Opinion issued September 22, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00767-CV

IN THE INTEREST OF J.D.S., A CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2009-00826J-A

MEMORANDUM OPINION

Appellant S.S. appeals the trial court's judgment terminating his parental rights to his daughter, J.D.S. In two issues, S.S. challenges the legal and factual sufficiency of the evidence that he constructively abandoned J.D.S. and that termination of his parental rights was in her best interest. We affirm.

BACKGROUND

J.D.S. was born in Texas in late 2007, and S.S. was listed on the birth certificate as her father. As an infant, J.D.S. lived in Missouri with her parents and her older half-brother. When J.D.S. was approximately seven months old, S.S. committed eight crimes over a two-week period. These crimes included arson, burglary, and stealing.

By September 2008, J.D.S. was in the care of her maternal grandmother in Texas. S.S. later said that he had no contact with J.D.S. at this time because her grandmother did not allow it. In January 2009, when J.D.S. was just over a year old, she fell from the window of a second-story apartment. The Department of Family and Protective Services took custody of her. At that time, her mother was homeless and addicted to drugs, and her father was incarcerated in Missouri. The mother later relinquished her parental rights.

Approximately three months later, S.S. wrote to the Department and stated that although he was incarcerated in Missouri he did not wish to relinquish his parental rights to J.D.S. He stated that his mother, who lived in Missouri, could take temporary custody of J.D.S. until his release from prison, and he asked for assistance in completing the arrangements necessary to accomplish that. The trial court ordered that a home study be requested pursuant to the Interstate Compact on the Placement of Children. At trial, Eva Dix, the Department caseworker assigned

to supervise J.D.S.'s case, testified that the home study was denied, implying that S.S.'s mother was rejected as a suitable guardian for J.D.S. S.S.'s mother did not appear at trial, and there is no indication in the record that she made any contact or attempt to gain custody of J.D.S.

Dix was one of only two witnesses who testified at trial. She testified that J.D.S. was in foster care with her half-brother and that the foster parents wished to adopt both children. She believed that adoption by the foster parents was in the best interest of J.D.S. Dix testified that S.S. was serving a ten-year sentence for arson, and he was eligible for conditional release in July 2015. The evidence at trial showed that S.S. was actually serving eight concurrent ten-year sentences for the crimes he committed during this 2008 crime spree. Dix testified that S.S.'s contact with the Department was limited to several letters, which indicated that he was incarcerated but that he wished to retain his parental rights to J.D.S. Dix said that she wrote to S.S. and sent him pictures and a family service plan. S.S. responded that he intended to take parenting classes while in prison, but he never verified that he had completed any of the services listed in the family service plan. Dix also testified that in the 18 months in which the Department had custody of J.D.S., S.S.'s contact with his daughter was limited to two letters or drawings and one birthday card. Dix testified that S.S. was not part of his daughter's life when she came in the Department's care and that termination of S.S.'s parental rights

was in her best interest. She said, "They don't have a relationship as far as the agency is concerned. Since the agency has been involved, there is not an established relationship." On cross-examination, Dix testified that S.S. had done everything he could to maintain contact with his daughter while incarcerated.

The second and final witness at trial was Allison Ward, the child advocate for J.D.S. Ward testified that J.D.S. and her brother were in a loving home and that it was in J.D.S.'s best interest for her father's parental rights to be terminated. When the trial court asked why she thought his rights should be terminated, Ward said, "From what I've seen since I've been on the case, [he has] had no involvement with [J.D.S.], which has been 18 months." On cross-examination, Ward testified that she had never had any contact with S.S.

After the parties rested, the trial court found S.S. had constructively abandoned J.D.S., as defined by Section 161.001(1)(N) of the Texas Family Code, and that it was in the best interest of J.D.S. for S.S.'s parental rights to be terminated. S.S. appealed.

SUFFICIENCY OF THE EVIDENCE

I. Standards of review

In proceedings to terminate the parent-child relationship brought under Texas Family Code section 161.001, the Department must establish that one or more of the acts or omissions enumerated under section 161.001(1) is satisfied and

that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2010). 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 (West 2008). In reviewing evidentiary sufficiency, we evaluate "the sufficiency of the evidence presented under the specific statutory grounds found by the trial court in its termination order." *Cervantes-Peterson v. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 252 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc).

"[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*, 221 S.W.3d at 249 (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.* at 250 (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).

