Affirmed and Memorandum Opinion filed May 4, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00970-CV

IN THE INTEREST OF R.T., F.M.P., AND F.L.P., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2015-06661J

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

Appellant F.D.P., III ("Father") appeals the trial court's final decree terminating his parental rights and appointing the Department of Family and Protective Services ("the Department") as sole managing conservator of appellant's child, F.L.P. ("Fiona").[1] The trial court terminated Father's parental rights on the predicate grounds of endangerment, abandonment, and failure to comply with a family service plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E),

[1] "Fiona" is a pseudonym. Pursuant to Texas Rule of Appellate Procedure 9.8, we use fictitious names to identify the minors involved in this case.

(N), and (O) (West Supp. 2016). The trial court further found that termination of Father's rights was in Fiona's best interest. In four issues, Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings on each predicate ground, as well as the best interest finding. Because we conclude the evidence is legally and factually sufficient to support the trial court's findings that (1) Father did not comply with the family service plan, and (2) termination is in Fiona's best interest, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

Fiona and her siblings, R.T. ("Rebecca"), F.M.P. ("Franklin"), and J.N.T. ("Julia") have the same mother, R.L.P. ("Mother").[2] Fiona, Rebecca, Franklin, and Julia lived with Mother and C.L.M. ("Colin"), Mother's boyfriend. In November 2015, Mother and Colin went out for pizza late one night and left the four children unattended at home. Fiona was three years old and all her siblings were between the ages of one and five years old. Upon returning home, Mother and Colin found the kitchen oven overturned. When Colin lifted the oven upright, he noticed the oven was turned on and noticeably hot, so he turned it off. Colin then saw nineteen-month-old Julia laying on the floor, severely burned. The trial record is unclear, but Julia was trapped either inside, or underneath, the oven and suffered burns over eighty-five percent of her body. Julia was declared dead at the scene.

The Department removed the three surviving children from the home due to neglectful supervision, instances of past domestic violence, and Mother's admissions that she used drugs, drove a vehicle without a license, and transported the children in a car without car seats.

[2] Appellant is not the father of Rebecca, Franklin, or Julia.

The pretrial removal affidavit lists Father's previous history with the Department. In 2012, the Department received a report of neglectful supervision noting that Mother and Father were involved in a physical altercation while Fiona and Franklin were present. Both parents completed their services, and the children were returned to them. At that time, it was alleged that Fiona and Franklin were both Father's children. Through genetic testing, Father was later determined to be Fiona's father, but not Franklin's father. Franklin's father is unknown. The pretrial removal affidavit notes that Father had no criminal history in Texas. However, at trial, the Department introduced judgments reflecting Father's convictions for assault of a family member and trespass.

The trial court signed an order removing the children from the home and naming the Department temporary managing conservator. Following an adversary hearing, the trial court ordered Father to comply with a family service plan to obtain Fiona's return. The service plan required Father to:

- participate in a drug and alcohol assessment and complete any services that may result from the assessment;
- participate in a six to eight week parenting course;
- participate in a psychosocial assessment and complete any services that may result from the assessment;
- maintain contact with the agency and notify the caseworker of any changes to his marital, employment, or housing status immediately;
- report for random drug testing with the understanding that a refusal to test or a no-show will be viewed as an indication of drug use and counted as a positive result;
- participate in all meetings, hearings, and visits related to his child and the agency's case;
- maintain safe and stable housing; and
- obtain and maintain legal employment.

The trial court held a status hearing during which it adopted the service plan as a court order. The plan's terms were explained to Father, including a provision that stated Father "should understand that in addition to completing the listed task, there should be an observable change in behavior that reflects ensuring that he can be a protective parent." Shortly after the trial court ordered Father to comply with the service plan, Father submitted to another drug test, which was positive for cocaine.

Following the permanency hearing before the final order, the trial court determined that Father had not demonstrated adequate and appropriate compliance with the service plan. Father completed the psychiatric assessment and parenting classes. Father did not have permanent employment or a permanent residence.

The ad litem's report contains information about the placement of the children. The children, including Fiona, were placed in a licensed foster home. The report notes that the children were observed laughing and playing with other children in the foster placement. The children seemed to understand that they were in alternative placement because of their sister's death. The children were reported to be healthy and safe, were comfortable in the home, and responded well to their caregivers.

