Opinion issued January 4, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00548-CV

IN THE INTEREST OF E.J., A CHILD

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Case No. 2016-01472J

MEMORANDUM OPINION

This is an appeal from a decree terminating a mother's parental rights. The mother contends that the evidence was legally and factually insufficient to support the termination of her parental rights and the appointment of the Department of Family and Protective Services as the child's sole managing conservator. Because the evidence is sufficient to support the trial court's decree, we affirm.

Background

The Department of Family and Protective Services received a report alleging the mother's neglectful supervision of three children, including E.J., who was younger than two years old at the time. The mother reportedly was found outside naked, possibly having been being raped by her boyfriend and his friends. The Harris County Psychiatric Center characterized her as being in a "psychotic state." The report alleged that the mother had tested "positive for PCP and THC." It further indicated a concern that the mother had subjected her children to neglect, abuse, or substance abuse in the home and was unable to care for them in her current mental state. At the time of the report, E.J. was already under the care of his mother's adoptive mother. The Department filed a petition seeking temporary managing conservatorship of E.J. and termination of parental rights if reunification with the parents was found to be unsuitable. E.J. was placed under the Department's care.

The Department created a family service plan for the mother, which the trial court incorporated by reference in a status-hearing order, making the service plan an order of the court. The plan included instructions on how and when she should report or provide proof of completion of or participation in each task or service. The plan also stated its purpose was to help the mother provide a safe environment for the child within the specified time, and that if the mother was unwilling or unable to provide her child with a safe environment, her parental and custodial duties may be

restricted or terminated, or the child may not be returned to her. Among other things, the plan required the mother to participate in a psychosocial evaluation and follow all resulting recommendations.

At a final permanency hearing held before trial, the mother was not present. An appointed attorney appeared on the mother's behalf and informed the court that she was in the Harris County jail. The attorney also informed the court that she had sent letters to the mother which were not returned. The Department's caseworker testified at the hearing. She stated that E.J. was approximately three years old, and that he was developmentally on target. He did not suffer from any diagnosed conditions, but he was receiving speech therapy and had completed occupational therapy. For approximately eight months, E.J. had been placed in the care of paternal relatives who were present in court and who had been approved for adoptive placement after undergoing a home study. The caseworker explained that all of E.J.'s physical and emotional needs were being met with the placement, and the Department's plan was for that family to adopt him. E.J.'s great aunt, T.M., also testified at the hearing and explained that the child had been in her care for over six months and was doing "great." She further stated that the mother had not contacted her during the pendency of the suit. At the close of the hearing, the court immediately proceeded to trial.

At trial, the father relinquished his parental rights with respect to E.J. The Department offered eight exhibits which were admitted into evidence. These included the appearance form for the mother, E.J.'s birth certificate, the mother's family service plan, a letter certifying that E.J. had not been the subject of a prior suit affecting the parent-child relationship, and several documents related to the mother's criminal history.

The caseworker testified again. She stated that E.J. had come into the care of the Department due to the mother's neglectful supervision of him and two of his siblings. She revealed that the mother was admitted to a hospital after being found outside, naked, in a psychotic state after possibly being raped. The caseworker stated that the child had been placed with paternal relatives for over six months, and he was doing well.

The caseworker explained that at the onset of the case, she unsuccessfully attempted to contact the mother by telephone and mail in order to develop a family service plan. When she eventually spoke with the mother by telephone, she provided information about the family service plan and her telephone number, and invited her to meet in her office. She further testified that after the initial conversation, she reached out to the mother by phone "until the number no longer worked," but the mother never contacted her. The mother did not complete any portion of her family service plan, and the court had entered an order that the mother could not visit the

child due to her failure to submit to drug testing. The caseworker asked that the court terminate the parental rights of the mother, noting her absence in E.J.'s life, as well as the stability of his current placement.

