

Opinion issued October 11, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-22-00228-CV

IN THE INTEREST OF A.K.S. A/K/A G.K.V.S., A CHILD

**On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2021-00220J**

MEMORANDUM OPINION

Appellant mother appeals the termination of her parental rights. Following a bench trial, the trial court entered an order terminating the parental rights of mother to her minor child, A.K.S. a/k/a G.K.V.S. (hereinafter “Alice”).¹ The trial court found that mother abandoned Alice, *see* TEX. FAM. CODE §§ 161.001(b)(1)(G),

¹ We use an alias to refer to the minor. TEX. R. APP. P. 9.8(b)(2).

161.001(b)(1)(N), and that she failed to comply with the provisions of a court order without proof of a statutory defense. *See id.* § 161.001(b)(1)(O). The trial court further found that termination of mother’s parental rights was in the child’s best interest.

In two issues, mother argues that the trial court erred in terminating her parental rights on grounds that were not pleaded by the Department of Family and Protective Services (hereinafter the “Department”) and alternatively that the evidence was legally and factually insufficient to support the trial court’s finding on abandonment. *See* TEX. FAM. CODE § 161.001(b)(1)(G). We affirm.

Background

Mother gave birth to Alice on February 6, 2021, in a hospital. Two days later, the Department received a referral alleging that mother was not prepared for the child and had no supplies for her. The report alleged that mother was homeless and unable to care for a newborn. On February 9, 2021, the Department received another referral alleging that an investigative worker attempted to get mother access to a shelter, but mother declined. The report alleged that mother wished to relinquish her parental rights. The report also alleged that mother had an unmanaged mental health condition and was at risk of being trafficked. It stated that mother refused to take the elevator to the newborn unit to discharge Alice

from the hospital, despite hours of effort to convince mother to do so. Mother left the hospital without the baby.

The Department filed suit and requested to be named temporary managing conservator due to mother's unmanaged mental health condition, the risk of human trafficking, and the immediate danger to the child. On February 11, 2021, the court ordered the Department to assume temporary conservatorship of Alice.

Mother was served with the Department's suit on March 2, 2021, while in the Galveston County Jail. Two weeks later, the court held an adversary hearing. Mother's attorney appeared, and the court's order required that mother comply with the Department's service plan during the suit. On March 26, 2021, the Department filed a service plan with the court for the mother. The plan stated that the Department was concerned that mother was mentally unstable and unable to care for Alice. To address these issues, the plan required that mother be evaluated for mental health and domestic violence services. It also required mother to avoid criminal activity and maintain stable housing and employment. Mother was required to attend all court hearings and family visits. The court approved the service plan and made it an order of the court on April 14, 2021.

The court held a permanency hearing in November 2021. Mother attended with her attorney. The court's order found that mother had not demonstrated adequate compliance with the service plan.

The case proceeded to trial using remote proceeding technology in January 2022. The caseworker testified that the Department became involved through a report of neglectful supervision. At the time of Alice's birth, mother was homeless. A caseworker attempted to provide mother with access to a homeless shelter, but mother never went to the shelter. While at the hospital, mother stopped responding to newborn Alice's needs. The caseworker also testified that mother stated she wanted to relinquish her parental rights. The mother left the hospital without discharging the baby. Mother named the child before leaving the hospital. The caseworker testified that mother did not identify the baby's father but stated that he was in El Salvador. Mother did not provide any information about other family members.

The caseworker testified that mother initially came to the United States from El Salvador. She reported that she was fleeing domestic violence. Mother first arrived in Florida and then left for Texas, stating that she had been forced to do a lot of housework.

The caseworker testified that mother was incarcerated for periods of time during the pendency of the case. Mother was arrested a week after Alice's birth. She was charged with criminal trespass and assault against a disabled or elderly person. In April and May of 2021, she was charged with criminal trespass, resisting arrest, and fraudulent use of an ID, and public intoxication. Mother was

eventually convicted of all of the charges. Mother was released from incarceration in January 2022. The caseworker was not aware of what happened to mother after she served her sentence. Though provided with the caseworker's contact information, mother did not contact her or anyone else from the Department.

The caseworker testified that mother was provided with the family plan of service in Spanish. The caseworker reviewed the plan with mother. The plan required her to show proof of stable housing and employment, to attend all meetings with the Department, to participate in random drug testing, a psychiatric evaluation, and to complete a parenting class. The caseworker stated that mother did not complete any of the services. Mother told the caseworker that there were no classes in jail and that therapy was not available. The caseworker asked the jail to assist with the psychological evaluation from the family service plan, but the caseworker admitted that mother could not have completed the other services while incarcerated. Mother did not complete the psychological evaluation.

The caseworker testified that Alice had been placed with a maternal cousin. Alice was thriving and well-adjusted in the placement. The cousin hoped to adopt Alice, and the caseworker believed it was in Alice's best interest.

Alice's foster mother testified. She stated that she is the mother's cousin. Alice had been placed with her since May 2021. She testified that Alice is a happy baby who is developing appropriately. The foster mother is employed as a private

nanny and had been with the same family for four years. When she works, the foster mother's parents care for Alice. They also live with the foster mother and Alice. The foster mother had not spoken to mother since November 2020.

