Affirmed and Memorandum Opinion filed February 11, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00947-CV

IN THE INTEREST OF R.J.S., AKA B.B.W., A CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2014-05309J

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

Appellant J.G.W. ("Mother") appeals the trial court's final decree terminating her parental rights, and appointing the Department of Family and Protective Services (the "Department") as sole managing conservator of R.J.S. ("the Child"). On appeal appellant challenges the legal and factual sufficiency of the evidence to support (1) the predicate grounds under which her parental rights were terminated, and (2) that termination was in the best interest of the child. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Removal Affidavit

On October 17, 2014, the Department received a referral alleging neglectful supervision of the newborn child. The referral stated that the alleged father threatened harm to Mother and Child. Mother had an untreated mood disorder, is easily angered, and exhibits mood swings. The affidavit noted that Mother had relinquished parental rights to two older children in July 2014.

On October 18, 2014, Lisa Rose, an investigator with the Department, spoke with medical personnel who advised that Mother was very emotional, did not make eye contact when spoken to, and did not appear to be bonding with the Child. Drug tests conducted on Mother were negative. When Rose spoke to Mother about lack of compliance in her previous case with the Department, Mother became threatening and "out of control." Security was notified and nurses attempted to remove the Child from the room. Mother refused to give the Child to the nurse and "grabbed the baby and would not let him go."

After the nurse left with the Child, Rose spoke with Mother and the Child's grandmother. The grandmother became upset and told Rose, "[S]omeone in your family is going to die because of what you are doing to my family." Mother refused to complete the Caregiver Resource Form. Rose served Mother with a Notice of Removal, but Mother refused to sign the form. Mother "jumped out of the bed in [Rose's] direction and flung her arms out and yelled 'leave me the fuck alone' and 'get the fuck out of my room!'" Rose immediately left the room. After discharging from the hospital Mother arrived at the Department's office requesting that the Child be placed with a neighbor who is a foster parent.

The affidavit also detailed Mother's previous history with the Department.

In April 2012, the Department received a report of physical abuse by Mother of her two-month-old baby. Mother was prescribed psychotropic medication, but was not taking it and has a history of noncompliance. Termination of Mother's parental rights to that child was "ruled out because [Mother] denied the allegations and there [were] no marks or bruises seen on children in home."

On May 19, 2013, physical abuse was reported of another newborn and neglectful supervision was reported of the child born in 2012. The baby born in 2013 tested positive for marijuana at birth. The Department sought temporary managing conservatorship of the children due to Mother's illegal drug use and her rationalization of her mental health issues. Mother voluntarily relinquished her rights to those two children.

On October 20, 2014, the Department filed an original petition for the termination of Mother's rights to R.J.S. in which the Department alleged termination was warranted because Mother:

> knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, pursuant to §161.001(l)(D), Texas Family Code; and
>
> engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child pursuant to §161.001(1)(E), Texas Family Code.

On August 31, 2015, the Department filed a first amended petition for termination of Mother's rights in which it alleged, in addition to the previous allegations, that termination was warranted because Mother:

> constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months and; (1) the Department or authorized agency has made reasonable efforts to return the child to the mother; (2) the mother has

> not regularly visited or maintained significant contact with the child; and (3) the mother has demonstrated an inability to provide the child with a safe environment, pursuant to §161.00(l)(N), Texas Family Code; and
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> failed to comply with the provisions of a court order that specifically established the actions necessary for the mother 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, pursuant to §161.001(1)(O), Texas Family Code.

B. Trial Testimony

The termination of Mother's parental rights was tried to the court. Mother did not appear at trial. Mother's counsel asked for more time to complete services. The Department objected to counsel's request because Mother had not made significant progress toward completing services in the year she had to complete them. The trial court denied Mother's request for more time.

The Department introduced into evidence the citations for both parents, the Child's birth certificate, the father's paternity test, family service plans for both parents, a status hearing order, drug test results for Mother, a termination decree for Mother's previous children, and the original petition filed in the previous termination. The trial court sustained Mother's hearsay objection to the original petition in the previous termination, and overruled Mother's hearsay objection to the family service plans and the drug test results. All exhibits except the original petition in the previous termination were admitted into evidence.

Laurisha Carroll, the Department caseworker, testified that the Child was eleven months old at the time of trial and was placed with the paternal grandmother who plans to adopt the Child. The Child has been with the grandmother for at least six months.

Carroll testified that Mother had not completed the services required under the Family Service Plan. Mother completed the psychosocial assessment and was referred to counseling, which would include domestic violence and anger management classes. Mother did not initially attend classes, but went for the first time the Saturday before trial. Other than completing the psychosocial assessment and attending one class, Mother had not performed the necessary requirements in her Family Service Plan. Mother did not submit to ten drug tests scheduled by the Department. When Mother submitted to a drug test in April she tested positive for marijuana and alcohol. Mother also had previous positive drug tests for marijuana and codeine. After testing positive for codeine, Mother produced a prescription for codeine. When the Department scheduled a drug test they notified Mother by phoning her and leaving messages, or speaking with Mother's sister. Carroll testified that Mother had not visited the Child in the six months leading up to trial despite being required by the Family Service Plan to visit him every two weeks. Mother provided no financial support for the Child. Carroll testified that Mother "placed the child in harm." Caroll stated that Mother's mental health is unstable, and Mother does not maintain consistency in taking her medication.

