Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00062-CV

IN THE INTEREST OF J.S., A CHILD

On Appeal from the 506th District Court
Grimes County, Texas
Trial Court Case No. 31,585

MEMORANDUM OPINION

Appellant P. appeals the trial court's judgment terminating her parental rights to her daughter, J.S. The trial court found that there was clear and convincing evidence that P. had endangered and constructively abandoned J.S. and that P. had failed to satisfy the requirements of the court's order that specified the actions required for P. to regain custody of J.S. In addition, the court found that

there was clear and convincing evidence that termination of P.'s parental rights was in the best interest of her daughter. In five issues, P. challenges the legal and factual sufficiency of the evidence to support the trial court's judgment. We affirm.

Background

At trial P. admitted that she had a six-year addiction to methamphetamines. She was arrested in April 2009 for possession of a controlled substance after police found methamphetamines in her car during a traffic stop. Also in the car was P.'s daughter J.S., who was approximately two years old at the time. The Department of Family and Protective Services began an investigation, and P. submitted to a hair-follicle drug test, with negative results. Around August 2009, the caseworker asked her to submit to a second drug test to expedite the closing of her case, and she refused.

Shortly thereafter, P. left J.S. with her unemployed ex-husband, L. She admitted at trial that she was using drugs at the time and that she used drugs on a weekly basis while J.S. was in the house. Although L. was not the biological father of J.S., he testified that he had been living with P. and helping to care for the child. L. testified that P. did not tell him where she was going or how long she would be gone. He said that P. took the couple's only car and left no money or instructions regarding J.S. There was insufficient food in the house—"it was down

to slim pickings"—and L. had neither money to buy groceries nor transportation to the grocery store. After P. had been gone for approximately a week, L. called his adult daughter for help. The family decided that J.S. would live with C., an adult daughter of P. and L. who has a daughter close in age to J.S. C. and her fiancé welcomed J.S. into their home. The family contacted the Department, which petitioned for temporary managing conservatorship and agreed to let J.S. stay with her sister C.

Jon Gregory, the Department caseworker who handled the intake investigation in August 2009, testified that he tried to contact P. and that she returned his phone call in early September. P. denied leaving J.S. and L. alone without resources, and she said that there was another couple living in the house with them. P. also asked what she needed to do to regain custody of J.S. In late September, P. met with Gregory at his office. Gregory testified that she was twitching in her seat and could not remain still.

Also in September 2009, P. was placed on probation for possession of a controlled substance related to her April 2009 arrest. While on probation, she was arrested for theft of service and two charges of theft by check. Her probation was revoked in January 2010, and, in lieu of prison time, she entered a court-ordered substance abuse treatment program, the Substance Abuse Felony Punishment Facility of the Texas Department of Criminal Justice, which was to be followed by

three-and-a-half years of probation. Caseworkers set up family meetings and appointments for various court-ordered evaluations and services, but P. did not attend these meetings or appointments because she was in jail or the court-ordered substance abuse treatment program.

Approximately two months before P. completed the court-ordered substance abuse treatment program, she wrote a letter to the Department, asking what was required for her to regain custody of J.S. After completing the program, P. entered a "halfway house for drug rehabilitation and to transition back into society after being in prison." P. said that she would be released from the halfway house in mid-December, but that she would go to prison if she violated a condition of her probation.

At trial, both L. and C. expressed concerns about P.'s ability to care for J.S. Both testified that P. had a history of leaving her children for periods of time. L. said that P.'s irresponsible behavior was affecting J.S. He testified that on several occasions P. left J.S. with a family friend who was babysitting and did not return on time, sometimes not until the next day. He also thought it was not possible for P. to be responsible or stable while using methamphetamines, and he was concerned about P.'s ability to get help for J.S. if needed, saying that he would have avoided police and hospitals when he was using drugs.

C. expressed concern about her mother's ability to provide a stable environment for J.S. based on P.'s criminal history including drug abuse, the instability C. herself experienced as a child, and the Department's involvement during J.S.'s life. C. noted that her mother had not seen J.S. since the child had been left with L., over a year before trial. And she testified that after J.S. was born, her mother placed another child for adoption because she lacked the ability and resources to care for the child. Finally, C. indicated that J.S. had made significant progress adjusting to a routine and dealing with her fears of abandonment. C. was concerned that J.S.'s fears and anxieties would return if she were returned to P. Finally, C. testified that she wished to adopt her younger sister and promised to be protective of J.S. regardless of the trial court's judgment.