Mother testified that she went to the hospital to give birth to Alice. She stayed in the hospital with Alice after the birth. At one point, she asked the doctors if she could go outside and get some air, and they told her that she could. She was feeling short of breath and anxious at the time. She testified that she returned to the hospital after going outside and that she cared for Alice in the hospital. She testified that she would like Alice returned to her.

The mother lost connection in the middle of her testimony.² She was purported to be participating in trial from El Salvador. While the mother was disconnected, testimony continued with another witness, the mother's aunt. The aunt testified that mother was not capable of taking care of a baby. The aunt stated that, "[Mother] has lied that she was sick mentally, and she would hit my sister." The aunt testified that mother has anger issues.

Mother never returned to the virtual proceeding. At the conclusion of testimony, the Department stated that it was seeking termination based on subsections (G), (N), and (O). *See* TEX. FAM. CODE § 161.001(b)(1). The court

² Mother's attorney remained connected and participated throughout the trial.

terminated the mother's parental rights based on those three subsections and found that termination was in the best interest of the child.

A few weeks after trial, mother's attorney moved to allow further testimony because of mother's technical difficulties during the trial. One month after the initial trial, the court heard additional testimony from mother. Mother testified that she felt she could raise Alice. She testified that she did not intentionally abandon Alice in the hospital. She stated that she hoped the court could give her permission to return to the United States. She said her boyfriend would help her pay for a place to live and that she would like to raise the baby. After her testimony, the court's rendition remained the same. Mother appealed.

The Pleadings

In her first issue, mother states that the only statutory predicate ground pleaded by the Department in its petition alleged that she abandoned the child without providing identifying information. *See* TEX. FAM. CODE § 161.01(b)(1)(G). Therefore, mother contends the trial court lacked jurisdiction to terminate her parental rights based on the (N) and (O) predicate acts because those grounds were not supported by the pleadings. *Id.* §§ 161.001(b)(1)(N), (O).

A. Termination of Parental Rights

“The Supreme Court of the United States and the Supreme Court of Texas have recognized that involuntary termination of parental rights involves

fundamental constitutional rights.” *In re S.R.M.*, 601 S.W.2d 766, 769 (Tex. App.—Amarillo 1980, no pet.) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980)). As a result, when the Department seeks to permanently terminate the relationship between a parent and a child, it must observe fundamentally fair procedures. *In re E.R.*, 385 S.W.3d 552, 554 (Tex. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982)). “The most basics of these is notice.” *Id.*

The interest of parents in the care, custody, and control of their children is a fundamental liberty interest protected by the Constitution. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky*, 455 U.S. at 758–59. But the rights of natural parents are not absolute. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). Protection of the child is paramount, and when the State institutes proceedings to terminate parental rights, courts focus on protecting the best interests of the child. *See id.*

“A strong presumption exists that a child’s best interests are served by maintaining the parent-child relationship.” *Walker v. Tex. Dep’t of Fam. & Protective Servs.*, 312 S.W.3d 608, 618 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We strictly scrutinize termination proceedings on appeal because “the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent’s rights.” *Holick v. Smith*, 685 S.W.2d 18, 20

(Tex. 1985) (citing *Santosky*, 455 U.S. at 747–48); see *In re J.F.C.*, 96 S.W.3d 256, 263–64 (Tex. 2002). “‘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 § 101.007.

A court may order termination of the parent-child relationship when it finds by clear and convincing evidence that the parent has committed one or more of the statutorily enumerated predicate acts or omissions, and that termination is in the children’s best interests. TEX. FAM. CODE § 161.001(b)(1), (2). “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.” *A.V.*, 113 S.W.3d at 362; see *In re A.H.L.*, No. 01-16-00784-CV, 2017 WL 1149222, at *3 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied) (mem. op.) (holding that mother concedes sufficiency of evidence for one predicate act so appellate court does not consider her sufficiency challenge for second predicate act).

B. The record reflects that subsection O was tried by consent.

Mother argues that she could not have known that termination based on subsection O was tried by consent because the evidence to support termination

under that subsection is also relevant to the court's best interest determination. The record does not support this argument.

A court's judgment shall conform to the pleadings. TEX. R. CIV. P. 301. A party's pleading invokes the trial court's jurisdiction, and therefore, an order or judgment not supported by the pleadings is void. *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *In re P.M.G.*, 405 S.W.3d 406, 416–17 (Tex. App.—Texarkana 2013, no pet.)); see *In re A.V.*, No. 13-14-00620-CV, 2015 WL 1957093, at *5 (Tex. App.—Corpus Christi-Edinburg Apr. 30, 2015, no pet.) (mem. op.) (concluding that terminating father's parental rights absent pleading seeking to terminate constituted fundamental error).

