Affirmed and Memorandum Opinion filed February 11, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00729-CV

IN THE INTEREST OF V.K.S., V.L.S., J.L.S., AND D.S., CHILDREN

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2014-03652J

M E M O R A N D U M O P I N I O N

R.A.C. (Mother) appeals the final decree terminating her parental rights with respect to her four children: Yvonne (age 12 at the time of trial), Vanessa (age 7), Julie (age 5), and Dennis (age 2).[1] The children's father, whose parental rights also were terminated, does not appeal. Mother raises two issues concerning the legal and factual sufficiency of the evidence to support the trial court's finding that

[1] We use fictitious names to refer to the children discussed in this opinion. *See* Tex. R. App. P. 9.8(b)(2).

termination was proper under section 161.001(1)(E) of the Texas Family Code[2] and that termination is in the children's best interest. We affirm.

BACKGROUND

On June 30, 2014, the Texas Department of Family and Protective Services (the Department) received a referral alleging neglectful supervision of Yvonne, Vanessa, Julie, and Dennis by Mother and her boyfriend, C.S. The referral stated that "the parents"[3] ran off and left the children in a motel room. At that time, the Department had two open investigations concerning Mother: one in Hidalgo County, where the family lived, and the other in Brooks County. The Hidalgo County investigation involved the death of another child of Mother, an infant boy. C.S. was the baby's father.

Department worker Charlotte Yoakum spoke with Mother and C.S. in the motel room on June 30. Mother denied currently using drugs, though she admitted taking drugs in the past. Mother and C.S. denied they were fleeing from the Department. They said the baby died of sudden infant death syndrome (SIDS). They were not aware the autopsy on the baby had been completed and the cause of death was ruled "undetermined." After some discussion, Mother released the children to the Department as long as they would be placed in a "good foster home." She said "just take the children" so she could do what was necessary to get them back.

A year later, the case proceeded to trial. The Department sought termination of Mother's parental rights on three predicate grounds: endangerment, constructive abandonment, and failure to comply with the court-ordered service plan. *See* Tex.

[2] The numbering of section 161.001 changed effective September 1, 2015. Section 161.001(1) is now section 161.001(b)(1). Act of June 18, 2015, 84th Leg., R.S., ch. 944, § 11, 2015 Tex. Sess. Law. Serv. 3271 (West) (codified at Tex. Fam. Code Ann. § 161.001(b)(1)). Mother's case is governed by the preceding version, effective January 1, 2011. We refer to the 2011 version in this opinion.

[3] Mother's boyfriend is not the father of any of the children at issue in this case.

Fam. Code Ann. § 161.001(1)(E), (N), (O). The trial court signed the final decree of termination on August 18, 2015, finding that termination of Mother's parental rights was warranted under subsections 161.001(E), (N), and (O) and was in the children's best interest. The decree also named the Department as the children's sole managing conservator. Mother timely appealed.

ANALYSIS

I. Standard of Review

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *See In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980); *In re S.R.*, 452 S.W.3d 351, 357 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Although parental rights are of constitutional magnitude, they are not absolute. The child's emotional and physical interests must not be sacrificed merely to preserve the parent's rights. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

Due to the severity and permanency of the termination of parental rights, the burden of proof is heightened to the clear-and-convincing-evidence standard. *See* Tex. Fam. Code Ann. § 161.001; *In re J.F.C.*, 96 S.W.3d 256, 265–66 (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 Ann. § 101.007; *accord In re J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *In re S.R.*, 452 S.W.3d at 358.

Parental rights can be terminated upon proof by clear and convincing evidence that (1) the parent has committed an act described in section 161.001(1) of the Texas Family Code, and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001. Only one predicate finding under section 161.001(1) is necessary to support a decree 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).

In reviewing the legal sufficiency of the evidence in a termination case, we must consider all the evidence in the light most favorable to the finding to determine whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. *See In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *In re J.F.C.*, 96 S.W.3d at 266; *In re C.H.*, 89 S.W.3d at 25. We assume the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence a reasonable fact finder could have disbelieved. *In re J.O.A.*, 283 S.W.3d at 344; *In re J.F.C.*, 96 S.W.3d at 266.

In reviewing termination findings for factual sufficiency of the evidence, we consider and weigh all the evidence, including disputed or conflicting evidence. *See In re J.O.A.*, 283 S.W.3d at 345. "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 fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d at 266. We give due deference to the fact finder's findings, and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109. We are not to "second-guess the trial court's resolution of a factual dispute by relying on evidence that is either disputed, or that the court could easily have rejected as not credible." *In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003).

If disposition of an issue would result in a rendition of judgment, an appellate court should consider that issue before addressing any issues that would result only in a remand for a new trial. *See Natural Gas Pipeline Co. of Am. v.*

Pool, 124 S.W.3d 188, 201 (Tex. 2003); *In re S.R.*, 452 S.W.3d at 359 (applying rule in parental-termination appeal and first addressing legal-sufficiency challenges). Accordingly, we first consider the challenges to the legal sufficiency of the evidence, followed, if necessary, by a review for factual sufficiency.

