



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00256-CV

IN THE INTEREST OF D.M.P., J.R.P., R.S.P., X.R.P., I.R.P., and J.N.P.

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-PA-00757
Honorable Charles E. Montemayor, Associate Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: August 31, 2016

AFFIRMED

Appellant Joseph P. appeals the trial court's order terminating his parental rights to his children D.M.P., J.R.P., R.S.P., X.R.P., I.R.P., and J.N.P. Joseph P. argues the evidence is legally and factually insufficient to support the following findings by the trial court: (1) Joseph P., pursuant to section 161.001(b)(1)(D) of the Texas Family Code, knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being; (2) Joseph P., pursuant to section 161.001(b)(E), engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotion well-being; and (3) termination of Joseph P.'s parental rights was in the children's best interest. We affirm the trial court's termination order.

BACKGROUND

On April 13, 2015, the Department of Family and Protective Services filed an Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship, requesting the termination of Joseph P.'s parental rights to D.M.P., J.R.P., R.S.P., X.R.P., I.R.P., and J.N.P.¹ At the time of the bench trial on April 7, 2016, Joseph P. was incarcerated and participated by audio-conference.²

Jennifer Saldana, a caseworker, testified that D.M.P. was eight years-old; J.R.P. was seven years-old; R.S.P. was almost six years-old; X.R.P. was five years-old; I.R.P. was three years-old; and J.N.P. was two years-old. The three oldest children were placed in one foster home, and the three youngest children were placed in a second foster home. Saldana testified that although the children were placed in different homes, they are able to see each other. At the beginning of this case, the children had been placed with their maternal great-grandmother, Margaret M. The children were removed from Margaret M.'s home when it was discovered that the children's mother (Margaret M.'s granddaughter) was also living in the home in violation of the Department's placement restrictions. Saldana testified that the Department requested the children's mother to move out of the home and provide a new address. According to Saldana, although the children's mother claimed she had moved out of the home and provided a new address, when Saldana went to verify the new address, the mother was not living there.

Saldana also testified that at the time of the bench trial, Joseph P. was incarcerated for aggravated robbery and "some drug charges." According to Saldana Joseph P. was serving a six-year sentence, which he began serving in 2014. Thus, if he did not get paroled, he would be imprisoned until 2020. According to Saldana, Joseph P. was incarcerated at the time the children

¹ The petition also requested the parental rights of the children's mother be terminated.

² The mother of the children did not appear at trial and did not file a notice of appeal.

were removed from their home. She testified that the children had been removed because their mother “was using and dealing drugs from her home.” The children’s mother was also “living with two other individuals [who] had extensive CPS and criminal histor[ies].” Saldana testified that the children were present while the mother was using and dealing illegal drugs and that the older children were aware of her activities. A service plan was prepared for both the mother and Joseph P., which sought to address issues of drug abuse. During the pendency of the case, the results of the mother’s drug tests were positive for methamphetamine, barbiturates, and amphetamines. Saldana testified that four of the children have developmental delays related to the mother taking drugs during her pregnancies. Saldana testified that neither the children’s mother nor Joseph P. completed their service plan. Saldana recognized that because Joseph P. was incarcerated, only a few of the services were available to him. Saldana testified that the children’s mother had had only sporadic contact with the children. Joseph P. had written letters to the children. According to Saldana, neither the mother nor Joseph P. had demonstrated any ability to provide the children with a safe and stable environment. Nor had the mother or Joseph P. provided any consistent support for the children. Saldana testified that in foster care, the four children with developmental delays were receiving therapy and accommodations in school.

Saldana testified that it was in the best interest of the children to terminate the mother’s and Joseph P.’s parental rights. Saldana testified that the children were happy and content in the current placements. She testified that the long-term plan for the children was adoption. According to Saldana, the children have bonded with their caretakers, and “look to them for help” and “comfort.” The younger children had been placed in their home for five months and “trust their placements as being in a parental role for them.” Although the older children had only been in their foster placement for a month before trial, Saldana testified that they were developing a bond with their caretakers and felt safe in the home. They also liked their school. Saldana testified she talked

with the three older children and they expressed concerns for their safety if they were to go back to live with their mother in her home.

