Affirmed and Memorandum Opinion filed April 4, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00850-CV

IN THE INTEREST OF J.E., JR. AND M.D.E., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2015-06056J

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

The trial court terminated the parental rights of M.C. ("Mother") and J.E. ("Father") with respect to their children, John and Mark,[1] and appointed the Texas Department of Family and Protective Services ("the Department") to be the children's managing conservator. Mother appeals, challenging the sufficiency of the evidence to support the finding that termination was in the children's best interest. She concedes the sufficiency of the evidence to support the findings on the predicate statutory bases for termination, and she does not challenge the

[1] John and Mark are pseudonyms. *See* Tex. R. App. P. 9.8(b)(2).

Department's appointment as managing conservator. Father does not appeal. We affirm.

BACKGROUND

A. Removal

In October 2015, Mother left five-year-old John and four-year-old Mark with a neighbor and said she would be back in two hours. When she had not returned after five days, the neighbor called the police, who in turn notified the Department. The neighbor reported that the boys were outside alone regularly and would ask neighbors for food. The neighbor also said Mother is known to work as a prostitute in the area.

Department investigator Shemika Peoples met with John and Mark at a Department office. Both boys reportedly could say only "five" and "mama." The boys were unkempt but showed no signs of physical abuse. They played well together.

Mother was found at a motel. Peoples said Mother had severe bruising on her eye, a swollen lip, and a swollen face. According to Peoples, Mother said she was beaten up by a man who tried to rob her while she was prostituting herself. Neighbors, however, suspected Mother's boyfriend assaulted her. Mother explained that she left the children so she could earn money to pay for a place to stay. She believed it was better for the children to be with the neighbor than to have to move from motel to motel with her.

Mother was administered an instant oral swab drug test that day. The test was positive for cocaine. Mother admitted she used "a little" cocaine three days earlier. Peoples asked Mother to take another drug test the following day, but Mother failed to appear at the testing facility.

B. Department and criminal history

Both Mother and Father had history with the Department. The record reflects the following two referrals.

First, when John was born in September 2010, the Department received a referral alleging Mother admitted using cocaine for several months throughout her pregnancy. She was negative for drugs at the time of John's birth. The Department referred the case to its Family Based Safety Services ("FBSS") division. Mother completed parenting classes through FBSS. When she became pregnant again in early 2011, she took prenatal vitamins and received prenatal medical care.

Second, Father was reported to the Department in February 2012 for allegedly sexually assaulting a five-year-old girl. According to the girl's mother, Mother and Father fled to Mexico to avoid the investigation. The Department ruled the case "unable to determine."

Mother, Mother's boyfriend, and Father also had a history of criminal activity. Mother's crimes were typically related to prostitution or possession of small quantities of illegal drugs. The boyfriend's criminal record included convictions for theft, burglary, and assault of a family member. Father was in prison due to his December 2014 conviction for indecency with a child. He was scheduled for release in June 2018.

C. Pretrial proceedings

Unable to locate Mother for several days, the Department filed this lawsuit. The boys were placed with their maternal great-uncle ("Uncle") in early November 2015. They remained with Uncle for the duration of the case.

Following removal, the trial court signed an order requiring both parents to comply with any family service plan by the Department. Mother's service plan

identified the tasks and services she needed to complete before the children could be returned to her care. The plan required Mother to submit to random drug testing; refrain from participating in criminal activity or interacting with people who have a history of drug use; obtain and maintain suitable employment, or enroll in a training program to make herself more employable; obtain and maintain stable housing for at least six months; undergo substance-abuse and psychosocial assessments and follow the assessors' recommendations; participate in individual therapy and follow the therapist's recommendations; complete a parenting class; maintain regular contact with the Department; pay any child support ordered by the court; attend and participate in all hearings, permanency conferences, scheduled visitations, and requested meetings; and maintain contact with her caseworker.

D. Trial

Department caseworker Dessa Parker and Uncle testified at trial. Among the documents admitted into evidence without objection were Mother's family service plan, judgments of criminal convictions for Mother and Father, and medical records regarding Mother's pregnancy with John. The trial court took judicial notice of all its orders in this case. *See In re K.F.*, 402 S.W.3d 497, 504–05 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (trial court is permitted to take judicial notice in a termination case). Neither Mother nor Father appeared personally at trial, called witnesses, or offered evidence.

Parker testified that Mother failed to complete any of her service plan's requirements. Though she had a calling schedule, Mother had not called the children for six or seven months. She never visited them or provided any support for them. Parker believed termination of Mother's parental rights was in the boys' best interest because Mother had not shown any interest in caring for her children, nor had she demonstrated she could provide them a safe and stable home.