II. Constructive abandonment

In his first issue, S.S. contends that the evidence was legally and factually insufficient to support the trial court's conclusion that he constructively abandoned J.D.S. In its termination decree, the trial court stated that it found by clear and convincing evidence that termination of S.S.'s parental rights was in J.D.S.'s best interest and that S.S. had constructively abandoned J.D.S. Section 161.001(1)(N) of the Texas Family Code provides, as a ground for termination of parental rights, that a parent constructively abandons his child if: (1) the child has been in the permanent or temporary managing conservatorship of the Department or an authorized agency for not less than six months; (2) the Department or authorized agency has made reasonable efforts to return the child to the parent; (3) the parent has not regularly visited or maintained significant contact with the child; and (4) the parent has demonstrated an inability to provide the child with a safe environment. TEX. FAM. CODE ANN. § 161.001(1)(N).

S.S. does not dispute that J.D.S. had been in the managing conservatorship of the Department for at least six months or that the Department made reasonable efforts to return J.D.S. to him. S.S. instead focuses on the last two elements, arguing that his correspondence with J.D.S. was significant and that he demonstrated his ability to provide J.D.S. with a safe environment by identifying his mother as a person who could care for J.D.S. until his release from prison.

Visitation and contact with the child. S.S. contends that his contacts with J.D.S. were sufficient because he was incarcerated in Missouri and he did all he possibly could do to maintain contact with his daughter, who was not yet three years old at the time of trial. In addition, he argues that all of his correspondence indicated a desire for contact with his child. The documents from the Missouri Department of Corrections that were admitted at trial in July 2010 indicate that S.S. had been in jail or prison since July 5, 2008. In a letter to the trial judge, S.S. stated that he had not had telephone contact with his daughter since at least September 2008. And the only contacts he had with J.D.S. in the 18 months in which she was in the custody of the Department were two letters or drawings and a single birthday card. Both the caseworker and the child advocate testified that he had no relationship with J.D.S. during the 18 months that she was in foster care. Although we are mindful that imprisonment alone is not a basis to terminate parental rights, *see Boyd*, 727 S.W.2d at 533–34, sporadic correspondence from a parent to a child is insufficient to establish significant contact. *See In re N.R.T.*, 338 S.W.3d 667, 673–74 (Tex. App.—Amarillo 2011, no pet.) (holding that single note from mother to child prior to her incarceration was not significant contact). Though his desire to have contact with J.D.S. is commendable, his minimal and sporadic correspondence supports the trial court's conclusion that he did not regularly maintain significant contact with her.

Ability to provide safe environment for child. S.S. argues that, because he suggested his mother as a potential guardian and either took or intended to take parenting and welding classes in prison, the evidence was insufficient to show that he was unable to provide a safe environment for his daughter.

The trial court ordered that, pursuant to the Interstate Compact on the Placement of Children, a home study be made to evaluate the potential to place J.D.S. with S.S.'s mother. Under the Family Code, the Department must investigate a proposed placement to determine if it is in the child's best interest. TEX. FAM. CODE ANN. § 264.754 (West 2008); *see In re Northrop*, 305 S.W.3d 172, 177 & n.4 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding). When the proposed placement is out of state, the Department must also comply with the Interstate Compact on the Placement of Children, which requires the agency in the state of the proposed placement to provide notice to the sending agency, in writing, to the effect that the "placement does not appear to be contrary to the interests of the child." TEX. FAM. CODE ANN. § 162.102 (West 2008). Dix testified that the home study was "denied." None of the attorneys asked any follow-up questions about why the home study was denied. S.S. contends that without such evidence the trial court was not able to determine whether S.S.'s mother could provide a safe environment for J.D.S.

However, the trial court was able to determine that, under the Interstate Compact for the Placement of Children, the Missouri agency refused to certify that placement with S.S.'s mother did not appear to be contrary to J.D.S.'s best interests. Thus, the evidence supported the implied finding that S.S.'s mother was not a suitable or legally viable proposed placement. *See, e.g.*, *In re N.R.T.*, 338 S.W.3d 667, 674–75 (Tex. App.—Amarillo 2011, no pet.). S.S. did not identify any other person as a potential guardian for his daughter. In addition, S.S.'s mother was not present at trial and did not otherwise appear in this litigation or attempt to gain custody of J.D.S.