When asked if Joseph P. had provided the names of family members who could care for his children, Saldana testified that he had, “but that family member had health issues at the time, and so declined to be studied.” Saldana testified that she talked to Joseph P.’s aunt who had asked several members of the family to take care of the children, but she said she could not find any family members who would be willing to be the children’s caretakers. The aunt said she was unable to take care of the children herself.

Joseph P. testified that he was the biological father of all six children. Joseph P. testified that he received a service plan, but was unable to do any of the services because they were not available to him at the prison facility. According to Joseph P., he was recently transferred to a new facility that did have services available and he was currently enrolled in the Cognitive Intervention Program and was on the wait list for Alcoholics Anonymous. Joseph P. testified that he was eligible for parole in 2017, and his discharge date is 2020. He testified that he was incarcerated for aggravated robbery.

Joseph P. believed it was in his children’s best interest not to “lose their father” in addition to their mother. When asked if a family member could take care of the children until he was released, Joseph P. replied that he had looked “but it is hard because [he] ha[d] to wait for a letter or whatnot.” He testified that his mother “was able to help, but right now she’s sick, and she should be completed with her program pretty soon.” When asked to elaborate what he meant by his mother being sick and in a program, Joseph P. stated, “She was in a program because she was big, to rehabilitate her. She has carpal tunnel and she has Lupus.” According to Joseph P., his mother would complete her program in thirty to forty-five days and then she would be willing to take care of the children.

On cross-examination, Joseph P. admitted that he had been arrested for possessing cocaine in 2013, but that charge was dismissed. Joseph P. also admitted that at the time he was arrested for aggravated robbery, he was residing with his children. Joseph P. testified that he committed the aggravated robbery by using a handgun and that handgun had been in his home. Joseph P. claimed that the children's mother had not used illegal substances when he lived with her. Joseph P. was then asked about his mother's substance-abuse problems. He replied, "It was prescribed medicine which the doctor prescribed because of her illness, but she's in programs to get off that. She is no longer taking any medication. She is just in rehabilitation to help her, also to gain the strength she used to have before the Lupus to help her muscles and her joints." Joseph P. also admitted that in 2009, there was an investigation for domestic violence between him and the children's mother, but no domestic violence was found. He and the mother completed parenting classes.

Margaret M. testified that at the beginning of this case, the children had been placed with her. She stated that she had enrolled the children in school and that they were doing well. She testified that one of the restrictions placed on her by the Department was not to allow the children's mother to "come by" the home. Margaret M. admitted that this restriction was violated three times, but argued that the children's mother had been "really, really sick" and "didn't even have a place where she was residing." According to Margaret M., the children's mother had been living in a car. The children were then removed from Margaret M.'s home. Margaret M. testified that if the children were returned to her, she would not allow their mother to have contact with them and would call the police if she appeared at the home. On cross-examination, Margaret M. admitted that she has another daughter who resides in the home and that this other daughter had also recently been involved with "Family Based Services" through the Department. Margaret M. claimed that the complaint had been dropped but could not remember what the allegations against her daughter had been.

After hearing the evidence, the trial court terminated both Joseph M.'s and the mother's parental rights to the children. Joseph M. now appeals.

DISCUSSION

Parental rights may be terminated only upon proof of clear and convincing evidence that (1) the parent has committed an act prohibited by section 161.001(b)(1) of the Texas Family Code, and (2) termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2015). Here, the trial court found five grounds supporting termination of Steven M.'s parental rights under section 161.001(b)(1):

1. Joseph P. knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being pursuant to section 161.001(b)(1)(D);
2. Joseph P. engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well-being pursuant to section 161.001(b)(1)(E);
3. Joseph P. constructively abandoned the children who have been in the permanent or temporary managing conservatorship of the Department for not less than six months and: (1) the Department has made reasonable efforts to return the children to the father; (2) the father has not regularly visited or maintained significant contact with the children; and (3) the father has demonstrated an inability to provide the children with a safe environment, pursuant to section 161.001(b)(1)(N);
4. Joseph P. failed to comply with the provisions of a court order that specifically established the actions necessary for the father to obtain the return of the children who have been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse and neglect of the children, pursuant to section 161.001(b)(1)(O); and
5. Joseph P. knowingly engaged in criminal conduct that has resulted in the father's conviction of an offense and confinement or imprisonment and inability to care for the children for not less than two years from the date of filing the petition, pursuant to section 161.001(b)(1)(Q).

