, 455 U.S. at 747-48, 102 S. Ct. at 1391–92; *In re B.L.D.*, 113 S.W.3d 340, 353–54 (Tex. 2003). To be legally or factually sufficient under the clear and convincing standard, the evidence must be such that a fact-finder reasonably could form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. *In re J.L.*, 163 S.W.3d at 84; *Robinson v. Tex. Dep’t of Protective & Regulatory Servs.*, 89 S.W.3d 679, 688 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

In a legal sufficiency challenge, we review the evidence in a light most favorable to the trial court’s finding, and assume the fact-finder resolved disputed facts in favor of its finding if a reasonable fact-finder could do so. *In re J.L.*, 163 S.W.3d at 85. We disregard any evidence that a reasonable fact-finder could have disbelieved, but we do not disregard undisputed facts. *Id.* In reviewing a challenge to the factual sufficiency of the evidence, we must give due consideration to the evidence that the fact-finder reasonably could have found to be clear and convincing, considering

all the evidence in the record, including evidence in support of and contrary to the trial court's findings. *In re J.F.C.*, 96 S.W.3d at 266.

### **Discussion**

The trial court terminated Rebecca Espinosa's parental rights on the grounds that she

- (1) Engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children. TEX. FAM. CODE ANN. § 161.001(1)(E).
- (2) Had her parent-child relationship terminated with respect to another child based on a finding that the mother's conduct was in violation of § 161.001(1)(D) or (E), Texas Family Code, or substantially equivalent provisions of the law of another state. TEX. FAM. CODE ANN. § 161.001(1)(M).
- (3) Constructively abandoned the children who have been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the children to the mother; (2) the mother has not regularly visited or maintained significant contact with the children; and (3) the mother has demonstrated an inability to provide the children with a safe environment. TEX. FAM. CODE ANN. § 161.001(1)(N).
- (4) Failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the children who have 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 children's

removal from the parent under Chapter 262 for the abuse or neglect of the children. TEX. FAM. CODE ANN. § 161.001(1)(O).

- (5) Used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the children, and (1) failed to complete a court-ordered substance abuse treatment program; or (2) after completion of a court-ordered substance abuse treatment program continued to abuse a controlled substance. TEX. FAM. CODE ANN. § 161.001(1)(P).

Only one of these findings is necessary to support an order of termination.

*See Robinson*, 89 S.W.3d at 687. A court must base a termination of parental rights upon a finding that a parent engaged in conduct described in one of the alleged grounds, plus a finding that termination is in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(1)–(2); *Latham v. Dep’t of Family & Protective Servs.*, 177 S.W.3d 341, 349 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Rebecca argues that the evidence is legally and factually insufficient to support the court’s findings under Sections 161.001(1)(E), (N), (O) and (P). Rebecca does not, however, contest the trial court’s finding under Section 161.001(1)(M), the provision allowing termination if a parent has previously had another parent-child relationship terminated. Because the trial court’s finding under Section 161.001(1)(M) is sufficient to support its order, we discuss it and the best interests of the children.



At the time of this trial, Rebecca's parent-child relationship had been terminated with respect to her fourth child, based on a finding that her conduct was in violation of Section 161.001(1)(D) and (E). During Rebecca's pregnancy with her fourth child, A.M., she tested positive for drug use, and TDFPS took temporary custody of the child at birth. She then failed to comply with the court-ordered provisions imposed as a condition of regaining custody, and the trial court terminated the parent-child relationship. Where, as here, a prior decree of termination as to another child is properly admitted into evidence, the State need not establish the underlying basis for termination, here Section 161.001(1)(D) and (E). *In the Interest of J.M.M., B.R.M., & W.T.M., Children*, 80 S.W.3d 232, 243 (Tex. App.—Fort Worth 2002, pet. denied). We hold that sufficient evidence supports at least one of the grounds on which the trial court terminated Rebecca's parent-child relationship with A.O. and A.E. Moreover, Rebecca did not assail that ground on appeal. We now consider the best interest of the children.

In determining the best interest of a child, courts examine a number of factors including the following: (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 individual seeking custody; (5) the programs available to assist the individual; (6) the plans for the child by the parent and the individual seeking custody; (7) the stability of the home; (8) the parent's acts or omissions that indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The *Holley* factors are not exhaustive; some listed may not apply, while others not included on the list may also be appropriate. *In re C.H.*, 89 S.W.3d at 27. Using several of these factors, we examine whether the evidence is legally and factually sufficient to support the trial court's finding that termination is in A.O. and A.E.'s best interests.

*The Desires and Needs of the Children*

A.O. has expressed a desire to live with her mother, and she told the court psychologist that it makes her sad that she doesn't get to see her mother often. She also said that she worries about her mother when she isn't able to communicate with her and worried about her mother's ability to overcome her drug addiction. A.E. told the court psychologist that she enjoyed visiting her mother, but she also liked living with De Los Santos. The TDFPS case worker testified that both girls were happy with De Los Santos and Waite, and that A.O. was sad when she had to leave and go into

foster care.

The psychologist further testified that the girls need an emotionally stable environment where they are supported and know what to expect day-to-day. The psychologist further testified that the girls were both friendly and polite, but that they would both need therapy in the future to help them learn to deal with the transitions they have experienced. A.O. has more serious emotional problems than A.E. in that she has some symptoms of depression, some self-esteem problems, and anger issues, which would require more therapy.

