Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00094-CV

IN THE INTEREST OF L.T.P.

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2015PA01819
Honorable Martha Tanner, Judge Presiding[1]

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: August 9, 2017

AFFIRMED

Appellant Ashley D. appeals the termination of her parental rights to her two-year-old son L.T.P. In its order of termination, the trial court found that Ashley D. had (1) failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of her child who had been in the temporary managing conservatorship of the Department of Family and Protective Services ("the Department") for not less than nine months as a result of the child's removal from the parent under chapter 262 for abuse or neglect; and (2) the Department had made reasonable efforts to return the child to Ashley D. The trial court also found that termination of the parent-child relationship was in the child's best interest. The trial court then found it was in the best interest of L.T.P. to appoint the Department as permanent managing

[1] Sitting by assignment

conservator of L.T.P. with the rights and duties specified in section 153.371 of the Texas Family Code. On appeal, Ashley D. argues the evidence is legally and factually insufficient to support the trial court's findings that she failed to comply with the provisions of a court-ordered family service plan and that termination of her parental rights was in her child's best interest. Ashley D. also argues the trial court erred in appointing the Department as permanent managing conservator of L.T.P. We affirm.

BACKGROUND

L.T.P. was born on April 29, 2015, and at the time of his birth, his meconium tested positive for marijuana. Part of the safety plan instituted by the Department was for L.T.P.'s maternal grandmother, Carla D., to supervise Ashley D.'s contact with L.T.P. On the night of August 26, 2015, Carla D. reported domestic violence against her by Ashley D. A caseworker arrived at Carla D.'s residence shortly thereafter and explained to Ashley D. that because the Department was concerned about domestic violence, Ashley D. would need to leave the home or L.T.P. would be removed. Ashley D. responded that L.T.P. should be removed because Ashley D. had nowhere to go. L.T.P. was thus removed and placed with foster parents.

The Department then filed a petition for protection of a child, for conservatorship, and for termination in a suit affecting the parent-child relationship. The trial court ordered that Ashley D. complete a family service plan. At trial, several witnesses testified. Although represented by appointed counsel, Ashley D. was not present.

The caseworker, Olivia Stephens, testified that L.T.P. is a special needs child who has a thin lining of the brain and a chromosomal disorder for which he has been referred to a geneticist. L.T.P. has developmental delays and attends physical therapy. According to Stephens, Ashley D. has bipolar disorder and, at the beginning of this case, she sent Ashley D. to Serenity Family Services because it has a counselor from the Center for Health Care Services. Stephens also

testified that she "set [Ashley D.] up with a psychological so that we could get a diagnosis on her and get her psychiatric care." The permanency report exhibit,[2] which was admitted in evidence, shows that Ashley D. completed a psychological evaluation in November of 2015 and was diagnosed with "major depression, cannabis abuse and an intellectual disability." The exhibit shows that Ashley D. attended a second appointment on December 15, 2015. However, she cancelled an appointment for December 29, 2015 and did not appear for her appointment on January 4, 2016. Ashley D. also cancelled appointments on February 1, 2016 and February 5, 2016, claiming that she lacked transportation. Ashley D. attended therapy on February 26, 2016 and was then transferred to services with Kristel Zoller. Ashley D. attended therapy on April 23, 2016, but missed her appointment with Zoller on April 28th. Ashley D. did not attend therapy after April 2016.

The Department's caseworker, Stephens, testified that Ashely D. was not in compliance with her court-ordered family service plan. Ashley D. had not completed her domestic violence classes, her Lifetime drug assessment and possible treatment, and had not continued in individual counseling. Stephens also testified that Ashley D. had not been cooperative and had not shown consistency in taking her medication. According to Stephens, when she tried to talk to Ashley D. about why Ashley D. was not taking her medication, Ashely D. would become very upset and yell. Stephens testified, "When I ask her to please stop yelling, she just continues to yell, so we don't get anywhere." Stephens testified Ashley D. refused to go to a psychiatrist.

According to Stephens, although Ashley D. attended most of her visits with L.T.P., she had not demonstrated she had an understanding of L.T.P.'s needs. She did not have an understanding

[2] Ashley D.'s attorney objected to the admission of this exhibit at trial but does not bring a complaint on appeal.

of the chromosomal disorder and how it affects the fungal infection suffered by L.T.P. Further, Ashey D.'s mother, Carla D., had to be present and help Ashley D. take care of L.T.P.

Stephens testified that she has concerns Ashley D. is capable of taking care of herself. Stephens testified that Ashley D. "has struggled with mental health issues for her whole life." "She gets upset easily and she becomes angered easily and [she] tends to go after people who try to help her." Because of her behavior, Stephens testified that the Department was not able to get Ashley D. into a living situation. Ashley D.'s "parents accepted her into the home, but there were still police being called because of altercations between her and her parents." Stephens did not know where Ashley D. was currently living. According to Stephens, Ashley D. had not demonstrated that she could live in any one place for a long time, and homelessness was an issue for her.

Ashley D.'s mother, Carla D., agreed that Ashley D. was not capable of taking care of herself and depends on others. Carla D. has a "long-term power of attorney for [Ashley D.] because of her mental health issues." Carla D. stated that Ashley D. was living with different friends and did not have a stable home. According to Carla D., Ashley D. used drugs and, while she was pregnant with L.T.P., L.T.P.'s father, Travis P.,[3] "beat her up." Travis P. "would beat her up every day." Travis P. and Ashley D. were in a relationship for two years.