On appeal, Joseph P. does not contest all five of these grounds; he contests only grounds (D) and (E) found by the trial court pursuant to section 161.001(b)(1)(D) and (E). Because Joseph

P. does not challenge all five grounds, we can affirm the trial court's termination order on any of the three grounds not contested. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (explaining that only one finding under section 161.001(b)(1) is necessary to support a termination order so long as termination is in the best interest of the child pursuant to section 161.001(b)(2)). Thus, we need not reach Joseph P.'s sufficiency of the evidence issues with respect to grounds (D) and (E).

Because we can affirm the trial court's termination order on the unchallenged grounds (N), (O), and (Q), we need only consider Joseph P.'s remaining issue regarding sufficiency of the best-interest finding. *See id.* Joseph P. argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights was in his children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2015).

When the legal sufficiency of the evidence is challenged, we look at all the evidence in the light most favorable to the trial court's finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). "To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id.* (citations omitted). "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* (citations omitted). "If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient." *Id.* at 344-45 (citations omitted).

When a parent challenges the factual sufficiency of the evidence on appeal, we look at all the evidence, including disputed or conflicting evidence. *Id.* at 345. "If, in light of the entire record,

the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.” *Id.* (citations omitted). In reviewing termination findings for factual sufficiency, we give due deference to the factfinder’s findings and do not supplant its judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Under Texas law, there is a strong presumption that the best interest of a child is served by keeping the child with a parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, there is also a presumption that when the court considers factors related to the best interest of the child, “the prompt and permanent placement of the child in a safe environment is presumed to be in the child’s best interest.” TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2015). And, in determining whether the child’s parents are willing and able to provide the child with a safe environment, the court should consider the following: the child’s age, and physical and mental vulnerabilities; the willingness and ability of the child’s family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency’s close supervision; the willingness and ability of the child’s family to effect positive environmental and personal changes within a reasonable period of time; and whether the child’s family demonstrates adequate parenting skills, including providing the child with (1) minimally adequate health and nutritional care, (2) a safe physical home environment, (3) care, nurturance, and appropriate discipline consistent with the child’s physical and psychological development; (4) guidance and supervision consistent with the child’s safety; (5) protection from repeated exposure to violence even though the violence may not be directed at the child; and (6) an understanding of the child’s needs and capabilities. *Id.* § 263.307(b).

In addition, courts may consider other nonexclusive factors in reviewing the sufficiency of the evidence to support the best interest finding, including (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 which may indicate the existing parent-child relationship is not appropriate, and (9) any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976). This list is not exhaustive. *Id.*

Joseph P. was incarcerated at the time of trial and participated by audio-conference. In support of his argument that the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights is in his children's best interest, Joseph P. emphasizes that there was no evidence presented at the bench trial regarding many of these best-interest factors. However, the list of factors set out above is not exhaustive, and evidence is not required on all of the factors to support termination of a parent's rights. *Id.*; *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Joseph P. also emphasizes that at their foster homes, the children have been split into two groups. However, the evidence also shows that the children are doing well in their placements, their developmental needs are being addressed by their foster families, they are bonding with their foster families, and they are living in safe and stable environments. Additionally, despite living in different homes, they are able to see one another. Further, the evidence shows that there is not a better placement for the children. Joseph P. cannot take care of his children while imprisoned, and he could not identify an appropriate family member who could. And, the children's maternal great-grandmother has already proved to be unreliable by breaking the Department's requirement that the mother not have contact with the children.

With respect to the children's future needs, there was evidence at trial that the long-term plan for the children is adoption. Joseph P.'s discharge date is 2020, and even if he was paroled when first eligible, he has provided no evidence of his ability to care and provide for the children except for his belief he would be able to provide a place to live and find a job. The evidence shows that he has a history of violence, being convicted of aggravated robbery with the use of a gun and also having undergone a domestic violence investigation. There is not credible evidence that he would be able to provide his children with a safe and stable environment or be able to support them upon his release from prison. Thus, whether we look at all the evidence in light most favorable to the trial court's finding, or whether we look at all the evidence, including disputed or conflicting evidence, we conclude the trial court's best interest finding is supported by sufficient evidence. *See In re J.O.A.*, 283 S.W.3d at 344-45 (stating legal and factual sufficiency standards). We therefore affirm the trial court's order terminating Joseph P.'s parental rights.

Karen Angelini, Justice