II. Predicate Termination Grounds

Mother does not challenge the trial court's findings on subsections 161.001(1)(N) or 161.001(1)(O). An unchallenged fact finding is binding on an appellate court "unless the contrary is established as a matter of law, or if there is no evidence to support the finding." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *see In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (unchallenged findings of fact supported termination under section 161.001(1)(O) because record supported those findings); *In re C.N.S.*, No. 14–14–00301–CV, 2014 WL 3887722, *7 (Tex. App.—Houston [14th Dist.] Aug. 7, 2014) (mem. op.) (same).

Our review of the record shows the trial court's finding on subsection O is supported by legally and factually sufficient evidence. That subsection requires clear and convincing evidence that Mother:

> 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.

First, Danielle Ryan, a Department caseworker, testified that Mother did not comply with all the provisions of her court-ordered service plan. She did not complete her counseling requirements or her parenting classes, and she needed to undergo another psychological evaluation. Second, the children were in the Department's managing conservatorship for one year at the time of trial. Third, the

children were removed from Mother due to neglect; the referral to the Department alleged Mother and C.S. "ran off" and left the children alone in a motel room.

Because the trial court's finding on subsection 161.001(1)(O) is supported by the record, we are bound by it. This single finding is sufficient to support a decree 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 at 362. In light of our conclusion regarding the trial court's finding on subsection O, we need not make a determination as to the findings under subsections E or N.

We overrule Mother's first issue.

III. Best Interest

A. Legal standards

Termination must be in the child's best interest. Tex. Fam. Code Ann. § 161.001(2). We review the entire record in deciding a challenge to the court's best-interest finding. *See In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013).

There is a strong presumption that the best interest of a child is served by keeping the child with the child's natural parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). Prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest. *See* Tex. Fam. Code Ann. § 263.307(a).

Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best-interest finding: the desires of the child; the physical and emotional needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for

the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). As noted, this list of factors is not exhaustive, and evidence is not required on all the factors to support a finding that termination is in the child's best interest. *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

In addition, the Texas Family Code sets out thirteen factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment. *See* Tex. Fam. Code Ann. § 263.307(b). Those factors are:

1. the child's age and physical and mental vulnerabilities;
2. the frequency and nature of out-of-home placements;
3. the magnitude, frequency, and circumstances of harm to the child;
4. whether the child has been the victim of repeated harm after the initial report and intervention by the Department;
5. whether the child is fearful of living in or returning to the child's home;
6. the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
7. whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
8. whether there is a history of substance abuse by the child's family or others who have access to the child's home;
9. whether the perpetrator of the harm to the child is identified;
10. the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

11. the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

12. whether the child's family demonstrates adequate parenting skills, including providing the child with:

    (a) minimally adequate health and nutritional care;

    (b) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

    (c) guidance and supervision consistent with the child's safety;

    (d) a safe physical home environment;

    (e) protection from repeated exposure to violence even though the violence may not be directed at the child; and

    (f) an understanding of the child's needs and capabilities; and

13. whether an adequate social support system consisting of an extended family and friends is available to the child.

Id.; *In re R.R.*, 209 S.W.3d at 116.

A. The children

The children did not testify at trial. The following facts come from the multiple reports filed by the children's attorney ad litem, their guardian ad litem, and the Department.

From the time they were removed until almost the time of trial, the children were in three placements: Yvonne was in a group home, Vanessa and Julie were together in a foster-to-adopt home, and Dennis was in a foster home in which adoption was not an option. Yvonne missed her sisters and, over time, grew depressed at her separation from them. In February 2015, she was moved to another group home at the request of her caregiver.

All four children had learning difficulties. Yvonne struggled in school, and her performance worsened with time. Her attorney ad litem recommended she receive counseling and tutoring. Yvonne was in a general education program for

the 2014–15 school year and was to move to the special education program in the fall of 2015. The school recommended that she be tested for learning disabilities.

Vanessa and Julie bonded with their foster caregiver and seemed happy in that home throughout the case. Vanessa was struggling in first grade, so she was moved to kindergarten. She improved but still had some difficulties. Julie was in pre-kindergarten and doing well.

Yvonne, Vanessa, and Julie all expressed throughout the case their desire to go home and be with Mother.

Dennis was described as a happy, extremely active toddler. His foster caregiver was an elderly woman with whom he bonded. However, his attorney ad litem recommended he be placed in a foster-to-adopt home with younger, more energetic caregivers. He had speech problems, so he received speech therapy. The record does not indicate Dennis' desire, if any, with regard to Mother.

Shortly before trial began, the Department found a foster parent willing to take all four children. The trial court approved the placement on June 16, 2015.

B. Mother

1. Multiple investigations by the Department

In March 2008, the Department received a referral regarding Mother alleging physical abuse of Vanessa, then a newborn, and neglectful supervision of Yvonne, then age five. The allegations of physical abuse of Vanessa were validated; Vanessa tested positive for marijuana at birth. The Department was unable to determine the validity of the allegations concerning Mother's neglect of Yvonne.