In a permanency report to the court, Fiona was described as a sweet child who has frequent tantrums. She is receiving weekly trauma therapy due to the circumstances of her sister's death.

Before trial, Mother pleaded guilty to abandoning a child in exchange for a sentence of twelve years' confinement.

B. Trial Testimony

Before hearing testimony, the trial court admitted, without objection, several

exhibits, including drug test results, Julia's autopsy report, the family service plans, treatment records, and the criminal records of Mother and Father. The criminal records reflected that when Fiona was almost two years old, Father pleaded guilty to assault of a family member, Mother. Four months before trial, Father pleaded guilty to trespass, and served twenty days in the Harris County Jail.

Felicia Huitt, the Department's conservatorship worker, testified that Father was not involved in Fiona's life at the time the children came into the Department's care. At that time, Father was homeless. He also tested positive for cocaine after the Department exercised conservatorship over Fiona.

After the service plan was established, a Department caseworker discussed the plan with Father and determined that Father understood the services required of him. Although Father completed an eight-week parenting class and a psychiatric assessment, he did not attend therapy and did not refrain from criminal activity. Further, while the termination case was pending, Father served time in jail for trespassing. At the time of trial Father lacked a safe and stable home and was unemployed. Father has not visited Fiona since she came into the Department's care. Father missed one opportunity to visit with Fiona, and the trial court ordered that no visits were to occur until Father participated in a psychiatric evaluation. On cross-examination, Huitt acknowledged that Father was on a waiting list for public housing, but emphasized that Father's application for public housing would not change her recommendation that the court terminate Father's parental rights. Huitt further testified that a father has an "affirmative obligation" to know the environment in which his child is living.

The Department attempted to conduct a home study on Fiona's paternal grandfather to determine if he was a suitable placement. The grandfather had a criminal history, which prevented the Department from conducting the study. The

Department did not consider placing Fiona with her paternal grandmother.

Kelsey Jerrick, a Child Advocates volunteer, testified that it was in Fiona's best interest to terminate Father's parental rights because Father did not have stable employment or housing and there was a report of domestic abuse between Father and Mother.

Father also testified at trial. He stated that he first learned about Julia's death because he saw television newscasters reporting her death. Further, he denied understanding that maintaining his parental relationship with Fiona required timely completion of certain assignments. Father said he missed the first visit with Fiona because he could not find the address. He also did not understand that the trial court suspended his visitation with Fiona after he missed his first opportunity for visitation. Father has not seen Fiona since Julia died. Father testified that he has a full-time job at a café and has applied for public housing.

At the conclusion of the bench trial, the trial court terminated Father's parental rights under Family Code sections 161.001(b)(1)(E) (endangerment); (N) (constructive abandonment); and (O) (compliance with service plan). *See* Tex. Fam. Code Ann. § 161.001(b)(1). The trial court further found that termination of Father's parental rights was in Fiona's best interest.

The final order also terminated Mother's parental rights as to all the children based on Mother's affidavit voluntarily relinquishing her parental rights. Rebecca's father's rights were not terminated, and he was appointed Rebecca's possessory conservator. At the time of trial, Franklin's father was unknown and the court terminated his parental rights as well. Appellant is the only party who has appealed the termination order.

ANALYSIS

Father argues the evidence is legally and factually insufficient to support the trial court's findings under Texas Family Code sections 161.001(b)(1)(E), (N) and (O).

A. Standards 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.").

Due to the severity and permanency of terminating the parental relationship, Texas requires clear and convincing evidence to support such an order. *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; *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 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. *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.). However, this does not mean that we must disregard all evidence that does not support the finding. *In re D.R.A.*, 374 S.W.3d at 531. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id*.

In reviewing the factual sufficiency of the evidence under the clear and convincing burden, 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).

In a proceeding to terminate the parent-child relationship brought under section 161.001 of the Texas Family Code, the petitioner must establish, by clear and convincing evidence, one or more acts or omissions enumerated under subsection (1) of 161.001 and that termination is in the best interest of the child under subsection (2). Tex. Fam. Code § 161.001; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

B. Predicate Termination Grounds

The trial court made predicate termination findings that Father had

committed acts or omissions establishing the grounds set out in subsections (E), (N), and (O) of section 161.001(b)(1). Only one predicate finding under section 161.001 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). We begin by addressing the trial court's finding under section 161.001(b)(1)(O).