The record contains evidence that Rebecca has a criminal record for two assaults causing bodily injury, two probation violations, possession of marijuana, and theft by check. The evidence supports a reasonable inference that a person with such a criminal history and who had a substance addiction, who used drugs while pregnant, endangering her child, and used them despite agreeing not to as part of a service plan, cannot provide an emotionally stable environment.

Despite the girls' desire to spend time with their mother, nothing in the record indicates that Rebecca can meet the girls' needs. When asked about their needs, Rebecca said that they needed her, their home, and the family that they know, yet she has not provided a home for them since well

before their placement in foster care, and before that time the girls demonstrated signs of neglect with respect to their hygiene and clothing. She testified that she had lived in around seven different places, sometimes with her mother, sometimes with her stepfather, and with three or four different boyfriends, in the eight years since A.O. was born, and she voluntarily gave up custody of the girls to different relatives in that time. These children have not lived with Rebecca since December 2005. During the year between when the girls were placed in TDFPS custody and the termination hearing, she rarely called or visited. Rebecca testified that she was willing to continue therapy, but she failed to complete her own outpatient therapy for her addiction and expressed during her treatment for her addiction that she did not think she needed it. Her criminal record and her failure to complete drug treatment leave a reasonable inference that Rebecca would not provide a stable environment for the girls. This factor weighs in favor of termination.

*The Emotional and Physical Danger to the Children*

Rebecca continued to use drugs after the children were removed from her mother's custody in April 2007, until September 2007, despite the fact that the family service plan required that she be drug-free. Rebecca also had used drugs before she sent the girls to live with her mother and while

pregnant. Furthermore, Rebecca has been arrested and jailed at least five times since A.O. was born, twice for assault and once for a drug offense. The trial court could have considered the danger to the girls from an inconstant relationship with their mother, who, because of her drug use and incarceration, disrupts any permanency or stability for the children. *See Latham*, 177 S.W.3d at 349. The record indicates that Rebecca has failed to participate in ongoing support for her drug problem, and, from this, the trial court could infer that her risk of relapse is high. Rebecca admitted that she believes she has endangered her children emotionally. This factor weighs in favor of termination.

#### *Parental Abilities and Available Programs*

The record contains little evidence of Rebecca fulfilling any parental responsibilities for A.O. and A.E.. Her responsibilities have largely been performed by others—first her mother, who was unsuitable, and then her biological father and stepmother, De Los Santos and Waite, and foster parents through TDFPS placement. In the time these girls have been in TDFPS custody, Rebecca has rarely called or visited them, nor has she regularly called her TDFPS case worker to ask about the girls' well-being or request a visit. When asked why she had not visited, she said there was really no reason. She paid child support infrequently, despite managing to

purchase drugs with her income. As evidence of her support of the children, she cites one instance where she brought the girls some school uniform tops and tennis shoes, the fact that she bought them Christmas presents, and that she has made sure her home includes a room and furnishings for them. The psychological and parenting evaluation suggests that Rebecca has few parenting skills or strategies.

The family service plan includes parenting classes, but Rebecca failed to attend any of them between April 2007 and November 2007. Thus, it is apparent that although services are available to her, Rebecca may not take advantage of them. The same is true of drug rehabilitative services. This factor weighs in favor of termination.

#### *The Stability of the Home*

As discussed, the history of this case shows previous instability in the home. Rebecca claims to have established a stable home now, but she has failed to have her social worker evaluate her home as required in the family service plan. Nor has Rebecca complied with other aspects of the service plan or made much effort to parent these children. This factor weighs in favor of termination.

#### *The Parent's Acts or Omissions that Indicate that the Parent-Child Relationship is not Proper and Any Excuse for those Acts or Omissions*

Rebecca's drug abuse and failure to comply with the family service

plan is evidence of an improper parent-child relationship. *See Latham*, 177 S.W.3d at 349. During a substantial part of the time the girls were in DFPS custody, Rebecca continued to abuse drugs. She offered no reason for her failure to call or visit the girls more often. She claimed that part of the reason she failed to attend inpatient drug rehabilitation earlier was that she had to wait for a bed to open up, but she did not seek inpatient services for the first five months that TDFPS had custody of the girls. She offered work requirements as an excuse for her failure to attend outpatient drug rehabilitation. Rebecca's criminal history, which includes two assaults and a drug offense, is evidence of an improper relationship. *See Yonko v. Texas Dep't of Family & Protective Servs.*, 196 S.W.3d 236, 244 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Rebecca testified that this time it would be different because she stopped using drugs, and that she would keep the girls away from bad influences, including her own mother, with whom she remains in contact. She testified that she would participate in any therapy that the girls needed. She also testified that she wanted the girls to have a better life, and that she thought a better life would be living with her as opposed to foster care or living with De Los Santos. We defer to the trial court's role in assessing the weight and credibility of this evidence cast against Rebecca's previous

history. *See Latham*, 177 S.W.3d at 349. This factor also weighs in favor of termination.

### **Conclusion**

Clear and convincing evidence justifies the trial court's termination decision. We conclude that legally and factually sufficient grounds exist under Section 161.001(M) of the Family Code to terminate Rebecca Espinosa's parental rights to A.O. and A.E., and under the *Holley* factor analysis, legally and factually sufficient evidence supports the trial court's finding that termination of Rebecca's parental rights is in the best interest of these children.

Jane Bland  
Justice

Panel consists of Judges Jennings, Hanks, and Bland.