By contrast, Parker testified, Uncle was meeting John's and Mark's physical and emotional needs. The boys were strongly bonded with Uncle and were doing very well in his home. In addition to the speech delays noted at the time of removal, the boys had learning disabilities and difficulty socializing. They were both receiving speech therapy at home and in school, were enrolled in special education classes, and had received counseling throughout the year.

Though he lived several hours away, Uncle attended every court hearing. He wanted to adopt the children, which the Department believed would be in John's and Mark's best interest. Uncle said he would protect the boys in part by keeping them safe from Mother; he assured the court, "We're not getting anywhere near her."

The trial court found termination of Mother's and Father's parental rights was in the children's best interest and was justified under several subsections of section 161.001(b)(1) of the Family Code. For Mother, those subsections were: D and E (both concerning endangerment), N (constructive abandonment), and O (failure to comply with a court-ordered service plan). The trial court appointed the Department to be the children's managing conservator. This appeal followed.

ANALYSIS

I. Burden of proof and standards 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 clear and convincing evidence. *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); *accord J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *S.R.*, 452 S.W.3d at 358.

Parental rights can be terminated upon clear and convincing evidence that (1) the parent has committed an act described in 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). Only one predicate finding under section 161.001(b)(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); *J.F.C.*, 96 S.W.3d at 266; *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 disbelieve. *J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266.

In reviewing the factual sufficiency of the evidence, we consider and weigh all the evidence, including disputed or conflicting evidence. *See 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." *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).

II. Predicate ground for termination: Endangerment (subsection E)

As stated in her statement of issues, Mother's first four issues challenge the trial court's findings on subsections D, E, N, and O of section 161.001(b)(1) of the Family Code. However, in her argument section, Mother concedes the evidence is legally and factually sufficient to support each of those findings.

An unchallenged fact finding is binding on us "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 subsection 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).

Only one predicate finding under section 161.001(b)(1) is necessary to support a decree 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. We conclude the record supports the unchallenged finding that termination is proper under subsection E.

Accordingly, we do not review the unchallenged findings regarding subsections D, N, or O.

A. Legal standards

Subsection E of Family Code section 161.001(b)(1) requires clear and convincing evidence that the parent "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." Tex. Fam. Code Ann. § 161.001(b)(1)(E). "To endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996); *S.R.*, 452 S.W.3d at 360. "Conduct" includes acts and failures to act. *See In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.).

A finding of endangerment under subsection E requires evidence the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *Id.* Termination under subsection E must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id.* A court properly may consider actions and inactions occurring both before and after a child's birth to establish a "course of conduct." *In re S.M.*, 389 S.W.3d 483, 491–92 (Tex. App.—El Paso 2012, no pet.). While endangerment often involves physical endangerment, the statute does not require that conduct be directed at a child or that the child actually suffer injury. Rather, the specific danger to the child's well-being may be inferred from the parent's misconduct alone. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738–39 (Tex. App.—Fort Worth 2004, pet. denied). A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re A.B.*,

412 S.W.3d 588, 599 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014).

The parent's conduct both before and after the Department removed the child from the home is relevant to a finding under subsection E. *See Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ) (considering persistence of endangering conduct up to time of trial); *In re A.R.M.*, No. 14-13-01039-CV, 2014 WL 1390285, at *7 (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.) (considering criminal behavior and imprisonment through trial).

B. Application

Drug use. A parent's continuing substance abuse can qualify as a voluntary, deliberate, and conscious course of conduct endangering the child's well-being. *See J.O.A.*, 283 S.W.3d at 345; *In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *S.R.*, 452 S.W.3d at 361–62. By using drugs, the parent exposes the child to the possibility that the parent may be impaired or imprisoned and, therefore, unable to take care of the child. *See Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617–18 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A mother's use of drugs during pregnancy may amount to conduct that endangers the physical and emotional well-being of the child. *See In re C.J.S.*, 383 S.W.3d 682, 690 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.).

The medical records admitted at trial state that Mother admitted using cocaine and marijuana for approximately four months (March through June) during the middle of her pregnancy with John. She tested negative for drugs in July and when John was born in September. When hospital staff offered to provide Mother

with substance abuse treatment referrals, Mother declined, saying she was not an addict.

