**Affirmed and Memorandum Opinion filed August 23, 2011.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-10-00725-CV**

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**D.O.H., Appellant**

**V.**

**TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, Appellee**

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**On Appeal from the 314th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2008-06739J**

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## MEMORANDUM OPINION

Appellant D.O.H. appeals the involuntary termination of his parental rights to C.D.H., a minor. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

C.D.H. tested positive for cocaine at birth. As a result, C.D.H. was removed into the care of the Texas Department of Family and Protective Services ("TDFS") before he was released from the hospital. The child has remained in TDFS custody since shortly after his birth; he is now approximately two and a half years old. He lives with a foster

family that intends to adopt him if appellant's parental rights are terminated. Appellant never had physical custody of C.D.H.

Appellant and C.D.H.'s mother, M.B., lived together for a period of time, including when M.B. was pregnant with C.D.H. Appellant testified he learned M.B. used drugs after they began cohabitating, but he discouraged her from using controlled substances. He explained that she was not allowed to do drugs in his home and never did drugs in his presence. M.B. testified appellant never did drugs with her, and did not allow her to do drugs at home. M.B.'s parental rights were involuntarily terminated by the trial court; she is not a party to this appeal.

A paternity test confirmed appellant is the natural father of C.D.H. After C.D.H. was born, TDFS created a Family Service Plan for appellant. A Family Service Plan is designed to help a parent: (1) accept responsibility for the reasons the child was placed in TDFS's custody; and, (2) demonstrate parenting skills. Appellant completed all classes and therapy sessions in the Family Service Plan, including a drug treatment program. Nonetheless, Katara Butler, TDFS program director, testified appellant was not a fit parent because he tested positive for cocaine use after he completed a drug treatment program.

Appellant was tested for drug use on four occasions: August 26, 2008, February 5, 2009, September 9, 2009, and December 12, 2009. Each test utilized a hair follicle. The first and third tests were conducted on a chest hair sample, the February 5, 2009 test used a pubic hair, and the final test was on appellant's head hair because "he shaved everywhere else." All tests indicated appellant had consumed cocaine in the prior three to six months. Appellant contends the drug tests were improperly admitted as evidence over his objections.

## I. TDFS Burden

The involuntary termination of parental rights implicates fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Before parental

rights may be terminated, the petitioner must establish by clear and convincing evidence that: (1) the parent has committed one or more of the statutory acts or omissions in Section 161.001(1) of the Family Code; and, (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001 (West 2010); *See In re J.P.B.*, 180 S.W.3d 570, 572 (Tex. 2005). "'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 2010).

## II. Were the Drug Tests Improperly Admitted Over a Daubert/Robinson Challenge?

Appellant argues the drug tests showing he tested positive for cocaine were improperly admitted because: (1) "there was no competent evidence to establish that the underlying scientific theory is valid"; (2) there is no evidence the technique applying the theory is valid; and (3) there is no evidence that the technique was properly applied in this case. Appellee urges, *inter alia*, that any error the trial court may have committed is harmless as the drugs tests are cumulative of other evidence about the drug test results.

Texas Rules of Evidence allow an expert to testify if three criteria are met: (1) the witness is qualified as an expert; (2) the evidence is "scientific . . . knowledge"; and, (3) the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702; *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). We construe appellant's three objections as challenges to the second prong, whether the test results were properly admitted as "scientific knowledge."

Appellant also argues that admission of the test results under the business records exception to the hearsay rule was error. Tex. R. Evid. 803(6).

### A. Standard of Review

When reviewing a trial court's decision to admit evidence, we utilize an abuse of discretion standard. *See In re J.F.C.*, 96 S.W.3d 256, 285 (Tex. 2002); *Nat'l Liability and*

*Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527-28 (Tex. 2000). A trial court abuses its discretion when it rules without regard for any guiding rules or principles. *Owens-Corning Fiberglass Corp v. Malone*, 972 S.W.2s 35, 43 (Tex. 1998). We must uphold a trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.*

**B. Analysis**

We conclude it is unnecessary to decide the issues appellant raised regarding admission of drug test results because other evidence showing appellant used drugs is available in the record. "The general rule is error in the admission of testimony is deemed harmless and is waived if the objecting party subsequently permits the same or similar evidence to be introduced without objection." *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004) (citing *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984)).

