**Opinion issued February 10, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-09-00241-CV**

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**IN THE INTEREST OF P.G.F., A.S., AND C.D.T., CHILDREN**

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**On Appeal from the 309th District Court**
**Harris County, Texas**
**Trial Court Case Nos. 2005-04518 & 2006-27470**

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## MEMORANDUM OPINION

This appeal arises from a bench trial resulting in the termination of appellant S.S.'s parental rights with respect to three of her biological children, P.G.F. and

A.S. (trial court cause number 2006-27470) and C.D.T. (cause number 2005-04518). The mother has multiple other children who are not at issue in this appeal. In three issues, she contends that the evidence is legally and factually insufficient to support each ground for the termination of her parental rights and that the trial court erred in admitting certain photographs and medical records into evidence. We affirm.

## Procedural Background

After a bench trial lasting approximately eight days, the trial court made several findings, based on clear and convincing evidence, that the mother had committed predicate acts supporting a termination of parental rights under Family Code section 161.001(1) with respect to her children P.G.F., A.S., and C.D.T. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2010). The mother was found to have knowingly placed the children in conditions or surroundings which endangered their physical or emotional well-being, or to have knowingly allowed them to remain in such conditions. *See id.* § 161.001(1)(D). She knowingly placed them with persons who engaged in conduct which endangered their physical or emotional well-being. *See id.* § 161.001(1)(E). She failed to support the children in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition. *See id.* § 161.001(1)(F). And she failed to comply with the provisions of a court order that specifically

established the actions necessary for her to obtain the return of the children, who had been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services as a result of their removal from the mother for her abuse or neglect of the children. *See id.* § 161.001(1)(O).

The trial court also found by clear and convincing evidence that termination of the mother's parent-child relationship with each of P.G.F., A.S., and C.D.T. was in the best interest of the children. *See id.* § 161.001(2). Accordingly, the trial court entered final judgments terminating the mother's parental rights as to each of them. The mother filed timely motions for a new trial and statements of appellate points. *See id.* § 263.405(b) (Vernon 2008). The trial court denied the motions for new trial, noted the mother's indigence, and determined that an appeal would be frivolous. *See id.* § 263.405(d), (e). The trial court also ordered expedited preparation of the record of the frivolousness hearing, which was provided to the mother without advance payment. *See id.* § 263.405(g).

This appeal ensued, with both the mother and DFPS submitting appellate briefs addressing the trial court's finding that the appeal was frivolous. *See id.* The court reporter was ordered to prepare and file, without cost to the mother, the reporter's record containing all of the recorded testimony and evidence admitted at the bench trial on the merits. Quoting Family Code section 263.405(g), the same order directed the mother, after reviewing the reporter's record, to file an amended

brief "presenting arguments 'on the issues presented.'" The parties proceeded to file amended briefs addressing the merits of the mother's appellate points with the benefit of a complete record prepared at no cost to the mother.

## Analysis

### I. Evidentiary challenges

#### a. Photographs

In her second issue, the mother argues that the trial court erred in admitting seven photographs that "purported to be photographs of the children" because the photographs "were not properly identified or authenticated and were not admissible under any other ground stated by [DFPS]." The mother asserts that, at the time the photographs were admitted, which was during the testimony of C. Horne, the child advocate, DFPS did not ask Horne "if she was familiar with the children in the photographs" or if the photographs depicted "accurate representations of the children at the time the photographs were taken." The mother complains that DFPS "merely asked if Ms. Horne had examined the photographs."

The photographs at issue are seven photographs taken of the children in 2005 and 2006. In response to questioning by DFPS, Horne confirmed that these photographs of the children were contained in the file of Children's Protective Services. Specifically, the photographs depicted two of the children's full body

and closer shots of their backs, arms, and faces. Some of the photographs depict what appears to be bruising and other injuries.

We review a trial court's ruling admitting photographs into evidence for an abuse of discretion. *In re K.Y.*, 273 S.W.3d 703, 709 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Thus, we will not overturn such a decision if it falls within the zone of reasonable agreement. *Id*.

In regard to any complaint about the authentication of the photographs, Horne's testimony confirms that the photographs are contained in the CPS file and are two of the minor children who are the subject of the underlying suit. Prior to Horne's testimony, another DFPS caseworker had confirmed that DFPS had in its file photographs of the children. Thus, there is evidence in the record supporting an implied finding by the trial court that the photographs at issue were of the mother's minor children and that they were properly authenticated. *See* TEX. R. EVID. 901.

