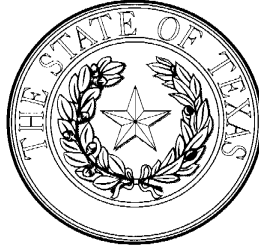


Opinion issued October 5, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00214-CV

IN THE INTEREST OF A.M.E., A Child

**On Appeal from the 315th District Court
Harris County, Texas
Trial Court Case No. 2017-01322J**

MEMORANDUM OPINION

The trial court terminated the parental rights of appellant, A.M.S. (Amos), to his child A.M.E. (Annie).¹ Amos argues on appeal that the evidence was legally and factually insufficient to support the termination of his parental rights pursuant to Family Code sections 161.001(b)(1)(N) and that the Department of Family and

¹ We use pseudonyms to protect the identity of the minor child and for ease of reading.

Protective Services (DFPS) failed to establish that a material and substantial change in the case warranted modification of a previous final decree. We affirm.

Background

Annie, who was born in August 2015, was removed from her mother's care after her mother used illegal drugs during her pregnancy with Annie's younger sibling. DFPS filed its original petition for protection on March 6, 2017. DFPS requested temporary managing conservatorship of Annie, asked that her paternity be determined, and, if reunification could not be achieved, that her parents' parental rights be terminated, and DFPS be named her sole managing conservator.

Genetic testing ruled out the first man identified as Annie's potential father. On June 26, 2017, DFPS amended its petition to name Amos as Annie's alleged father.

On August 8, 2018, Amos answered and counter-petitioned for paternity and conservatorship. He alleged that he "just recently became aware" of the suit and of DFPS's temporary managing conservatorship of Annie. He requested that the trial court order paternity tests "so that his paternity of the child could be established one way or the other." Finally, if he was determined to be Annie's father, Amos sought to be named Annie's conservator. This pleading was filed on Amos's behalf by attorney William Connolly.

On September 26, 2018, the trial court held the final hearing on the initial petition. Amos failed to appear at this hearing. His attorney, Connolly, filed a “Statement Regarding Due Diligence,” stating that he had been appointed to represent Amos and that he had spoken by phone with his client, via a translator, “on or around” August 1, 2018. Connolly stated that Amos told him to file controverting pleadings and to arrange for DNA testing. Since filing the pleadings, however, Connolly had “called, emailed and sent a letter to [Amos’s] last known address” but had been “unsuccessful in being able to reach [him].” Counsel obtained an order for DNA testing and arranged for the testing, but neither he, his employees, nor the testing facility were able to locate Amos to complete the testing. Counsel likewise attempted to contact Amos by phone but was unable to reach him. Counsel further attempted to reach Amos by (1) asking the DFPS caseworker, the attorney for Annie’s mother, and Annie’s attorney ad litem for information on his whereabouts; (2) searching “Public Data (Texas),” the Immigration and Customs Enforcement database, the Federal Bureau of Prisons database, records from “Allegheny County, Pennsylvania (last known county and state of residence),” and the “Search Quarry” database; (3) checking social media, like Facebook; and (4) conducting “an internet person search using Google.” None of these searches resulted in locating Amos.

The trial court terminated Annie’s mother’s parental rights. The trial court found, however, that DFPS “did not meet its burden by clear and convincing

evidence that termination of the parent-child relationship, if any exists or could exist, between the alleged father, [Amos], and [Annie]” was appropriate and, accordingly, the trial court declined to terminate Amos’s parental rights “if any exist.” The trial court granted DFPS’s request to be named Annie’s sole managing conservator.

DFPS continued to attempt to reach Amos. The caseworker created a family plan of service that included completing genetic testing and mailed it to Amos’s last known address on numerous occasions. Some of the mail was returned. Amos did not have any further contact with DFPS or his attorney. Annie continued in DFPS’s sole managing conservatorship, and its goal for permanency became non-relative adoption by the foster family that was caring for her.