Issues not raised in pleadings can be tried by express or implied consent. *In re C.J.G.*, No. 04-19-00237-CV, 2019 WL 5580253, at *5 (Tex. App.—San Antonio Oct. 30, 2019, no pet.) (mem. op.); *In re B.L.H.*, No 14-18-00087-CV, 2018 WL 3385119, at *9 (Tex. App.—Houston [14th Dist.] July 12, 2018, no pet.) (mem. op.); *In re K.S.*, 448 S.W.3d 521, 533 (Tex. App.—Tyler 2014, pet. denied). Absent trial by consent, judgment on an unpleaded action is void. *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.) (citing *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)). “We note other appellate courts have applied the trial by consent doctrine to termination of parental rights cases, but only when the trial court's judgment is supported by a petition seeking termination against the

parent.” *In re J.W.*, No. 06-21-00098-CV, 2022 WL 319868, at *3 (Tex. App.—Texarkana, Feb. 3, 2022, no pet.) (mem. op.) (quoting *A.V.*, 2015 WL 1957093, at *4). To determine whether an issue was tried by consent, we examine the record to determine if the issue was tried as opposed to evidence being presented on the issue. *B.L.H.*, 2018 WL 3385119, at *9. An unpleaded issue may be deemed tried by consent when the evidence of the issue is developed without objection under circumstances indicating both parties understood the issue was being contested. *Id.*; *see also C.J.G.*, 2019 WL 5580253, at *5; *B.L.H.*, 2018 WL 3385119, at *9; *K.S.*, 448 S.W.3d at 533. The trial court has broad discretion in determining whether an unpleaded issue was tried by consent. *B.L.H.*, 2018 WL 3385119, at *9.

To terminate parental rights pursuant to subsection O of section 161.001(b)(1), the Department must show that (1) the child was removed under chapter 262 of the Texas Family Code for abuse or neglect, (2) the child has been in the managing conservatorship of the Department for more than nine months, and (3) the parent “failed to comply with the provision of a court order that specifically established the actions necessary for the parent to obtain the return of the child.” TEX. FAM. CODE § 161.001(b)(1)(O).

The record reflects that all parties understood the Department was seeking to terminate mother’s parental rights on the grounds that she did not comply with the

family service plan.³ *See* TEX. FAM. CODE § 161.001(b)(1)(O). The March 11, 2021 court order required mother to comply with each Department service plan during the suit. The court’s order included a bold-print warning that failure to comply with the requirement may result in termination of parental rights. The Department filed a service plan for mother in March 2021, and it became a signed court order at a hearing in April 2021. The order noted that mother had not reviewed the service plan but that she had been advised that “unless she is willing and able to provide the child with a safe environment, even with the assistance of a service plan, within the reasonable period of time specified in the plan, her parental . . . rights may be subject to termination or the child may not be returned to her.” The service plan was admitted into evidence at trial without objection.

The caseworker testified at trial that she had discussed the service plan with mother, and mother did not complete any services from the plan. The caseworker sought assistance from the jail to help mother complete the psychological evaluation, but mother did not complete it. Though the plan required the mother to stay in contact with the caseworker, the caseworker testified that after mother’s

³ The Department’s petition only alleged violation of subsection G. The record suggests that at some point the Department decided to pursue termination based on additional grounds at trial, but the Department did not amend its pleading. When the trial court terminated her rights based on unpleaded subsections N and O, mother did not file a motion to modify the judgment or a motion for new trial. Under the facts of this case, however, we need not reach the jurisdictional, notice, and due process issues associated with terminating based on an unpleaded ground. The record compels the conclusion that the predicate act of whether mother complied with the service plan was tried by consent.

release from jail, mother did not contact the caseworker or anyone from the Department.

Mother's attorney cross-examined the caseworker, asking the caseworker if she had given the mother the family service plan in Spanish and if the mother understood what she needed to do. The caseworker responded affirmatively to both questions. Mother's attorney also inquired what efforts the Department had made to get the mother into services required by the plan. The caseworker testified that she asked the jail to complete a psychological evaluation and that she asked the mother if the jail could provide counseling.

In closing argument, the Department's attorney stated that the Department was requesting termination based on subsections (G), (N), and (O). The Department's attorney explained how the evidence presented provided clear and convincing evidence of each subsection, including subsection (O). Mother's attorney did not object. In her closing statement, mother's attorney argued that there were limited services mother could complete while in jail.

The record reflects that evidence of whether mother failed to comply with the service plan was developed without objection and that both parties understood that the issue was being contested. Under these facts, we are compelled to conclude that the issue was tried by consent and the trial court did not lack jurisdiction to

make findings based on subsection (O). *See C.J.G.*, 2019 WL 5580253, at *5; *B.L.H.*, 2018 WL 3385119, at *9; *K.S.*, 448 S.W.3d at 533.

We overrule mother's first issue.

* * *

Mother does not challenge the sufficiency of the evidence to support the trial court's finding under subsection O. Mother also does not challenge the trial court's best interest finding. "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." *A.V.*, 113 S.W.3d at 362. Concluding that subsection O was tried by consent, we need not reach mother's issues that the trial court erroneously terminated her parental rights under subsection N or that the evidence was insufficient to support a finding under subsection G.

Conclusion

We affirm the decree terminating mother's parental rights.

Peter Kelly
Justice

Panel consists of Justices Kelly, Rivas-Molloy, and Guerra.