To the extent that the mother's second issue is more properly construed as presenting a general challenge to the relevancy of the photographs, in part because they were taken in 2005 and 2006, "photographs are admissible if oral testimony as to the matters depicted in the photographs is also admissible." *K.Y.*, 273 S.W.3d at 709. Here, the photographs depict some visible bruising and other marks on two of the children. Accordingly, the trial court could have reasonably determined that

the photographs were relevant to show an ongoing pattern of mistreatment, neglect, or abuse at the time the children were removed from the control of the mother and that they would help the jury in understanding the testimony presented by DFPS on these issues. *See id*.

**b. Medical records**

In her third issue, the mother argues that the trial court erred in admitting into evidence medical records from her inpatient treatment facility because the trial court's order allowing the admission of the evidence did not comply with the Health Insurance Portability and Accountability Act or related federal regulations.

At trial, the attorney ad litem explained to the court that she had subpoenaed the mother's file from her treatment facility. She indicated that she had done so because Ms. O'Keke, a doctor at the facility, was potentially going to testify on the mother's behalf. The following exchange occurred:

> [attorney ad litem]: . . . . I subpoenaed the complete file, the intake forms, all counseling records and notes for [the mother], all discipline records or infraction regarding [the mother], all drug test results regarding [the mother], the rules and regulations regarding the New Hope program and any and all records and/or documents regarding [the mother], . . . .
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> . . . .
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> [mother's counsel]: Your honor, I understand that an agency that have clients with substance abuse, mental issues are under HIPPA rules and some of

the things that [she] asked for are not subject to subpoena.

We have agreed to give her everything that sets out that [the mother] has followed her service plan, such as the UA's, certificates of completion, but therapy notes that has to do with the intimate details of her past and those things that she talked about with the therapist, we believe should be privileged and that they don't fall under the subpoena.

. . . .

[attorney ad litem]: If Ms. O'Keke is going to take the stand and give her opinion in regards to how [the mother] is doing, she's basing that on everything that she's done with [the mother] and I think I have a right to look at those notes to see what she's basing her recommendations on and to look at those, and I don't have access to anything other than speaking with Ms. O'Keke.

[mother's counsel]: There are therapy notes that we don't have any problem—

The trial court then announced it would order that the mother's entire file be produced for an "in-camera inspection of the therapy notes to determine what [it would] release." The ad litem agreed with this procedure, and the mother's counsel made no objections or any other statements in regard to the trial court's intention to conduct in camera inspection and determine what records from the facility could be released. The following day, the ad litem inquired of the trial court whether it had conducted the in-camera inspection. The trial court responded

that it had and stated, "[M]y ruling is, I think they're available for anybody here in the courtroom to review." Again, the mother's counsel made no objection or any other statements on the record.

With her initial comments regarding HIPPA rules, the mother never identified to the trial court which specific documents could not be produced and subsequently admitted under HIPAA. In fact, at the end of the exchange, she agreed that there were certain therapy notes in the file to which she would not object. When the trial court announced that it intended to conduct an in-camera inspection, and when the trial court announced the following day that it was making the records available to the parties, the mother again did not complain of any specific documents that should not be admitted. She also failed to assert any objection at either time. Thus, the mother waived any complaint to the production and or admission of her records from the treatment facility. *See* TEX. R. APP. P. 33.1.

## II. Legal and factual sufficiency

The mother challenges the legal and factual sufficiency of the evidence to support the judgments terminating her parental rights as to three of her children. In proceedings to terminate the parent-child relationship brought under Texas Family Code section 161.001, DFPS must establish one or more of the acts or omissions enumerated under section 161.001(1) and that termination is in the best interest of

the child. TEX. FAM. CODE ANN. § 161.001. Both elements must be established, and termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). A trial court's decision to terminate parental rights must be supported by clear and convincing evidence. *In re J.F.C.*, 96 S.W.3d 256, 263–64 (Tex. 2002); *In re V.V.*, No. 01-08-00345-CV, 2010 WL 2991241, at *4 (Tex. App.—Houston [1st Dist.] July 29, 2010, pet. denied) (en banc). "'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." TEX. FAM. CODE ANN. § 101.007 (Vernon 2008).

"[I]n conducting a legal sufficiency review in a termination-of-parental-rights case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which the State bore the burden of proof." *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 249 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc) (citing *In re J.F.C.*, 96 S.W.3d at 266). "In viewing the evidence in the light most favorable to the judgment, we 'must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could [have done] so,' and

we 'should disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible.'" *Id*. (quoting *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005)).

"In conducting a factual sufficiency review in a termination-of-parental-rights case, we must determine whether, considering the entire record, including both evidence supporting and evidence contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which the State bore [the] burden of proof." *Id*. (citing *J.P.B.*, 180 S.W.3d at 573; *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). "We should consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding." *Id*. (citing *J.F.C.*, 96 S.W.3d at 266–67). "'If, in light of the entire record, the disputed evidence that a reasonable fact finder 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*. (quoting *J.F.C.*, 96 S.W.3d at 266).