On February 6, 2020, DFPS filed its Original Motion to Modify and Original Petition to Terminate the Parent-Child Relationship. This pleading identified Amos as Annie’s alleged father. DFPS further alleged that the “circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the rendition of the order.” The pleading also alleged that Amos’s parental rights, if any existed, should be terminated based on allegations that his conduct endangered Annie, that he constructively abandoned her, and that he failed to comply with the terms of his family plan of service.

At DFPS’s request, the trial court appointed an attorney ad litem to locate Amos in August 2020. The attorney ad litem eventually located Amos in the Harris

County Jail, and on November 3, 2020, the trial court signed an order for DNA testing. Amos was also personally served with notice of the modification in November 2020.

In January 2021, Amos submitted a DNA sample and the trial court appointed new counsel to represent him. At the next permanency hearing, DFPS noted that Amos had completed the DNA testing and stated that “once paternity has been established the family plan will be revised.” DFPS included a request that Amos complete a psychosocial evaluation, maintain contact with the caseworker, and refrain from criminal activity, among other recommendations. The family service plan with these terms was filed with the trial court.

On March 4, 2021, the trial court officially identified Amos as Annie’s biological father and adopted the family service plan as an order of the court. The trial court held the final hearing on March 26 and 31, 2021. Charlie Esie, the caseworker for the entirety of Annie’s case, testified that Amos was first mentioned as a potential father in July 2018. She testified that, after Amos filed his answer to the petition in August 2018, DFPS received a letter from Connolly—Amos’s attorney at the time—stating that Amos was willing to move to Houston and to participate in DNA testing. The Court ordered the DNA testing in 2018, but Amos never appeared for the test. He likewise failed to appear at the final hearing in September 2018—the hearing at which the trial court terminated Annie’s mother’s

parental rights but determined there was insufficient evidence to terminate Amos's rights. From 2018 until 2020, Esie sent multiple letters and copies of the family plan of service to Amos at his last known address, as provided by his attorney, but she never got a response. Some of the letters were returned, but not all of them were.

Esie testified that Annie has been in her current foster placement since April 2018. The foster home was a good home that was meeting her needs. Annie did not have a relationship with Amos. Annie's foster father testified regarding the foster family's relationship with Annie, stating that they were bonded with her and would like to adopt her.

Amos testified that he had not spoken with Annie's mother in years. He had last spoken to Annie's mother approximately a year after their relationship ended, and she told him that she had had a baby and that maybe it was his. He never met with Annie or her mother in person because her mother was difficult to get in touch with. Amos discovered that he was Annie's father in January 2021, following the DNA test. He denied any previous knowledge of the case, and specifically denied ever speaking with Connolly about the case or asking him to file the August 2018 answer to the original petition. When asked about the address to which Esie mailed multiple letters and copies of his family plan of service, Amos testified that he no longer lived at that address, but some of his employees continued to live there. Amos denied ever receiving any mail regarding this case.

At the time of trial, Amos was incarcerated in Conroe, Texas, facing charges for aggravated robbery. Prior to his incarceration, Amos had an apartment that he shared with another of his children and her mother. He testified that, even though he was incarcerated, his family could provide a home from Annie. However, he had not told any of his family members about Annie, and he had not provided any contact information for family members to the case worker. Amos testified that this was because he did not know who the case worker was or how to go about providing her with the necessary information. He stated that he never had any contact with the case worker.

Modification

We begin by addressing Amos's second issue, in which he contends that DFPS failed to establish a material and substantial change in the case sufficient to warrant the filing of the February 6, 2020 Original Motion to Modify and Original Petition to Terminate the Parent-Child Relationship. He further argues that the trial court erred in allowing DFPS to present evidence of his actions or omissions that occurred prior to the first termination hearing that occurred in September 2018.