The other evidence came from the testimony of Katara Butler. Butler explained C.D.H. was assigned to a program she supervised. Within her testimony, she responded in the affirmative to several questions about appellant's drug abuse. These included:

- "You've seen the drug test. You've heard the testimony about dad's drug test . . . [which] shows to you a continuous use of cocaine throughout the pendency of this case."
- "[B]ased on the information from all those drug tests and dad's own admissions, he's been doing cocaine for a long time, hasn't he?"
- "[Appellant] continued to test positive in his hair follicles [for cocaine?]"
- "[Appellant] tested positive after completing [a drug abuse treatment] program?"

The content of the testimony is cumulative of the drug test results appellant argues were inappropriately admitted. Both Butler's testimony and the drug test results indicate

appellant used cocaine during the period C.D.H. has been in TDFS custody. Appellant failed to ask for a running objection or to object to any of the questions Butler answered. Consequently, we conclude that if the trial court made any error by determining the drug test results were admissible, the error is harmless because Butler's testimony was admitted without objection. *Id.* Thus, we overrule appellant's first point of error.

## III. Legal and Factual Sufficiency of Findings of Cause to Terminate Appellant's Parent-Child Relationship with C.D.H.

A parent-child relationship may be involuntarily terminated if the trial court finds that (1) a parent violated any subsection of Section 161.001(1) of the Texas Family Code; and, (2) termination is in the best interests of the child. Tex. Fam. Code Ann. § 161.001 (West 2010). The trial court found appellant violated five provisions of Section 161.001(1) of the Texas Family Code and termination of appellant's parental rights was in the best interests of C.D.H. *Id.* Appellant argues there is legally or factually insufficient evidence to support the trial court's findings on any of the five subsections of Section 161.001(1) or that termination was in the best interests of C.D.H. *Id.*

### A. Standard of Review

When reviewing the evidence for legal sufficiency in parental termination cases, we must determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the grounds for termination were proven. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). We review all evidence in the light most favorable to the finding and judgment. *Id.* All evidentiary disputes are resolved in favor of the factfinder's findings and judgment if a reasonable factfinder could do so because the factfinder is the sole judge of witness credibility. *Id.* We do, however, consider undisputed evidence if it is contrary to the finding. *Id.*

When reviewing the evidence for factual sufficiency, we give deference to the trial court's findings. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must determine

whether a factfinder could reasonably form a firm conviction or belief that that the parent violated Section 161.001 of the Texas Family Code. Tex. Fam. Code Ann. § 161.001, *In re C.H.,* 89 S.W.3d 17, 28 (Tex. 2002). If a reasonable factfinder could not have formed a firm conviction or belief in light of the evidence in the entire record, the evidence is factually insufficient. *In re H.R.M.*, 209 S.W.3d at 108.

B. **Sections 161.001(1)(N) — Constructive Abandonment of the Child**

A trial court may terminate parental rights if the parent "constructively abandoned the child" while in DFPS care for at least six months. Tex. Fam. Code § 161.001(1)(N). There are three elements DFPS must show to prove constructive abandonment: (1) the department made reasonable efforts to return the child to the parent; (2) the parent has not regularly visited or maintained regular contact with the child; and, (3) the parent has demonstrated an inability to provide the child with a safe environment. *Id.*

Katara Butler testified that appellant has not seen C.D.H. since August 2008, which she stated was a failure to maintain significant contact with him. Butler explained the reason appellant has not had contact with his child is because the trial court ordered there could be no visitation until the parents tested negative for cocaine. According to the clerk's record, the trial court entered an order on September 3, 2009 stating "the father is allowed to begin visitation if the results of his drug test taken today is negative." Butler also concluded that a parent using cocaine could not create a safe environment for a child because the parent: (1) risks going to jail for his illegal activity; and, (2) may be too intoxicated to care for the child.

Appellant acknowledged that the last time he held C.D.H. was "two weeks after he was born." Appellant stated he had not used drugs in the past thirteen to fifteen years and testified he had the ability to meet C.D.H.'s physical and emotional needs.