S.S. also argues that his efforts at self-improvement should be dispositive of this issue. Although S.S. wrote a letter indicating that he intended to pursue parenting and welding classes, nothing in the record shows that he completed either course. Finally, S.S. argues that he offered to pay child support. But the record shows that as an inmate, S.S. earns only $8.50 a month. Taken together, this evidence supports the trial court's finding that S.S. did not demonstrate an ability to provide a safe environment for his child. *See Hampton v. Tex. Dep't of Protective & Regulatory Servs.*, 138 S.W.3d 564, 567–68 (Tex. App.—El Paso 2004, no pet.) (holding that, under section 161.001(1)(Q), incarcerated parent did not show ability to care for child when two proposed relative placements were denied under Interstate Compact for Placement of Children and that signing over

IRS refund check and paychecks was no evidence of ability to care for child without evidence that money was being spent on child's care).

Viewing the evidence in both the light most favorable to the finding and in its entirety, we conclude that the fact finder could reasonably have formed a firm belief or conviction that S.S. did not maintain significant contact with J.D.S. and that S.S. did not have the ability to provide for his daughter. We overrule S.S.'s first issue.

III. Best interest of the child

In his second issue, S.S. contends that the evidence is legally and factually insufficient to support the trial court's judgment that termination is in the best interest of the child because he has maintained significant contact with his daughter while in prison, taken parenting classes, and expressed a desire or plan to take welding classes.

A strong presumption exists that a child's best interests are served by maintaining the parent-child relationship. *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) may be probative in determining the best interests of the child. *Id.* (citing *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002)). The Texas Supreme Court has provided a nonexclusive list of factors that the fact finder in a termination case may use to

determine the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* These factors are not exhaustive, and there is no requirement that the Department prove all factors as a condition precedent to parental termination. *In re C.H.*, 89 S.W.3d at 27; *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 618–19 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

The desires of the child. At trial, J.D.S. was two years old and did not express her desires. However, J.D.S. had not seen her father at least since his incarceration in July 2008. Thus, a reasonable fact finder could conclude that she had no conscious memory of S.S.

The child's physical and emotional needs, now and in the future, and the emotional and physical danger to the child, now and in the future. S.S. has been

incarcerated for the majority of J.D.S.'s life. As we have already concluded, his minimal and sporadic correspondence did not amount to significant contact with his daughter. Because S.S. was serving eight concurrent ten-year sentences, the date of his release from prison was uncertain. The evidence at trial was that he would first be eligible for parole in 2015, but he could also serve his entire sentence and not be released until 2018. Ward, the child advocate, testified that this kind of uncertainty would be detrimental to J.D.S.

The parental ability of the individual seeking custody and programs available to assist in promoting the child's best interest. S.S. argues that he took parenting classes while in prison, but the evidence at trial was that he did not verify whether he had completed such classes. There was no other evidence about S.S.'s parenting ability.

Plans for the child by S.S. As we have discussed, S.S. suggested his mother as a potential guardian for J.D.S. until his release from prison, but the home study on S.S.'s mother was denied, indicating that this would not be a suitable placement for J.D.S.

Stability of the home or proposed placement. The evidence at trial showed that J.D.S. was bonded to her brother and foster parents, who wished to adopt both J.D.S. and her brother. Both Dix and Ward testified that this would be in J.D.S.'s best interest.

The acts or omissions of the parent and any excuse for such acts or omissions. S.S. had been incarcerated in Missouri since before J.D.S. came into the Department's custody. "When parents are incarcerated, they are absent from the child's daily life and are unable to provide support, and when parents like appellant repeatedly commit criminal acts that subject them to the possibility of incarceration, that can negatively impact a child's living environment and emotional well-being." *In re S.M.L.*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005, no pet.). While S.S. may not have been able to visit J.D.S. because of his incarceration, no excuse for his criminal acts and incarceration appears in the record.

Viewing the evidence in both the light most favorable to the finding and in its entirety, we conclude that the fact finder could reasonably have formed a firm belief or conviction that termination of S.S.'s parental rights was in the best interest of J.D.S. We overrule S.S.'s second issue.

* * *

The Department brought a cross-issue about the trial court's denial of termination based on section 161.001(Q), which provides that termination of parental rights may be predicated on a finding that the parent "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less

than two years from the date of filing the petition." TEX. FAM. CODE ANN. § 161.001(Q). In light of our disposition of S.S.'s issues, we do not reach the Department's cross-issue.

CONCLUSION

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.