Pursuant to Family Code section 161.004(a), however, a court "may terminate the parent-child relationship after rendition of an order that previously denied termination" if, among other conditions, the circumstances of the child, parent, conservator, or other party affected by the previous order have "materially and

substantially changed” since the date of the order. TEX. FAM. CODE § 161.004(a). And section 161.004(b) expressly authorizes the trial court to consider evidence presented at a previous hearing in a later termination proceeding for the same child. *Id.* § 161.004(b); *In re A.A.M.*, 464 S.W.3d 421, 424 (Tex. App.—Houston [1st Dist.] 2015, no pet.). “There are no definite guidelines as to what constitutes a material and substantial change in circumstances under [section] 161.004.” *In re N.R.T.*, 338 S.W.3d 667, 679 (Tex. App.—Amarillo 2011, no pet.). We make this determination based on the facts of each case. *Id.* A material and substantial change in circumstances may be established by either direct or circumstantial evidence. *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Amos acknowledges the provisions of section 161.004 but argues that they do not apply here because DFPS did not file the petition under that section. He relies on *In re K.G.*, 350 S.W.3d 338 (Tex. App.—Fort Worth 2011, pet. denied) and other authority holding that, when DFPS does not plead the statute governing a termination after a prior order denying a termination, it is error to admit evidence from before the prior decree. DFPS, on the other hand, asserts that it pled the elements of section 161.004, including that the circumstance of a party affected by the previous order had materially and substantially changed.

This Court has previously addressed a similar argument and ruled in favor of DFPS. *See In re A.A.M.*, 464 S.W.3d at 424–25. In *A.A.M.* and here, although DFPS

did not expressly name the statute by its code section in its live pleading (here, the Original Motion to Modify and Original Petition to Terminate the Parent-Child Relationship), it nevertheless pleaded the statutory elements for modification of an earlier order, including materially changed circumstances. *Id.* DFPS presented evidence of Amos’s failure to follow through with the genetic testing arranged in August 2018 and his continued failure to communicate with DFPS. DFPS further presented evidence that finding an adoptive placement for Annie became a priority to support her continued physical, emotional, and social development. These are circumstances supporting the trial court’s finding of a material and substantial change since the rendition of the prior order. *See In re H.M.O.L.*, No 01-17-00775-CV, 2018 WL 1659981, at *12 (Tex. App.—Houston [1st Dist.] Apr. 6, 2018, pet. denied) (mem. op.) (holding that changes in adoption prospects and parents’ continued drug use constituted material and substantial change under section 161.004); *In re J.R.*, No. 07-12-00003-CV, 2012 WL 1605738, at *4–5 (Tex. App.—Amarillo May 8, 2012, no pet.) (mem. op.) (upholding finding of material and substantial change pursuant to section 161.004 where children were “significantly closer, both psychologically and logistically, to places in which they seek adoptive families and stability” than they were at time of prior order and where parents’ “continued instability ha[d] manifested itself in new ways”).

The cases relied upon by Amos—*In re K.G.* and *In re K.P.*, 498 S.W.3d 157 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)—are distinguishable. In *In re K.G.*, our sister court held that the trial court erred by admitting evidence from before the denial of DFPS’s first petition because DFPS did not plead section 161.004 as a ground to terminate parental rights. 350 S.W.3d at 352. In that case, DFPS proceeded solely under section 161.001, without alleging any facts or elements required by section 161.004. *See id.* In contrast, DFPS here alleged the elements required by section 161.004. Similarly, in *In re K.P.*, DFPS did not plead section 161.004 and conceded that it was not seeking termination under that section at trial. 498 S.W.3d at 170. These cases do not support Amos’s arguments here.

We further observe that Amos failed to specially except to the nature of DFPS’s pleadings. His failure to specially except to the pleadings waived any complaint about the perceived lack of notice from the omission of a specific reference to section 161.004 in the pleadings. *See In re A.A.M.*, 464 S.W.3d at 425. Construing them broadly, as we must in the absence of a special exception, the pleadings were sufficient to notify Amos that his earlier conduct would be at issue. *See id.* (citing *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000)).

We overrule Amos’s second issue.

Termination of Parental Rights

In his first issue, Amos argues that the evidence was legally and factually insufficient to support the termination of his parental rights under Family Code section 161.001(b)(1)(N).

