Reversed and Remanded, in part, and Affirmed, in part, and Memorandum Opinion filed March 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00717-CV

IN THE INTEREST OF T.A.D., A CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2015-04802J

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

Appellant Father appeals the trial court's final decree terminating his parental rights and appointing the Department of Family and Protective Services as sole managing conservator of his child Tracy.[1] On appeal, Father brings three issues asserting (1) the trial court erred in granting a partial summary judgment on the predicate termination ground; (2) the trial court erred in granting a partial

[1] We use pseudonyms to refer to appellant's child in this case. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

summary judgment on the child's best interest; and (3) the trial court erred by refusing Father access to all court proceedings. Because we conclude the trial court erred in granting a partial summary judgment on the predicate termination ground, we reverse the portion of the trial court's judgment terminating Father's parental rights and remand for trial. We affirm in all other respects.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2015, the Department received a referral for neglectful supervision of Tracy by Mother. Mother left Tracy with her paternal grandmother for three days and had failed to return. According to the referral, Mother was having transportation problems and no one knew when she would retrieve Tracy. Grandmother could not continue caring for Tracy. The referral further alleged that Mother was using codeine and Xanax daily. At the time of the referral, Father was incarcerated.

On August 14, 2015, following an investigation, the Department filed its original petition seeking termination of the parents' rights to Tracy.

On July 1, 2016, the Department moved for a partial summary judgment as to termination of Father's parental rights pursuant to sections 161.001(b)(1)(Q) and 161.001(b)(2) of the Texas Family Code. Subsection Q provides that a court may terminate the parent-child relationship upon a finding by clear and convincing evidence that the parent has knowingly engaged in criminal conduct that has resulted in the parent's conviction of an offense, and the parent is both incarcerated and unable to care for the child for at least two years from the date the termination petition was filed. Tex. Fam. Code Ann. § 161.001(b)(1)(Q). Father filed a

[2] The trial court also terminated Mother's parental rights pursuant to an irrevocable affidavit of relinquishment; however, she has not appealed. Thus, we affirm the judgment as to Mother.

response to the Department's motion, in which he challenged the admissibility of much of the Department's evidence and submitted his own summary judgment evidence.

On July 27, 2016, the trial court heard the motion for summary judgment as to Father only. After reviewing the evidence and considering argument of counsel, the court granted the Department's motion for partial summary judgment, finding grounds for termination of Father's parental rights pursuant to subsection Q and finding that termination of Father's parental rights would be in Tracy's best interests. On July 28, 2016, the trial court signed an interlocutory decree for termination as to Father.

On August 9, 2016, a court trial as to Mother's parental rights was held, during which Mother's irrevocable affidavit of voluntary relinquishment was admitted without objection.

On September 1, 2016, the trial court signed a final decree for termination and appointed the Department as Tracy's sole managing conservator. Father timely appealed.

II. BURDEN OF PROOF AND STANDARD OF REVIEW

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.").

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(b)(1) of the Family Code; and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b)(1), (2); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). "'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; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). 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.). 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).

In a traditional summary judgment proceeding, the moving party carries the burden to show there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review summary judgment de novo. *Raynor v. Moores Mach. Shop*, LLC, 359 S.W.3d 905, 907 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Dowell v. Dowell*, 276 S.W.3d 17, 20 (Tex. App.—El Paso 2008, no pet.).

We take as true all evidence favorable to the nonmovant and resolve any doubt in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable fact finder could, and disregarding evidence contrary to the nonmovant unless a reasonable fact finder could not. *Mann Frankfort*, 289 S.W.3d at 848. If the

movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *Gray v. Entis Mech. Servs., L.L.C.*, 343 S.W.3d 527, 529 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000)).

III. SUMMARY JUDGMENT

The Department moved for summary judgment on both the alleged predicate ground for termination, subsection Q of section 161.001(b)(1), and best interest of the child. The Department had the burden of showing that no genuine issue of material fact existed and that the Department was entitled to judgment as a matter of law whether Father's rights should be terminated involuntarily.

A. Predicate Ground

Subsection Q requires clear and convincing evidence that Father "knowingly engaged in criminal conduct that has resulted in [his]: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition." Tex. Fam. Code Ann. § 161.001(b)(1)(Q); *A.V.*, 113 S.W.3d at 359–60 (construing phrase "two years from the date of filing the petition" to apply prospectively from the date of filing a petition). The second part of subsection Q requires proof that the parent "be both incarcerated or confined *and* unable to care for the child for at least two years from the date the termination petition is filed." *In re H.R.M.*, 209 S.W.3d 105, 110 (Tex. 2006) (emphasis in original). Inability to care for the child is an independent requirement and is not met by showing incarceration alone. *In re B.M.R.*, 84 S.W.3d 814, 818 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The incarcerated parent's willingness and ability to provide financial and emotional support are

factors to be considered in determining if the parent is unable to care for the child. *See id.* Moreover, an incarcerated parent may demonstrate an ability to care for the child by making arrangements for the care to be provided by another. *See In re Caballero*, 53 S.W.3d 391, 396 (Tex. App.—Amarillo 2001, pet. denied) ("Because incarceration is inherently inconsistent with providing personal care for a child, the legislature's inclusion of the phrase 'and inability to care for the child' would be meaningless unless care encompassed arranging for care to be provided by another.").