The trial court found that the mother had committed the predicate acts of endangerment, constructive abandonment, and failure to comply with a court order. *See* TEX. FAM. CODE § 161.001(b)(1)(D), (E), (N), (O). In its final decree of termination, the court also found that termination of the mother's parental rights was in the best interest of E.J. Based upon those findings, the trial court terminated the mother's parental rights to E.J. The Department was named sole managing conservator of the child.

Analysis

On appeal, the mother challenges the legal and factual sufficiency of the evidence supporting termination of her parental rights under section 161.001(b)(1)(D), (E), (N), and (O). She also argues that the evidence was legally and factually insufficient to support the finding that termination of her parental rights was in E.J.'s best interest. Finally, she argues that the evidence was legally and factually insufficient to support the trial court's finding that appointment of the Department as E.J.'s sole managing conservator was in the child's best interest.

To terminate parental rights, the State must establish by clear-and-convincing evidence that there is at least one predicate statutory ground for termination and that

the termination is in the child's best interest. TEX. FAM. CODE § 161.001(b); *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). Clear-and-convincing evidence is "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 § 101.007.

In reviewing the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the trial court's finding to decide "whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *J.F.C.*, 96 S.W.3d at 266. We assume that any disputed facts were resolved in favor of the finding as long as a reasonable factfinder could have done so. *Id*. In our review of the factual sufficiency of the evidence, we consider the entire record, including disputed evidence. *Id.* (citing *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). The evidence is factually insufficient if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have resolved in favor of the finding is so significant that the factfinder could not reasonably have formed a firm belief or conviction. *Id*.

I. Failure to comply with court order (Family Code § 161.001(b)(1)(O))

One of the predicate grounds which may justify termination of the parent-child relationship applies when a 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 § 161.001(b)(1)(O). The mother does not dispute that E.J. was removed from her care due to her neglectful supervision of him. Nor does she dispute that the Department was appointed temporary managing conservator of E.J. at least nine months before trial. The mother never participated in any services and she concedes that the record establishes her noncompliance with the family service plan. In her brief, she argues instead, that the plan "may not have been fully read and understood," noting that she suffers from a mental illness. She also argues that the Department did not keep track of her to arrange for testing.

The caseworker testified that she contacted the mother by telephone and mail prior to developing a family service plan, but after she was unable to reach the mother she used the information she had to create a plan. Later, when she was able to establish contact with the mother, she informed her of the service plan and offered to meet with her. The evidence further establishes that the family service plan was made an order of the court and that it required the mother to complete several tasks and services in order for E.J. to be returned to her. The caseworker arranged for psychosocial and psychiatric evaluations, a parenting class, and a drug assessment for the mother, but the mother failed to attend. The trial record contains no evidence

that the mother failed to complete her family service plan due to a lack of understanding its requirements or the consequences of her noncompliance.

Further, the Family Code does not provide for consideration of excuses for noncompliance in assessing whether a violation of section 161.001(b)(1)(O) has occurred. *See In re M.C.G.*, 329 S.W.3d 674, 676 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *see also In re R.W.*, No. 01-11-00023-CV, 2011 WL 2436541, at *7 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mother's assertion that she did not complete her family service plan because her husband was abusive and would not let her obtain the required services was not relevant in assessment of a section 161.001(b)(1)(O) violation). Any excuse for failing to complete a family service plan can only be considered in the best-interest determination. *M.C.G.*, 329 S.W.3d at 676.

Viewing the evidence in the light most favorable to the trial court's finding, we conclude that the factfinder reasonably could have formed a firm belief that the mother failed to comply with her family service plan. Given that none of the evidence establishing her noncompliance is in dispute, we conclude that the evidence was also factually sufficient to support the judgment. We overrule the mother's challenge to the sufficiency of the evidence to support a finding that she violated Family Code section 161.001(b)(1)(O).