P. testified that she had no permanent place to live at the time she left J.S. with L. She conceded that she had spent a year and a half of her life in jail, including nine months in jail during J.S.'s life. She admitted that she committed three crimes while on probation and that she knew that her actions could result in imprisonment for violation of her probation. She acknowledged that it would be "very hard" to take care of her daughter from jail, and she said that she was not "thinking in [her] right mind" when she violated probation because she was using methamphetamines. She testified that after J.S. was born, she placed another child for adoption because she could not care for the child. She said, "Well, I didn't

want to bring another child into that." P. was also unemployed at the time of trial, though she testified that she was looking for work.

However, P. also testified that she had been sober for ten months and that she wanted a chance to parent J.S. and care for her everyday needs. P.'s father and stepmother testified about positive changes they had seen in her since she entered the court-ordered substance abuse treatment program. They also testified that they would be materially supportive of P. if J.S. were returned to her. L. and C. both testified that P. had been an appropriate parent to her older children before she began using drugs.

The trial court terminated P.'s parental rights on two grounds of endangerment, constructive abandonment, and failing to comply with the provisions of a court order that established the actions necessary for her to regain custody of J.S. *See* TEX. FAM. CODE ANN. § 161.001(D), (E) & (N) (West Supp. 2010). The trial court made findings of fact including:

- [P.] left [J.S.], age two at the time, without adequate food, money, or transportation, did not provide a time of estimated return, and remained away for approximately two weeks;

- [J.S.] has had no contact with [P.] since the date of [her] abrupt departure from the home;

- [P.] used illegal drugs for a significant period of time, including the entire period of [J.S.'s] life, and up until the day before she was arrested and sent to [the court-ordered substance abuse treatment program];

- [P.] was incarcerated for the majority of the pendency of this case, from approximately mid-January 2010 until September 21, 2010 when she was discharged from [the court-ordered substance abuse program] to a half-way house;

- [P.] at no time offered any information regarding family members who might be able to provide [J.S.] with a safe environment during the pendency of this case;

- [W]hile [J.S.] was in her care, [P.] relinquished her parental rights to a newborn child because she did not have the ability to care for that child;

- Prior to the removal of [J.S.], [P.] continually used illegal drugs. "Continually" is defined as a duration over a long period of time with intervals of interruption;

- During the pendency of this case and at the time of trial, [P.] did not have a job, an income, a home, a vehicle, or any money; and thus, she had inadequate resources to provide for [J.S.];

- At the time of trial, [P.] was unable to provide a safe environment for [J.S.];

- [J.S.] was placed with her adult sister, another child of [P.], who has indicated a desire to adopt [J.S.];

- At the time of trial, [J.S.] was bonded with the adult sister and the child's physical and emotional needs were being met.

P. appealed the trial court's judgment terminating her parental rights. In five issues she challenges the legal and factual sufficiency of the evidence to support each of the predicate acts the trial court found and to support the trial court's conclusion that termination of her parental rights was in the best interest of J.S.

Analysis

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. 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). "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).

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 *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 *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. Termination of parental rights

The trial court found that P. had knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child. *See* TEX. FAM. CODE ANN. § 161.001(1)(D). "Endanger" means to expose to loss or injury or to jeopardize. *Boyd*, 727 S.W.2d at 533; *Ruiz v. Tex. Dep't of Family & Protective Servs.*, 212 S.W.3d 804, 814 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The term means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Boyd*, 727 S.W.2d at 533. However, it is not necessary that the conduct be directed at the child or that the child actually suffer injury. *Id.*; *see also Robinson v. Tex. Dep't of Protective & Regulatory Servs.*, 89 S.W.3d 679, 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Section 161.001(1)(D) focuses on proof that the child's environment was the source of endangerment to the child's physical or emotional well-being. *Ruiz*, 212

S.W.3d at 815. The evidence showed that P. left her daughter without sufficient food, money, or transportation. Although she testified that she and L. had an agreement that she would return within two weeks, L. testified that she left no instructions on how to care for J.S. or information about when she would return. In addition, P. used drugs while J.S. was in the home and left her with three people who were known by P. to use methamphetamines.