1. The Department's evidence

In support of its motion for partial summary judgment, the Department attached twelve exhibits, which included an affidavit from Department caseworker Iris Darrington detailing the Department's inability to place Tracy with a relative named by Father. In her affidavit, Darrington stated that the Department had attempted to place Tracy with the individuals Father identified as possible caregivers for Tracy but that no placement had been approved as of July 1, 2016. Tracy was placed with Father's aunt Theresa on two separate occasions, but Theresa asked for Tracy to be removed due to severe behavioral issues. According to the affidavit, Theresa no longer wished to be considered for placement or adoption. Darrington stated that the Department was still waiting for another paternal aunt, Sabrina, to provide the Department with a "Point of Contact" due to Tracy's behavioral problems at school. Because of Sabrina's inflexible work schedule, it was imperative that another individual be identified who could pick up Tracy from school if necessary. The Department also attempted to contact several other individuals identified by Father but to no avail.

2. Father's evidence

Father filed a response to the motion for partial summary judgment. Father's

response included a sworn affidavit from Theresa addressing efforts Father had made to provide care for Tracy.[3] In her affidavit, Theresa stated that Father had reached out to the family in order to seek help in caring for Tracy and that she, along with all of her sisters, were willing to help care for Tracy during Father's incarceration. Although unable to send a lot of money, Father had sent funds from his commissary account to be used for Tracy's benefit. Theresa used these funds during the time Tracy was living in her home. Father had also purchased items from the commissary for Tracy, including crayons, M&M's, deodorant, toothpaste, and toothbrushes.

Theresa further stated that she personally had cared for Tracy for a significant period of time during the pendency of the case by having Tracy live in her home. Recently, Father had arranged for Sabrina and her husband to provide care for Tracy. Father's attorney had provided complete information on the couple to the Department so that background checks could be performed. Neither Sabrina nor her husband has any criminal history or involvement with the Department. It was Theresa's understanding that they had passed the Department's background checks and a home study had been completed. The only issue identified as to placement with Sabrina was the need for a backup caregiver in the event Tracy needed to be picked up from school while Sabrina and her husband were at work. In order to address this concern, Father asked Sabrina's son, as well as Theresa and her other sisters, to serve as backup caregivers. Father provided the Department with the names of potential caregivers and backup caregivers by completing the Child Caregiver Resource Form.

According to Theresa, Father also provides for Tracy's emotional care by

[3] Subsequently, Father sought leave to file a supplemental response with additional summary judgment evidence in the form of an unsworn declaration of Father. Father's declaration also outlined efforts Father had made to provide care for Tracy.

writing her letters and attempting to counsel her with regard to recent behavioral problems. Father's letters emphasize the importance of Tracy not allowing her conduct to interfere with school as well as placement with family.

Finally, Theresa expressed her belief that termination of Father's parental rights would not be in Tracy's best interest. Because of Tracy's significant behavioral issues, Theresa had concerns about the Department finding long-term caregivers who could provide Tracy with a better home environment than her own family. Father's family is "willing, capable and competent to meet [Tracy's] physical and emotional needs and to care for [Tracy] as long as it is necessary."

3. Analysis

Father contends the Department failed to prove by clear and convincing evidence that he is unable to care for Tracy, especially in light of Theresa's affidavit. We agree. Theresa's statements regarding her previous and future involvement in assisting with the care of Tracy, as well as facts pertaining to Father's efforts to provide Tracy with some form of financial support and a home with his aunt Sabrina, created a fact issue as to Father's inability to care for Tracy.