The grandmother testified that she had the Child for six to nine months and could provide a safe, stable environment for him.

Following argument of counsel the trial court found Mother's parental rights should be terminated based on the predicate findings under Family Code sections 161.001(1)(E), (N), and (O), and that termination of Mother's rights was in the best interest of the Child. The trial court also terminated the father's parental rights based on his voluntary relinquishment of his rights. The Child's father has not appealed.

II. ANALYSIS

A. Predicate Termination Grounds

In Mother's third issue she argues the evidence is legally and factually insufficient to support the termination of her parental rights under Texas Family Code section 161.001(1)(O). Parental rights can be terminated upon proof by clear and convincing evidence that (1) the parent has committed an act prohibited by 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(1), (2) (West 2014); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009).

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re D.R.A.*, 374 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Although parental rights are of constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002) ("Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.").

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 (West 2014); *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 C.M.C.*, 273 S.W.3d 862, 873 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

In reviewing legal sufficiency of the evidence in a parental termination case, we must consider all 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. *In re J.O.A.*, 283 S.W.3d at 336. We assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence that a reasonable fact finder could have disbelieved. *Id.*; *In re G.M.G.*, 444 S.W.3d 46, 52 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence, including disputed or conflicting evidence. *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." *Id*. 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). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109.

Relevant to this issue, section 161.001(1) provides that termination is warranted if the trial court finds by clear and convincing evidence, in addition to the best interest finding, that the parent has:

> (O) 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 Ann. § 161.001(1)(O).

Mother does not challenge the fact that the Child was removed from her under Chapter 262 for abuse or neglect, or that the Child was in the Department's conservatorship for the requisite period of time. Mother admits she did not fully comply with the Family Service Plan, but argues she failed to do so because the Department failed to provide her with proper support.

The record reflects that the court approved Mother's service plan and ordered compliance with its terms. *See* Tex. Fam. Code Ann. §§ 263.101–106; 161.001(l)(O). Mother's Family Service Plan was admitted into evidence at trial. The plan required Mother to:

- Visit the Child twice per month at the Department office;
- Participate in parenting classes in person;
- Demonstrate learned behaviors during family visits with the Child and through discussions with the caseworker;
- Pay all fees associated with parenting classes;
- Participate in and successfully complete an anger management treatment program and demonstrate the ability to control immediate impulses and consider the consequences of her actions;
- Maintain suitable housing that is safe, clean, organized, with operational utilities, and free of hazards to ensure her children's well-being;
- Maintain stable employment enabling her to meet her children's basic needs;
- Sign a release of information to permit agency access to parent's records at agencies or other entities from which the parent received services;
- Participate in and successfully complete a domestic violence treatment program; and
- Complete a psychological assessment and follow all

recommendations.

The record reflects that Mother did not participate in parenting classes, anger management or domestic violence treatment, maintain stable housing, or maintain stable employment. Mother did not begin attending counseling sessions until the Saturday before trial when she attended one session. Mother did not visit the Child for at least six months prior to trial. The record further reflects that Mother did not remain drug free, nor did she submit to drug tests as required by the Department.

Mother argues that the Department is to blame for her failure to fully comply with the Family Service Plan. Mother argues that the Department failed to contact her and failed to provide a support system. Not only is Mother's argument not supported by the record, the Family Code does not permit consideration of excuses for non-compliance with section 161.001(1)(O). *See In re M.C.G.*, 329 S.W.3d 674, 675–76 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Even substantial compliance with a Family Service Plan is insufficient to avoid a termination finding under subsection O. *In re C.M.C.*, 273 S.W.3d at 875; *see also In re T.T.*, 228 S.W.3d 312, 319–20 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (noting Texas courts have uniformly found substantial compliance with the provisions of a court order inadequate to avoid a termination finding under subsection O). Sporadic incidents of partial compliance with court-ordered Family Service Plans do not alter the undisputed fact that the parent violated many material provisions of the trial court's orders. *See In re J.F.C.*, 96 S.W.3d at 278.

By failing to complete her service plan, Mother has not demonstrated an ability to provide the Child with a safe environment. *See In re A.D.*, 203 S.W.3d 407, 411–12 (Tex. App.—El Paso 2006, pet. denied) (affirming termination under subsection O because mother failed to meet her service plan's material requirements including drug assessment, finding a job, and providing a safe home).

Reviewing the evidence under the appropriate standards, we conclude that the trial court could have formed a firm belief or conviction that termination of Mother's rights is warranted under section 161.001(1)(O). Because there is legally and factually sufficient evidence of Mother's failure to comply with the service plan, we need not address her arguments that the evidence is insufficient to support the trial court's findings under sections 161.001(1)(E) and (N). *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) ("Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."). We overrule Mother's third issue.