Because sufficient evidence of only one predicate finding is required under to support a judgment of termination when there is also a finding that termination is in the best interest of the child, we need not address the evidentiary challenges to the other predicate findings of endangerment and constructive abandonment. TEX. FAM. CODE § 161.001(b)(1); *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

II. Best interest of the child

Evidence that establishes the predicate acts under section 161.001(b)(1) also may be relevant to determining the best interest of the child. *See C.H.*, 89 S.W.3d at 27–28. On appeal, the mother concedes that much of the evidence presented at trial supports or weighs heavily in favor of the trial court's best-interest finding. Yet she contends that the Department failed to prove by clear-and-convincing evidence that termination of her parental rights would achieve permanency for the child. She argues that E.J.'s placement with the paternal relative caregivers already had achieved this goal, and it therefore was not in the best interests of the child to sever the parent-child relationship.

There is a strong presumption that the best interest of a child will be served by maintaining the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). There also is a presumption that prompt and permanent placement of a child in a safe environment is in the child's best interest. *Id.* To determine whether a

reasonable factfinder could form a firm belief or conviction that termination of the parent-child relationship was in the best interest of the child, we consider the factors set out in *Holley v. Adams*: (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 which 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. 544 S.W.2d 367, 372 (Tex. 1976). The list is neither exhaustive, nor is evidence of all nine factors required to support a judgment of termination. *Id*. Direct and circumstantial evidence, subjective factors, and the totality of the evidence may be considered in conducting this analysis. *In re J.M.T.*, 519 S.W.3d 258, 269 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

E.J. was approximately three years old at the time of trial. There was no testimony as to his desires. When a child is too young to express his desires, the factfinder may consider evidence that the child has spent minimal time with the parent, that a foster family has provided good care for him, and that bonds have developed between the child and the foster family. *In re J.D.*, 436 S.W.3d 105, 118

(Tex. App.—Houston [14th Dist.] 2014, no pet.). There was no direct evidence of the mother's relationship with E.J. prior to his placement with the Department, but the evidence showed she had no relationship with him for almost one year leading up to the trial. At the time of trial, E.J. had been with the relative placement for approximately eight months, and the mother concedes that he presumably bonded with his relative caregivers.

There was no evidence that E.J. had specific emotional or physical needs different than those of any other child, but the caseworker testified that the mother had not provided for or taken care of her child, and she had not shown genuine concern for him. She further explained that E.J.'s current placement provided him a two-parent home with caregivers who loved him and who were willing and able to care for and provide for him. There was no concern of drug use or criminal activity in E.J.'s current placement, and the caseworker testified that she believed it was a "very healthy and stable environment" for the child.

In contrast to the child's placement, the evidence indicated that the mother was in the Harris County jail at the time of trial. Further, an order of deferred adjudication indicated that the mother had appeared in a Harris County court in person and pleaded guilty to committing the offense of unauthorized use of a vehicle while this case was pending. A judgment from Navarro County, also entered while this case was pending, showed that the mother appeared in person and pleaded guilty

or nolo contendre to a criminal-mischief offense. Both offenses occurred while this case was pending. This evidence shows that the mother engaged in criminal activity, even though she was aware that her parental rights were in jeopardy. *See In re T.G.R.-M.*, 404 S.W.3d 7, 15 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that evidence of mother's arrests after she knew her parental rights were in jeopardy supported a finding of endangerment); *see also Hall v. Tex. Dep't. of Protective & Regulatory Servs.*, No. 01-02-00664-CV, 2003 WL 321525, at *7 (Tex. App.—Houston [1st Dist.] Feb. 13, 2003, no pet.). Another judgment showed the mother was convicted for a theft that occurred before the suit was initiated, approximately eight months after E.J.'s birth.

The family service plan indicated that when the mother presented to the Harris County Psychiatric Center, she was "selectively mute, psychotic, depressed, withdrawn and paranoid with a positive urine drug screen for PCP and THC." The trial court also heard evidence that the mother never submitted to court-ordered drug testing during the pendency of the suit, and it reasonably could have inferred that she failed to report for testing because she was using drugs. *See J.M.T.*, 519 S.W.3d at 269.