**a. Waiver of complaints about Section 161.001(1) findings**

The trial court made findings by clear and convincing evidence under four separate provisions of section 161.001(1) to support an involuntary termination of the mother's parent-child relationship with the three children involved in this

appeal. The trial court made the requisite findings under section 161.001(1)(D), (E), (F), and (O). "Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

In her timely filed statement of appellate points and motion for new trial, the mother challenged only three of the four section 161.001(1) findings. She did not challenge the trial court's finding under section 161.001(1)(O). The Legislature has instructed us not to consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the mother intended to appeal or in a statement combined with a motion for new trial. *See* TEX. FAM. CODE ANN. § 263.405(i). The mother did not argue in the trial court that section 263.405(i) is unconstitutional to the extent it required her to timely present her section 161.001(1)(O) argument to the trial court in order to preserve it for appeal. The mother has not argued, either in the trial court or on appeal, that any of her counsel rendered ineffective assistance by failing to include in the statement of appellate points or motion for new trial an argument that the evidence was insufficient to support a finding under section 161.001(1)(O). *See In re M.S.*, 115 S.W.3d 534, 548–49 (Tex. 2003). Accordingly, we conclude that the mother has waived her complaints about the legal and factual sufficiency to support the trial

court's finding of one or more of the acts or omissions enumerated under section 161.001(1). *See J.P.B.*, 180 S.W.3d at 574 (holding legal sufficiency point was waived when parent did not allege in the court of appeals or in the Supreme Court that her trial counsel "unjustifiably failed to preserve a 'no evidence' issue").

**b. Sufficiency of the evidence to support Section 161.001(2) best-interest findings**

We turn to the mother's sufficiency challenges to the trial court's best interest finding under section 161.001(2). In determining whether termination of the mother's parental rights was in the children's best interest, we may consider several factors including (1) the children's desires, (2) the current and future physical and emotional needs of the children, (3) the current and future physical danger to the children, (4) the parental abilities of the person seeking custody, (5) whether programs are available to assist the person seeking custody in promoting the best interests of the children, (6) plans for the children by the person 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. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *V.V.*, 2010 WL 2991241, at *7. The *Holley* factors are not exhaustive, and there is no requirement that DFPS prove all factors as a condition precedent to parental termination. *See C.H.*, 89 S.W.3d at 27.

In regard to the desires of the children, C. Hammonds, a family counselor, testified that the children told her that they wanted to "live with" or "stay" with their foster parents rather than their biological mother. Based upon her counseling, she also recommended that the foster parents adopt the children. The child advocate, C. Horne, testified that one of the children had spoken to him about his desire to stay with the foster parents and expressed that he was "fearful" of being returned to his mother. Another child expressed her desire to stay with the foster parents. The foster father and potential adoptive parent testified that one of the children had "anxiety" before visitations with the mother.

In regard to the current and future physical and emotional needs of the children and the current and future physical danger to the children, DFPS presented evidence that the mother had a long history of narcotics use and other criminal activity, including at least one period of incarceration, and that the mother also had a history of being abusive to her children and endangering their welfare. It also presented evidence that the mother had left her children with others with the knowledge that they were serious narcotics users and were physically abusive to her children. Moreover, at the time of trial, the mother was not employed and would not have any means to obtain employment or provide a stable home for the children.

In regard to the mother's parental abilities, DFPS presented evidence that she gave birth to a baby during the pendency of the case and that this baby tested positive for having cocaine in his system. C.B., a friend of the mother, testified that the mother abused her children and had a history of working as a crack cocaine dealer. C.B.'s mother, A.T., testified that appellant S.S. had even been C.B.'s dealer. There is also evidence that the mother had left her children with C.B. for significant periods of time while she sold narcotics. The trial court also could have determined that the mother was not credible or trustworthy, based upon the mother's testimony about her narcotics use and narcotics history, which conflicted with other substantial evidence presented by DFPS.

In regard to the remaining factors, there is no evidence that the mother would have any means to independently provide for the children even if she successfully completed the in-patient care she was undergoing. DFPS also presented evidence that the facility where the mother was residing could not house children, although the mother did present conflicting evidence on this point. The record before us contains evidence that the foster parents, who sought to adopt the children, provided a stable and safe environment and that the children's behavior had significantly improved after being placed with the foster parents.

In sum, the record before us establishes that the evidence is legally and factually sufficient to support the trial court's finding that that termination of the

mother's parental rights to the children was in their best interest. TEX. FAM. CODE ANN. § 161.001(2).

## Conclusion

We conclude that DFPS presented legally and factually sufficient evidence that termination of the mother's parental rights to the children was in their best interest. Moreover, the mother's complaints about the admissibility of the photographs and medical records are without merit. Accordingly, we affirm the final judgments of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Alcala, and Massengale.

Justice Jennings, concurring.