B. Best Interest of the Child

In her fourth issue Mother challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination is in the best interest of the Child.

A strong presumption exists that the best interest of the child is served by keeping the child with his natural parent, and the burden is on the Department to rebut that presumption. *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Evidence supporting termination under section 161.001(1)(O) supports a finding that termination is in the best interest of the child. *See In re C.H.,* 89 S.W.3d at 28. ("While it is true that proof of acts or omissions under section 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues.").

The factors the trier of fact may use to determine the best interest of the child include: (1) the desires of the child; (2) the present and future physical and emotional needs of the child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the persons seeking custody; (5) the

programs available to assist those persons seeking custody in promoting the best interest of the child; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and (9) any excuse for the parents' acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re U.P.*, 105 S.W.3d at 230; *see also* Tex. Fam. Code Ann. § 263.307(b) (West 2014) (listing factors to consider in evaluating parents' willingness and ability to provide the child with a safe environment).

There is a strong presumption that the best interest of a child is served by keeping the child with his natural parent. *In re D.R.A.*, 374 S.W.3d at 533. Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a). Mother contends that the presumption in her favor is not rebutted because the evidence was insufficient to show appellant was mentally unstable and that the Department made reasonable efforts to return the Child to Mother.

1. Needs of and Danger to the Child

With regard to the present and future emotional and physical needs of the Child and the present and future emotional and physical danger to the Child, the record reflects that Mother abandoned the Child after a positive drug test approximately six months before trial. Mother did not maintain a stable home or income. The Child was initially removed at birth due to Mother's anger management and untreated mental health issues.

Mother argues the Department failed to prove she was mentally unstable. The record reflects, however, that Mother had been prescribed psychotropic medication, had managed well when taking the medication, but had not been

reliably compliant with medication.

2. Stability and Compliance with Services

In determining the best interest of the child in proceedings for termination of parental rights, the trial court may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) ("Many of the reasons supporting termination under subsection O also support the trial court's best interest finding.").

In this case, Mother admits she did not complete the tasks contained in the Family Service Plan. Despite positive drug tests for marijuana, Mother denied illegal drug use. Mother's failure to comply with court-ordered tasks, drug use during the termination proceedings, and failure to provide a safe and stable environment and income support the trial court's finding that termination is in the best interest of the Child.

3. Child's Desires and Proposed Placement

The Child was an infant at the time of trial, and unable to express his desires. When a child is too young to express his desires, the factfinder may consider that the child has bonded with the foster family, is well cared for by them, and has spent minimal time with a parent. *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The stability of the proposed home environment is an important consideration in determining whether termination of parental rights is in the child's best interest. *See In re J.N.R.*, 982 S.W.2d 137, 143 (Tex. App.—Houston [1st Dist.] 1998, no pet.). A child's need for permanence through the establishment of a stable, permanent home has been recognized as the paramount consideration in a

best interest determination. *See In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.). Therefore, evidence about the present and future placement of the child is relevant to the best interest determination. *See In re C.H.*, 89 S.W.3d at 28.

In this case, the caseworker testified that the Child appeared to have bonded with the grandmother who plans to adopt him. The Child was removed from Mother at birth. Mother did not visit the Child for approximately six months prior to trial; therefore, the Child has spent minimal time with Mother. The grandmother has had the Child for six months before trial up to the present date. The grandmother testified that she will keep the Child in her home, and that she will continue to provide him with a safe and stable environment. She further testified that she is financially able to support the Child through the age of 18.

4. Parenting Abilities and Family Support

The evidence showed that Mother did not demonstrate the ability to safely parent the Child. The Child was initially removed because Mother had untreated mental health and anger management issues. Three months prior to the Child's birth Mother had voluntarily relinquished rights to two older children. The record further reflects that Mother made no attempts to re-unite with the Child until the week prior to trial. The Child's maternal grandmother threatened the caseworker in the hospital when the caseworker attempted to remove the Child.

The record contains evidence supporting the best interest finding based on Mother's drug use, lack of stable employment, lack of a stable home, and failure to comply with court-ordered services. *See In re S.B.*, 207 S.W.3d 877, 887–88 (Tex. App.—Fort Worth 2006, no pet.) (considering the parent's drug use, inability to provide a stable home, and failure to comply with a family service plan in holding the evidence supported the best interest finding).

Based on the evidence presented, the trial court could have reasonably formed a firm belief or conviction that terminating Mother's parental rights was in the Child's best interest so that he could promptly achieve permanency through adoption by a foster family. *See In re T.G.R.-M.*, 404 S.W.3d 7, 17 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Applying the applicable *Holley* factors to the evidence, we conclude that legally and factually sufficient evidence supports the trial court's finding that termination of the parents' rights was in the best interest of the Child. *See E.C.R.*, 402 S.W.3d at 249–50 (finding sufficient evidence that termination was in the best interest of the child and considering reasons supporting termination under subsection (O) supported best interest finding). We overrule Mother's fourth issue.

We affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Jamison, Donovan, and Brown.