The mother concedes that her history of illegal drug use and failure to make use of services to address that issue, as well as her criminal history, are evidence of her poor judgment. She also concedes that her mental-health issues compromised

her ability to care for herself or for a young child. Nevertheless, she argues that the evidence was not conclusive of such behavior in the future. However, in determining the best interest of a child, a factfinder may consider evidence of the parent's past behavior that endangered the well-being of the child and infer that the conduct may recur in the future if the child is returned to the parent. *In re S.P.*, 509 S.W.3d 552, 557 (Tex. App.—El Paso 2016, no pet.). Further, the evidence showed the mother engaged in criminal conduct before the removal of the child and afterwards.

The factfinder also may consider the parent's past neglect or inability to meet the physical and emotional needs of the child in analyzing the factor of parental ability. *Id.* at 557–58. The initial report received by the Department indicated that the mother's psychotic state would prevent her from caring for her children, and it was unknown how long she had been in that state. The report also noted concerns of possible "neglect, abuse, or substance abuse" in the home, and it stated that the mother refused to answer questions about whether her boyfriend, who physically abused her, also abused her children. The family service plan further noted concern that the mother did not have a current residence, was not cooperative, had a prior history with the Department, and exposed E.J. to drug abuse and domestic violence. The caseworker testified that the mother's parental rights to other children previously had been terminated.

The mother concedes that she did not complete the services offered to her, and has "limited insight" into her mental-health issues, while E.J.'s caregivers are not in need of such programs. She also concedes that the child is properly placed in a loving and stable environment. She admits that with respect to her acts or admissions that may indicate that the existing parent-child relationship is an improper one, the evidence weighs heavily in favor of termination, and that there is no evidence of any excuses for her acts or admissions. Nevertheless, she argues that termination of her parental rights was not in E.J.'s best interest because permanency already had been achieved through his placement with relatives without termination. She contends that E.J.'s paternal aunt should be allowed to continue raising him without further involvement of the Department.

E.J.'s father relinquished his parental rights, and the mother concedes that the evidence at trial showed her inability to provide for E.J. The caseworker testified that the Department planned for E.J. to be adopted by his relative caregivers. The trial court properly could have considered that termination of the mother's parental rights would be a necessary precondition to achieving the goal of a relative adoption. *See In re B.H.R.*, No. 06-17-00081-CV, 2017 WL 5150852, at *7 (Tex. App.—Texarkana Nov. 7, 2017, no pet. h.).

Considering the *Holley* factors and reviewing all of the evidence in the light most favorable to the trial court's finding, we conclude that a reasonable trier of fact

could have formed a firm belief or conviction that termination of the mother's parental rights was in the best interest of E.J. Because the evidence supporting a conclusion that termination is in the best interest of the child was not disputed, we conclude that the evidence was both legally and factually sufficient to support termination of both the mother's parental rights to E.J.

III. Appointment of Department as managing conservator

The mother argues that the court should have appointed E.J.'s paternal aunt (with whom he was placed at the time of trial) as his managing conservator, and it should have appointed her as his possessory conservator.

Once the court terminates the parent-child relationship with respect to both parents, it "shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child." TEX. FAM. CODE § 161.207(a). The appointment of a non-parent managing conservator is subject to a lower standard of proof than termination, and it requires a finding only by the preponderance of the evidence that appointment of a parent would "significantly impair the child's physical health or emotional development." *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). The decision is reviewed for abuse of discretion. *Id*. Because we already have concluded that the evidence was sufficient to support termination of the mother's parental rights, we

also conclude that the trial court did not abuse its discretion in appointing a non-parent as E.J.'s managing conservator.

The mother argues that the evidence supported a finding that appointing E.J.'s paternal aunt as his managing conservator would have been in his best interest. The best interest of the child is always the primary consideration in the court's appointment of a managing conservator, and thus the court should consider the *Holley* factors as described above. *Id*.; TEX. FAM. CODE § 153.002. The caseworker testified positively about E.J.'s current placement with his relative caregiver. However, there was not much substantive evidence presented at trial about the placement. Further, the evidence indicated that the Department did plan to place E.J. with that family. We conclude that no abuse of discretion has been shown in the appointment of the Department as E.J.'s managing conservator. We overrule the mother's final issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Caughey.