Mother's four-month period of substance abuse distinguishes this case from *In re A.S.*, 261 S.W.3d 76 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The mother in *A.S.* used marijuana once while she was pregnant. *Id.* at 86. We concluded her single use of the drug did not constitute legally sufficient evidence of endangerment: "While unquestionably, an exercise of poor judgment, Veronica's use of marijuana on a single occasion, standing alone, does not rise to the level of a conscious course of conduct." *Id.*; *accord In re M.G.P.,* No. 02-11-00038-CV, 2011 WL 6415168, *10–*11 (Tex. App.—Fort Worth Dec. 22, 2011, pet. denied) (mem. op.) (mother's use of drugs before she knew she was pregnant was legally insufficient evidence of endangerment). By contrast, Mother used cocaine and marijuana continuously for four months during the middle of her pregnancy. Such substance abuse does rise to the level of a conscious course of conduct. *See C.J.S.*, 383 S.W.3d at 690 (mother's repeated use of cocaine while she was pregnant supported trial court's finding of endangerment).

Criminal activity. Evidence of criminal conduct, convictions, or imprisonment is relevant to a review of whether a parent engaged in a course of conduct that endangered the well-being of the child. *S.R.*, 452 S.W.3d at 360–61; *A.S. v. Tex. Dep't of Family & Protective Servs.*, 394 S.W.3d 703, 712–13 (Tex. App.—El Paso 2012, no pet.).

The record contains four judgments of conviction for Mother, each based on a guilty plea. She was convicted three times in 2006: in January for prostitution, in February for possession of less than one gram of cocaine, and in June for delivery of less than one gram of cocaine. In 2009, she was convicted of theft.

Conclusion on subsection E. The evidence of Mother's drug use and criminal activity supports the trial court's unchallenged finding of endangerment under subsection E. Accordingly, we are bound by that finding. *See E.C.R.*, 402 S.W.3d at 249; *McGalliard*, 722 S.W.2d at 696. We overrule issues one through four.

III. Best interest

In her fifth issue, Mother contends the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights is in the children's best interest.

A. Legal standards

Termination must be in the child's best interest. Tex. Fam. Code Ann. § 161.001(b)(2). Prompt, permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *Id.* § 263.307(a). There is a strong presumption that the best interest of a child is served by keeping the child with the child's parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam).

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.). *See also* Tex. Fam. Code Ann. § 263.307(b) (setting out factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment).

B. Application

1. The children

Desires. No evidence was presented about the children's desires. However, Parker testified that John and Mark were bonded very well with Uncle and he was meeting all their needs.

When a child is too young to express his desires, the fact finder 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. *L.G.R.*, 498 S.W.3d at 205; *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Needs. Both boys had speech problems, learning disabilities, and difficulty socializing. Throughout the year they lived with Uncle, they had speech therapy, special education at school, and sessions with therapists and counselors.

Department's plan for the children. The Department planned for John and Mark to continue living with Uncle so he could adopt them. Uncle testified he was willing and able to adopt and support them.

2. Mother

Endangerment. As discussed, Mother endangered the children by abusing drugs and engaging in criminal activity. Evidence relevant to statutory bases for termination is also relevant to the child's best interest. *See S.R.*, 452 S.W.3d at 366.

Failure to comply with court-ordered services. The evidence is undisputed that Mother did not complete any of her court-ordered services. Her failure to do so is relevant to the best-interest analysis. *See E.C.R.*, 402 S.W.3d at 249.

History with the Department. Mother came to the Department's attention when she admitted to hospital personnel that she abused cocaine and marijuana for several months during her pregnancy with John. Following that referral, she availed herself of some of the support available through FBSS. About a year later, Mother reportedly fled to Mexico with Father due to the Department's investigation of allegations that Father sexually assaulted a five-year-old girl.

Failure to return to children. The children came into the Department's care because Mother left them with a neighbor and said she would be back in two hours. She did not leave any food or clothing for the children. After five days, Mother had not returned.

Unwillingness to parent. Perhaps most importantly, the record reflects Mother is unwilling to parent her children. By the time of trial, she had not seen John or Mark for nearly a year and had not called them in more than six months. She called her Department caseworker only once throughout the case. And Mother failed to appear at trial, despite knowing she could lose her children.

Considering all the evidence in the light most favorable to the best-interest finding, we conclude the trial court reasonably could have formed a firm belief or conviction that termination of Mother's parental rights was in the children's best interest. *See J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266; *C.H.*, 89 S.W.3d at 25. Further, in light of the entire record, we conclude the disputed evidence the trial court could not reasonably have credited in favor of its best-interest finding is not so significant that the court could not reasonably have formed a firm belief or conviction that termination is in the children's best interest. Accordingly, the

evidence is legally and factually sufficient to support the trial court's finding that termination of Mother's parental rights is in the best interest of the children. We overrule Mother's fifth issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Busby, and Wise.