Nevertheless, P. argues that the evidence is legally and factually insufficient because the Department did not prove abuse or neglect as defined by Texas Family Code section 261.001, which defines abuse and neglect in many ways that require a showing that the child was harmed or exposed to a substantial risk of immediate harm. *See* TEX. FAM. CODE ANN. § 261.001(1)(I) (West 2008). P. argues that there was no evidence that J.S. was actually harmed or exposed to a substantial risk of harm, and therefore the trial court's judgment should be reversed. Subsection (D) refers to acts that "endanger" the child, and nothing in the statutory text requires proof of "abuse" or "neglect" as defined by section 261.001. *See id.* § 161.001(1)(D). P.'s argument thus lacks merit.

We hold that the evidence was legally and factually sufficient to produce in the mind of the fact finder a firm belief or conviction that P. knowingly allowed J.S. to remain in conditions or surroundings that endangered her physical or emotional well-being. *See id*.; *Ruiz*, 212 S.W.3d at 815. Because we conclude the

evidence was legally and factually sufficient as to section 161.001(1)(D), we overrule P.'s first issue. We need not address her second, third, and fourth issues, which attack the sufficiency of the evidence to support the trial court's other section 161.001(1) findings in support of the termination decree. *See A.V.*, 113 S.W.3d at 362 (holding that only one predicate finding under section 161.001(1) is necessary to support judgment of termination).

III. Best interest of the child

In her fifth issue, P. argues that the evidence was legally and factually insufficient to show that termination of her parental rights was in the best interest of J.S. Specifically, she argues that there was no evidence that J.S. was harmed as a result of her actions.

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 *C.H.*, 89 S.W.3d at 28). 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. *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.S. was three years old, and she did not express her desires. However, J.S. had not seen her mother since she abruptly left her with L., and C. testified that J.S. was doing well in her home and called her "mommy."

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. J.S. was three years old at the time of trial. The testimony showed that she was a bright and healthy child who was thriving with a regular routine and excelling in preschool. Although there were no special needs identified, the evidence was that P. had a

recent history of drug use and repeated criminal activity, both of which would expose J.S. to the risk of instability and uncertainty if her mother were to become unavailable because she was incapacitated or incarcerated.

The parental ability and programs available to assist in promoting the child's best interest. P. testified that she continued to be involved in drug rehabilitation programs and was in a rigorous program at the halfway house. But she also testified that she would be leaving the halfway house a few months after trial. While both L. and C. testified that P. had been an appropriate or good mother before she began using drugs, the only time she had been sober during J.S.'s life was when she was incarcerated or in the court-ordered substance abuse treatment program. The evidence also showed that she made irresponsible choices as a mother while using drugs.

Plans for the child. P. testified that she was looking for work, and her father and stepmother indicated that they would make room for her in their home after she left the halfway house if necessary. But P.'s father testified that he would be away from home for long periods of time as a truck driver, and thus he would be unable to be present and supportive of P. at those times. P. said that she wished to be a parent to J.S. and to care for her day-to-day needs.

Stability of the home or proposed placement. C. testified that she and her fiancé were both employed, and she testified about the daily routine they kept for

J.S. and their young daughter. C. described the day care or preschool that J.S. attended and the family activities they did together. The Department's caseworkers testified that C. demonstrated appropriate parenting skills, and both L. and P. agreed.

The acts or omissions of the parent and any excuse for such acts or omissions. P.'s most significant acts were her drug use and criminal activity, in which she engaged despite the risk of incarceration. The record shows P.'s admirable efforts to become and stay sober and maintain a stable life and her understandable desire to parent her child. But there is nothing in the record to excuse her voluntary drug use or criminal activity. Though she testified that she left J.S. with L. to complete vocational training and find a place to live, she also testified that she was using methamphetamines at that time and that she was not thinking clearly because of the drug use when she committed additional crimes while on probation.

We hold this evidence was legally and factually sufficient to produce in the mind of the fact finder a firm belief or conviction that termination of P.'s parental rights was in her daughter's best interest. We overrule P.'s fifth and final issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.