A. Standard of Review

In a case to terminate parental rights under Texas Family Code section 161.001, DFPS must establish, by clear and convincing evidence that (1) the parent committed one or more of the enumerated acts or omissions justifying termination, and (2) termination is in the best interest of the child. TEX. FAM. CODE § 161.001(b). 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.” *Id.* § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Only one predicate finding under section 161.001(b)(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).

When reviewing the legal sufficiency of the evidence in a case involving termination of parental rights, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that there existed grounds for termination under section 161.001(b)(1) and that termination was in the

best interest of the child. *See* TEX. FAM. CODE § 161.001(b); *In re J.F.C.*, 96 S.W.3d at 266. In doing so, we examine all the evidence in the light most favorable to the finding, assuming the “factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.” *In re J.F.C.*, 96 S.W.3d at 266. We must also disregard all evidence that the factfinder could have reasonably disbelieved or found to be incredible. *Id.*

When conducting a factual sufficiency review, we consider and weigh all the evidence including disputed or conflicting evidence. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). “If, in light of the entire record, the disputed evidence that a reasonable factfinder 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 *In re J.F.C.*, 96 S.W.3d at 266). We give due deference to the factfinder’s findings, and we cannot substitute our own judgment for that of the factfinder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder’s province. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). And, even when credibility issues appear in the appellate record, we defer to the factfinder’s determinations as long as they are not unreasonable. *Id.*

B. Subsection 161.001(b)(1)(N) Finding

The trial court concluded that Amos constructively abandoned Annie, a predicate ground for termination under section 161.001(b)(1) of the Family Code. *See id.* § 161.001(b)(1)(N). To establish constructive abandonment, DFPS had to prove that Amos:

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:

(i) the department has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and

(iii) the parent has demonstrated an inability to provide the child with a safe environment[.]

TEX. FAM. CODE § 161.001(b)(1)(N).

The first element focuses on DFPS's conduct; the second and third elements focus on the parent's conduct. *In re X.A.S.*, No. 05-19-01082-CV, 2020 WL 1042520, at *3 (Tex. App.—Dallas Mar. 3, 2020, no pet.) (mem. op.). When reviewing whether sufficient evidence supports termination under section 161.001(b)(1)(N), the issue is whether DFPS made reasonable efforts, not ideal efforts. *Id.* (quoting *In re F.E.N.*, 542 S.W.3d 752, 766–67 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *In re G.K.G.A.*, No. 01-16-00996-CV, 2017 WL 2376534, at *5 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (mem.

op.). When DFPS removes a child, it designs a family service plan to reunify the parent with the child. *Liu v. Dep't of Family & Protective Servs.*, 273 S.W.3d 785, 795 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Preparing and administering a service plan for the parent constitutes evidence that DFPS made reasonable efforts to return the child to the parent. *See, e.g., id.; In re K.M.B.*, 91 S.W.3d 18, 25 (Tex. App.—Fort Worth 2002, no pet.).

DFPS established that Annie came into its care in March 2017 and that it was named her sole managing conservator on September 26, 2018. Annie continued in DFPS custody until the time of the final modification hearing in March 2021. Thus, Annie had been in DFPS's conservatorship for at least six months. *See* TEX. FAM. CODE § 161.001(b)(1)(N).

DFPS further presented evidence that, following the filing of Amos's answer in August 2018, it made repeated attempts to contact him and mailed a family service plan to the last known address provided through his counsel. DFPS, working with Amos's counsel and the trial court, arranged for the DNA testing to occur as early as 2018, and continued efforts to contact him by conducting various searches and attempting communications through the contact information he had provided to his counsel. This is clear and convincing evidence that DFPS made reasonable efforts to unite Amos with Annie. *See Liu*, 273 S.W.3d at 795; *In re K.M.B.*, 91 S.W.3d at 25.

Despite these efforts, Amos did not appear for the DNA testing, nor did he appear at the September 2018 final hearing. In the intervening years, he did not reach out to or respond to DFPS's efforts to contact him. He did not make any effort to contact, visit, or provide for Annie. In fact, he has had no relationship at all with Annie. This is clear and convincing evidence that Amos "has not regularly visited or maintained significant contact with the child." *See* TEX. FAM. CODE § 161.001(b)(1)(N)(ii).