Relevant to this issue, under section 161.001(b)(1)(O), termination of parental rights is warranted if the fact finder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has:

> . . . 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(b)(1)(O).

Father does not challenge the fact that Fiona was removed under Chapter 262 for abuse or neglect, or that Fiona was in the Department's conservatorship for the requisite period of time. Father also admits he did not fully comply with the court-ordered family service plan, but argues he complied with portions of the plan and is trying to find housing and stable employment.

The record reflects that the court approved Father's service plan and ordered compliance with its terms. *See* Tex. Fam. Code Ann. §§ 161.001(b)(1)(O); 263.101–106. Father's family service plan was admitted into evidence at trial.

The record evidence demonstrates that Father did not complete many court-ordered services and tasks, which provides a basis for termination of parental rights

under subsection O. *See In re C.M.C.*, 273 S.W.3d at 875. For example, the record reflects that despite being required to remain drug-free, Father tested positive drug for cocaine during the service plan's pendency. Also, Father was unable to refrain from criminal activity, as evidenced by his trespassing conviction four months before trial. The record further reflects that Father did not complete individual therapy and was unable to obtain stable housing or provide proof of stable employment. Father does not contest most of this evidence, but argues he was trying to find housing and was employed full-time at a café and part-time at a temporary agency.

On this point, Father's sole appellate argument is that he substantially complied with the family service plan. But even substantial compliance with a family service plan is insufficient to avoid a termination finding under subsection O. *Id*.; *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).[3] Here, Father attempted to comply with parts of the court-ordered services, but failed to follow these tasks through to completion. Sporadic incidents of partial compliance with a court-ordered family service plan do not justify reversing a termination order when the parent also violated many material provisions of the same family service plan. *See In re J.F.C.*, 96 S.W.3d at 278. By failing to complete the service plan, Father has not demonstrated an ability to provide Fiona 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 parent failed to meet service plan's material requirements including drug assessment, finding a job, and providing a safe home).

[3] Father's brief does not address or distinguish precedent rejecting his substantial compliance argument.

Reviewing all of the evidence in the light most favorable to the finding that Father did not fully comply with the service plan, we conclude that the trial court could have formed a firm belief or conviction that termination of Father's rights was warranted under section 161.001(b)(1)(O). In light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the trial court's finding is not so significant that a fact finder could not reasonably have formed a firm belief or conviction as to the truth of the termination finding. Because there is legally and factually sufficient evidence to support the trial court's finding under this section, we need not address his arguments that the evidence is insufficient to support the trial court's findings under sections 161.001(b)(1)(E) and (N). *See In re A.V.*, 113 S.W.3d at 362 ("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."). Accordingly, we overrule Father's third issue.

C. Best Interest of the Child

Father also challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination is in Fiona's best interest.

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 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also* Tex. Fam. Code Ann. § 263.307(b) (listing factors to consider in evaluating parents' willingness and ability to provide the child with a safe environment).

A strong presumption exists that the best interest of the child is served by keeping the child with her natural parent, and the burden is on the Department to rebut that presumption. *In re U.P.*, 105 S.W.3d at 230. Prompt and permanent placement of the child in a safe environment also is presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a). Father contends that the presumption of keeping the child with her natural parent is not rebutted because Father is not the reason Fiona came into care, Father substantially completed the family service plan, has made important steps to acquire housing and employment, and loves his child and wants to provide for her. Multiple factors support the trial court's determination that termination of Father's parental rights was in Fiona's best interest.

1. *Desires of the child*

At the time of trial Fiona was too young to express with whom she desired to live. When a child is too young to express her 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. *In re L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

The ad litem's report reflects that Fiona was doing well in foster placement. She was observed laughing and playing with other children in the home. When asked whether Fiona formed a bond or attachment to the caregivers, the ad litem responded, "Yes, the children seemed comfortable in the home and responded well to their caregivers." Fiona is attending daycare and is properly supervised by

foster parents in the evenings. The court-appointed advocate recommended that Fiona and her brother continue to live in the foster home.