A few months later, the Department investigated Mother and the children's father, E.S., this time based on allegations of neglectful supervision of both

Yvonne and Vanessa. The truth of the allegations was unable to be determined, and the case remained open with Family Based Safety Services, a division in the Department.

The Department received a third referral in October 2009, alleging Mother negligently supervised Yvonne and Vanessa. Mother and other people going in and out of the home reportedly were abusing cocaine, marijuana, alcohol, and pills in front of the children. The referral also stated Mother was verbally abusive and has been physically abusive in the past. The allegations in that referral were ruled out.

In June 2011, Mother and E.S. were referred to the Department due to their alleged neglectful supervision, physical abuse, and physical neglect of Yvonne and Vanessa. The referral stated the children were exposed to domestic violence. A law enforcement report confirmed the domestic violence. The Department ruled it had reason to believe those allegations. The children were removed from the home and remained in care until they were returned in May 2012.

In July 2012, shortly after the children were returned to Mother, the Department received another referral alleging neglectful supervision of Yvonne, Vanessa, Julie, and newborn Dennis. Dennis tested positive for marijuana and cocaine at birth. Mother tested positive for marijuana, cocaine, and benzodiazepines. The Department found it had reason to believe the allegations in that referral, and the children were removed and placed in foster care. They were returned to Mother in October 2013.

The Department received a referral about Mother and C.S. in February 2014, alleging physical neglect and neglectful supervision of Yvonne, Vanessa, Julie, and Dennis. The report stated the children are at substantial threat of harm due to poor living environment, poor physical state, and malnourishment. The children were said to be at risk due to inadequate supervision and Mother's and C.S.'s ongoing

use of crack and "spice drugs." Department investigator Lilybell Arguello of Hidalgo County said Mother and C.S. were notified of a court hearing scheduled in May 2014, but they disappeared the day of the hearing. That case remained open at the time of trial in this case.

Finally, on June 28, 2014, two days before this case began, Mother and C.S. were reported to the Department in Brooks County. Mother and C.S. were said to be fleeing from the Department regarding the February 2014 referral. Kendra Robins of the Brooks County office of the Department said Mother reportedly locked all the children in a room with a padlocked metal door in front of the regular door for a few hours. A neighbor said the children were always dirty. The family was in Brooks County for approximately two weeks before moving to Houston. Robins said they moved to Houston when they learned the Department was looking for them.

2. Children spent three years in foster care

Before this case, the children had lived in foster care for approximately two years. Dennis was removed from Mother's care at birth and spent the first fifteen months of his life in foster care.

The children lived in foster homes the entire year this case was pending.

3. Visited children only once

Mother visited the children in person only once in the year between their removal and the trial. That visit occurred in December 2014. She testified that following that visit, she and the Department attempted to set up internet video calls between her and the children, but the record is not clear if or when those calls occurred. Mother said visits were not feasible because she lived in Hidalgo County, and it would take her about seven hours to drive to Houston. However, she

attended at least four court proceedings in this case in person; each was held in Harris County. According to caseworker Danielle Ryan, Mother told her in February 2015 that she had moved back to McAllen and would not be returning to the Houston area. In June 2014, Mother reportedly told Ryan that she would like to stop visitations due to her moving to McAllen.

4. Substance abuse

As stated, at least two of Mother's children tested positive for drugs at birth: Vanessa for marijuana, and Dennis for marijuana and cocaine. Mother said the drugs in Dennis resulted from her purchasing and eating a brownie on the streets that she did not know was laced with drugs.

Mother admitted to snorting cocaine after the death of her infant son in March 2014. She said she used drugs because she was a "mother in sorrow."

A week after the children were removed, Mother was tested for drug use. The test revealed she had 29,588 picograms of cocaine in her hair. She testified that she did not know how that happened. The record also indicates she tested positive for marijuana and benzodiazepine.

Mother tested negative for drugs in November 2014 and December 2014. She refused to submit to a drug test in March 2015. In May 2015, she tested positive for benzodiazepine, for which she had a prescription.

5. Mental health

Mother was diagnosed with anxiety and depression. The record contains some evidence that she was diagnosed with bipolar disorder and schizophrenia. According to the caseworker, Mother's therapist discharged her because they could not help her due to her "illusions and delusions." At the time of trial, Mother had been referred for another psychological evaluation but had not completed it.

6. Conclusion on best interest

Before this case began, Mother had been investigated by the Department at least seven times. The three older children had been removed from Mother's care twice and spent approximately two years in foster care. All of the children spent another year in foster care after being removed from Mother's care in this case. Mother visited the children only once during the year this case was pending. Though she tested negative for drugs on several occasions during this case, she admitted using drugs in the past, and at least two of her children (Vanessa and Dennis) tested positive for drugs at birth.

Considering all the evidence, as we are charged to do in a best-interest evidentiary review, we conclude the trial court reasonably could have found termination was in each of the children's best interest. *See In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.) (termination of parental rights was in four-year-old child's best interest in part because she had been in foster care since she was seventeen months old); *In re S.R.*, 452 S.W.3d at 361, 367 (termination of parental rights was in child's best interest due in part to parent's history of substance abuse).

We overrule Mother's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.