Finally, DFPS presented evidence that Amos had never provided any care for Annie, leaving her in the custody of her mother, who abused drugs and ultimately had her parental rights to Annie terminated. At the time of the final hearing on the modification, Amos was incarcerated and thus unable to provide Annie with a safe environment himself. DFPS had never been presented with names of any family members who could have provided care for Annie on Amos's behalf. Accordingly, DFPS provided clear and convincing evidence that Amos has demonstrated an inability to provide the child with a safe environment. *See id.* § 161.001(b)(1)(N)(iii).

Amos argues that there is no evidence that DFPS made reasonable efforts to return Annie to him because he had no indication that Annie was in DFPS care until he was personally served with notice of this suit while he was in jail in November 2020. DNA testing did not establish that he was her father until early 2021, and his

parental rights were terminated in March 2021. Amos further argues that there is no evidence that he abandoned Annie, and he argues that DFPS “relied on the fact that [Amos] was incarcerated as the basis of termination of his parental rights to his daughter by indicating he abandoned her and he cannot provide her with a safe environment.”

These arguments, however, ignore the controverting evidence presented by DFPS. DFPS introduced into evidence Amos’s August 2018 answer, indicating that Amos desired DNA testing to establish his paternity and seeking conservatorship of Annie. DFPS also introduced into evidence Connolly’s September 2018 “Statement Regarding Due Diligence,” in which Connolly represented that he spoke with Amos by phone, via an interpreter, prior to filing the answer. And DFPS presented Esie’s testimony that Amos’s attorney notified DFPS by letter that he had consulted with Amos in August 2018 and Amos was willing to participate in DNA testing and to move to Houston if necessary to care for Annie. The trial court, as the factfinder, was entitled to credit this evidence and discredit Amos’s own testimony to conclude that Amos was aware that Annie was potentially his child and was in DFPS’s custody as of August 2018. *See In re J.P.B.*, 180 S.W.3d at 573; *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (trial court as factfinder is sole judge of credibility of witnesses and weight to be given their testimony).

DFPS also presented evidence that it continued its attempts to contact Amos following his answer and subsequent failure to appear in the original termination hearing. Connolly's September 2018 "Statement Regarding Due Diligence," recounted his counsel's extensive efforts to locate Amos prior to the final hearing on the original termination petition. Esie testified that she sent multiple letters and copies of the family plan of service to Amos's last-known address. DFPS documents contained in the record indicated that DFPS conducted multiple searches attempting to locate Amos. His counsel eventually discovered his whereabouts when he was jailed in Harris County on felony charges. Amos testified that he did not contact DFPS or the caseworker because he did not know how to do so.

Finally, DFPS did not rely exclusively on evidence that Amos was incarcerated to establish that he could not provide a safe environment for Annie. Testimony at trial indicated that, although Amos knew about his potential relationship to Annie as early as August 2018, he never spoke to his family about her or made any efforts to contact or visit Annie, despite the fact that he was not incarcerated for at least some of the time between 2018 and the final hearing in 2021. Amos did not provide DFPS with the names or contact information for any family members that could provide a suitable home for Annie. Amos himself testified that he had a child with another woman and that, prior to his incarceration on aggravated-robbery charges, he lived with them in an apartment in the Houston area. He testified

that he did not provide any support to this other child, who lived with her mother now that Amos was incarcerated. Thus, there was some evidence beyond the mere fact of Amos's incarceration to support the trial court's finding that he constructively abandoned Annie.

We conclude that the evidence was legally and factually sufficient to support the trial court's findings pursuant to Family Code section 161.001(b)(1)(N).

We overrule Amos's first issue.

Conclusion

We affirm the trial court's judgment terminating Amos's parental rights to Annie.

Richard Hightower
Justice

Panel consists of Justices Kelly, Hightower, and Farris.