Under a legal sufficiency review, we consider whether a factfinder could have formed a reasonable conviction or belief that the statutory requirements have been met. *In*

*re J.P.B.*, 180 S.W.3d at 573. We consider the evidence in the light most favorable to the verdict. *Id.* The trial court could have concluded the department made reasonable efforts to allow visitation by creating and helping appellant complete a Family Service Plan, enrolling appellant in drug counseling, and making visitation contingent only upon a negative drug test. Appellant did not challenge the statement that he had not seen his child in almost two years, longer than the statutory six months of no contact. The trial court could have also concluded Butler's testimony that a parent using drugs could not create a safe environment for a child. Consequently, we overrule appellant's legal sufficiency challenge to the evidence.

In a factual sufficiency challenge, we consider whether a fact finder could have formed a reasonable and firm conviction or belief that a parent committed the acts contemplated under the statute based upon all the evidence in the record. *In re H.R.M.*, 209 S.W.3d at 108; *In re C.H.*, 89 S.W.3d at 28. We give deference to the trial court's findings. *In re H.R.M.*, 209 S.W.3d at 108. When considering the whole record, we determine that Butler's testimony is factually sufficient for a fact finder to form a reasonable belief that appellant constructively abandoned C.D.H. for the reasons stated above. We overrule appellant's factual sufficiency challenge to Section 161.001(1)(N). Tex. Fam. Code Ann. § 161.001(1)(N).

Appellant has argued there is insufficient evidence that appellant committed acts under Sections 161.001(1)(D), (E), (O) and (P) justifying the termination of his parental rights. *Id.* at §161.001(1). We have concluded that the trial court properly found TDFS met its burden to show by clear and convincing evidence that appellant constructively abandoned C.D.H. *Id.* at § 161.001(1)(N). Any single violation of Section 161.001(1) is sufficient grounds to involuntarily terminate a parent's rights to his child if it is also proven that termination is in the child's best interests. *Id.* at § 161.001. Consequently, it is unnecessary for this court to consider the remainder of appellant's challenges to Section 161.001(1). *Id.* at §161.001(1); Tex. R. App. P. 47.1.

### C. Termination of Appellant's Parental Rights Is in the Best Interest of C.D.H.

Appellant challenges the legal and factual sufficiency of the trial court's finding that termination of appellant's parental rights is in the best interests of C.D.H.

Evidence at trial showed appellant used cocaine after C.D.H's birth. As discussed above, Butler testified that a parent who used cocaine could not provide a safe environment for a child. All parties agree that as of the date of trial, appellant had not seen the child for nearly two years. Butler stated that C.D.H. has been living in the same foster home since July 2009 and he is developmentally "on target." She explained that the child was receiving "all of the physical and emotional care that he needs" in the foster home. Butler and a foster parent also testified that the foster parents have plans to adopt C.D.H. if appellant's parental rights are terminated.[1] As a result, Butler stated it was in C.D.H.'s best interests to remain in the foster home.

Under a legal sufficiency review, we consider the evidence in the light most favorable to the trial court's judgment. *In re J.P.B.*, 180 S.W.3d at 573. The trial court could have reasonably concluded C.D.H.'s best interests would be served by terminating appellant's parental rights. *Id.* Testimony stated appellant used illicit narcotics and had not had contact with the child in nearly two years. On the other hand, the foster parents were providing an appropriate home and would seek to adopt C.D.H., creating a safe, stable, and healthy environment for the child. In a light most favorable to the trial court's finding, we conclude there is legally sufficient evidence to support the finding.

In a factual sufficiency review, we review all evidence in the record to determine whether the factfinder could have formed a reasonable belief or conviction that it is in the best interests of the child for appellant's rights to be terminated. *In re H.R.M.*, 209 S.W.3d at 108. Based upon the evidence listed above, we conclude the trial court could

[1] The foster parent's name was redacted from the trial court record. He or she was referred to only as "foster parent."

have formed a reasonable conviction that termination of appellant's rights were in the best interests of C.D.H. Considering the evidence as a whole, there is evidence appellant uses cocaine; as a result, the safety and stability of C.D.H.'s life is at risk. The foster parents intend to adopt C.D.H., creating stability for the child. Furthermore, Butler testified that the foster parents are currently meeting all of C.D.H.'s physical and emotional needs.

We overrule appellant's legal and factual sufficiency challenges to the trial court's finding that it is in the best interests of C.D.H. to terminate appellant's parental rights.

## CONCLUSION

We have overruled all of appellant's points of error and affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Seymore, and McCally.