The Department responds that many of Theresa's statements are conclusory and thus incompetent summary judgment evidence. A "conclusory" statement is defined as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based."[4] *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 520 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see Arkoma Basin Exploration Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 389 n. 32 (Tex. 2008) (citing Black's Law Dictionary 308 (8th ed. 2004)); *see also LeBlanc*

[4] An objection is not required to preserve error on a challenge to conclusory statements because they constitute no evidence. *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

v. Lamar State Coll., 232 S.W.3d 294, 301 (Tex. App.—Beaumont 2007, no pet.) ("Statements are conclusory if they fail to provide underlying facts to support their conclusions."). Conclusory affidavits are not sufficient to raise fact issues because they are not credible or susceptible to being readily controverted. *La China*, 417 S.W.3d at 520 (citing *Ryland Group v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam)). Objections that statements in an affidavit are conclusory assert defects of substance, which may be raised on appeal for the first time. *Pipkin v. Kroger Texas L.P.*, 383 S.W.3d 655, 670 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *S & I Mgmt., Inc. v. Sungju Choi*, 331 S.W.3d 849, 856 (Tex. App.—Dallas 2011, no pet.)).

Although we agree with the Department that some of Theresa's statements are conclusory, there remain many probative statements to which the Department did not object as conclusory including, in relevant part, the following:

- [Father] has reached out to family in order to seek our help in caring for his daughter, [Tracy].
- [Father] isn't able to send a lot of money, but he has sent funds to me from his commissary account to be used for [Tracy's] benefit. I used the money [Father] sent to me for her needs during the time [Tracy] was in my home and under my care. [Father] also purchased some items from the prison commissary and mailed them to me for [Tracy], including crayons, M&M's, deodorant, toothpaste, and toothbrushes.
- I have personally cared for [Tracy] for a significant period of time during this case, by having [Tracy] live in my home.
- [Father] recently arranged for [Sabrina] and her husband [Vincent] to provide care for the needs of his daughter. Through [Father's] counsel, John Millard, the full names, address, telephone numbers, dates of birth and driver's license numbers of Sabrina and [her husband] were furnished to CPS so background checks on them could be performed. Neither Sabrina [nor her husband] have any criminal history or history of involvement with Child Protective Services.
- It is my understanding both [Sabrina and her husband] passed the

> necessary CPS background checks, a home study has been completed, and no issues have been identified that would prevent placement of [Tracy] with Sabrina [and her husband], save and except the need to have a backup caregiver in the event [Tracy] needs to be picked up from school during hours of the day that Sabrina [and her husband] are at work. To address this concern, [Father] requested that Sabrina's son and a friend of his in the same locale to serve as a backup caregiver whenever Sabrina and Vincent are not available. In addition, [Father] has requested and arranged for me and my other sisters to serve as additional backup caregivers for [Tracy].

We conclude that Theresa's affidavit contains sufficient competent summary judgment evidence to raise a genuine issue of material fact as to whether Father is unable to care for Tracy. *See Rivera v. White*, 234 S.W.3d 802, 808 (Tex. App.—Texarkana 2007, no pet.) (holding that, although all of the affiant's statements were "to some degree conclusory, each furnishe[d] some factual information that could have been rebutted" and, therefore, were not merely conclusory, but contained enough underlying facts to support a summary judgment award).[5]

Citing *Lujan v. Navistar, Inc.*, the Department further contends Theresa's inclusion of herself as someone who is willing and able to care for Tracy creates a "sham" fact issue because it "contradicts the undisputed fact" that she previously asked the Department to remove Tracy from her home. 503 S.W.3d 424, 434 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). In *Lujan*, we adopted the sham affidavit doctrine, holding that when an affidavit is executed after a deposition of the same person and there is a clear contradiction on a material point without explanation, the contradictory statements in the affidavit may be disregarded for purposes of summary judgment. *Id.* An objection that an affidavit is a sham

[5] Because we conclude that a genuine issue of material fact exists as to the second prong of the predicate ground, we do not reach Father's argument that the Department failed to prove Father knowingly engaged in criminal conduct that resulted in his conviction and that, as a result, Father is confined for not less than two years from the date of the filing of the petition. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(Q).

affidavit is one that complains of a defect in form, not substance. *See Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879, 883 (Tex. App.—Dallas 2006, no pet.) (citing *Choctaw Prop., L.L.C. v. Aledo I.S.D.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.) (holding that objection to affidavit of an interested witness that is not clear, positive, direct, or free from contradiction is defect in form complaint)). Absent a timely objection and a ruling from the trial court, the complaint that a summary-judgment affidavit is a sham is waived for purposes of appellate review. *Parkway Dental Associates, P.A. v. Ho & Huang Properties, L.P.*, 391 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Because the Department did not raise this objection below, it failed to preserve error with regard to this argument.

Having concluded that a material fact issue exists as to whether Father is unable to care for Tracy, we hold the trial court erred in granting the Department's motion for partial summary judgment and sustain Father's first issue. Because we resolve Father's first issue on appeal in his favor, it is not necessary for us to reach the merits of his remaining issues.

IV. CONCLUSION

We reverse the trial court's judgment, in part, and remand the cause for a trial on the issue of Father's parental rights. We affirm in all other respects.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Boyce, Jamison, and Donovan.