Father has not established a bond with Fiona. Father was not present when Julia died and had no relationship with Fiona at that time. When Fiona came into the Department's care, Father was homeless. Moreover, Father has failed to visit Fiona during the Department's conservatorship. In fact, Father had not seen Fiona in almost a year prior to trial. Huitt testified that due to Father's failure to visit Fiona, she did not believe they had a bond.

2. *Present and future physical and emotional needs of the child*

The Supreme Court of Texas has recognized that parents' use of narcotics and its effect on their ability to parent may qualify as an endangering course of conduct. *In re J.O.A.*, 283 S.W.3d at 345; *see also Edwards v. Tex. Dep't of Protective Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997, no writ) (stating a parent's drug use is a condition that can endanger a child's physical or emotional well-being and indicate instability in home environment). A parent's drug use also supports a finding that termination of parental rights is in the best interest of the child. *See L.G.R.*, 498 S.W.3d at 204. The fact finder can afford great weight to the significant factor of drug-related conduct. *Id.*; *see also In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *4 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (mem. op.) (considering a parent's drug history in affirming a trial court's decision that termination was in the best interest of the child).

Knowing that he must remain drug free and refrain from criminal activity to obtain Fiona's return, Father was unable to do so. Father's drug use and criminal activity present a risk to Fiona's physical and emotional well-being. *See In re A.W.T.*, 61 S.W.3d 87, 89 (Tex. App.—Amarillo 2001, no pet.) ("[I]ntentional

criminal activity which exposed the parent to incarceration is relevant evidence tending to establish a course of conduct endangering the emotional and physical well-being of the child."); *see also In re S.R.*, 452 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (evidence of father's criminal activity supported trial court's best interest finding).

3. *Acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate*

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 at 249. The present record reflects that Father complied with some of the requirements, but failed to comply with several other material terms, including remaining drug free, refraining from criminal activity, and maintaining stable housing. Father's failure to comply with court-ordered tasks during the termination proceedings supports the trial court's finding that termination is in the best interest of the child.

To be sure, Father completed an eight-week parenting course. Since the Department took custody of Fiona, however, Father has not visited her at all. One visit was scheduled, but Father failed to attend. The court suspended Father's visits, but he was unaware of the suspension and did not attempt to visit his daughter. Father left Fiona with Mother who had a history of past neglect of the children. Father does not have housing and is unable to support Fiona.

4. *Any excuse for the parent's acts or omissions*

Evidence supporting termination under the grounds listed in section 161.001(b)(1) is also relevant to a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d at 27 (holding the same evidence may be

probative of both section 161.001(b)(1) grounds and best interest).

Father offers as an excuse the fact that he did not understand he had to comply with the service plan to obtain the return of his child. The record reflects, however, that the service plan was fully explained to Father and that he was informed of the need to complete the services and demonstrate an observable change in behavior providing adequate assurance that he can be a protective parent.

5. *Other factors*

Fiona and her siblings experienced trauma the night their sister died. They each will require therapy to cope with that trauma. There was little evidence addressing the parental abilities of the persons seeking custody, programs available to assist those persons seeking custody, plans for the child, and stability of the home or proposed placement. 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.D.*, 436 S.W.3d 105, 119–20 (Tex. App.—Houston [14th Dist.] 2014, 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. *Id.* at 120 ("Stability and permanence are paramount in the upbringing of children.").

There was no evidence about potential adoption at the time of trial. However, "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located." *In re C.H.*, 89 S.W.3d at 28. "Instead, the inquiry is whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's

future home environment." *Id*.

Applying the *Holley* factors, we conclude that there exists legally and factually sufficient evidence to reasonably establish a firm belief or conviction that termination of Father's parental rights is in the child's best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(2). We overrule Father's fourth issue on appeal.

CONCLUSION

Based on the evidence presented, the trial court could have reasonably formed a firm belief or conviction that Father did not meet the requirements of the family service plan and that terminating Father's parental rights was in Fiona's best interest so that she could promptly achieve permanency through adoption. *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).

We affirm the decree terminating Father's rights.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Busby, and Jewell.