Carla D. confirmed that when he was four months old, L.T.P. was removed from Carla D.'s home because Ashley D. refused to move out. "Her mentality, she didn't understand what she was being told, so she thought 'where am I going to go?' 'Where am I going to live?' 'I prefer them to take [L.T.P.] because I don't have nowhere to go.'" Carla D. testified that Ashley D. was awaiting trial on possession of dangerous drugs.

[3] Travis P.'s parental rights were also terminated. He has not appealed.

Stephens testified that the Department's permanency plan in the case had been to place L.T.P. with his foster parents, with whom he had lived since he was four months old and with whom he had a strong bond. Stephens testified that two social studies, conducted in November 2015 and September 2016, "declined placement of L.T.P. with the grandparents." According to Stephens, the Department had concerns about L.T.P.'s maternal grandparents because L.T.P.'s maternal grandfather had been recently convicted of DWI and L.T.P.'s maternal grandmother, Carla D., was not consistently taking her seizure medication. The Department also had concerns relating to domestic violence by Ashley D. and by one of the maternal grandparents' other adult children. However, the Department's permanency goal changed when Ashley D. became pregnant again. In March 2016, Ashley D. gave birth to L.T.P.'s sibling, N. Stephens testified that in August 2016, the Department sought removal of N. from the maternal grandparents' home, but after the grandparents hired an attorney, N. was not removed. Stephens testified that she was then asked by her program director "to do a Kinship Safety Evaluation." Based on this evaluation, the Department changed its permanency goal to placement with the maternal grandparents.

Both foster parents testified about the strong bond they and their children had formed with L.T.P., who had lived in their home for sixteen months. They testified that they wanted to adopt L.T.P. According to L.T.P.'s foster mother, L.T.P. thought of her other children as his brother and sister. L.T.P.'s foster father testified he had arranged his work schedule so he could spend a lot of time with all his children, including L.T.P. A clinical social worker, Dorothy Le Pere, testified as an expert witness on behalf of the foster family. According to Le Pere, once a young child like L.T.P. has become attached to a parental figure, he should not be removed from that person because to break such an attachment could cause long-term damage to the child.

After hearing all the evidence presented, the trial court terminated Ashley D.'s parental rights and named the Department permanent managing conservator of L.T.P. Further, the trial

court ordered L.T.P. to remain placed with his foster parents with the goal of adoption. Ashley D. appealed.

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. 2016).

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.* (citation 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.* (citation 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 (citation 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.* (citation 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).

FAMILY SERVICE PLAN

The trial court terminated Ashley D.'s parental rights based on section 161.001(b)(1)(O) of the Texas Family Code. Section 161.001(b)(1)(O) provides that a trial court may terminate the parent-child relationship if it finds by clear and convincing evidence 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 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) (West Supp. 2016). Ashley D. does not argue that the evidence was insufficient to show that she failed to comply with the court-ordered family service plan. Instead, she argues that the uncontroverted evidence showed she "did not have an understanding of what was required of her by the Department."

Ashley D. points to section 263.102(a) of the Family Code, which requires the family service plan to be specific and in writing in a language that the parents understand, or made otherwise available. *See* TEX. FAM. CODE ANN. § 263.102(a) (West Supp. 2016). The family service plan here meets all those requirements. Ashley D. also points to section 263.102(d), which requires the service plan to be written "in a manner that is clear and understandable to the parent in order to facilitate the parent's ability to follow the requirements of the service plan." *See id.* § 263.102(d). Ashley D. argues she did not understand the requirements of the service plan and points to Stephens's testimony for support. At trial, Stephens testified she did not believe that Ashley D. had an understanding of what was being asked from the service plan. Ashley D. claims

this testimony from Stephens is undisputed and thus the evidence is legally insufficient to support the trial court's finding based on section 161.001(b)(1)(O).

We disagree with Ashley D.'s assertion that the evidence on which she relies is undisputed. There is other evidence in the record from which the trial court could have determined that Ashley D. did understand what was required of her by the court-ordered service plan. Stephens testified that she, her supervisor, and another Department employee had all gone over the service plan with Ashley D. Stephens testified she discussed the services available with Ashley D. on a monthly basis. Stephens also testified at a permanency hearing, which was admitted in evidence at trial, that the services Ashley D. needed to complete her service plan had been "set up for her" and that Ashley D. knew where she needed to go to complete those services. Finally, Stephens testified Ashley D. had engaged in services and had completed a parenting class. The permanency report admitted in evidence likewise showed Ashley D. had engaged in services. *See In re C.K.*, No. 04-17-00034-CV, 2017 WL 2791315, at *3 (Tex. App.—San Antonio June 28, 2017, no pet. h.) (holding that mother asking questions and beginning to engage in services was evidence to support finding that mother understood the requirements of the service plan).

In looking at all the evidence in the light most favorable to the trial court's finding, we conclude a reasonable trier of fact could have formed a firm belief or conviction that Ashley D.'s rights should be terminated under section 161.001(b)(1)(O). *See In re J.O.A.*, 283 S.W.3d at 344. Further, in looking at all the evidence, including disputed or conflicting evidence, we conclude the evidence is factually sufficient to support the trial court's finding pursuant to section 161.001(b)(1)(O). *See In re J.O.A.*, 283 S.W.3d at 345.

BEST INTEREST

In her second issue, Ashley D. argues the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in L.T.P.'s best interest.

According to Ashley D., termination of her parental rights is not in L.T.P.'s best interest because L.T.P. needs to foster a bond with his sister, N., who lives with his maternal grandparents.

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. 2016). 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:

(1) the child's age, and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the Department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of harm to the child is identified;

(10) 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;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

> (12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with (A) minimally adequate health and nutritional care, (B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development; (C) guidance and supervision consistent with the child's safety; (D) a safe physical home environment, (E) protection from repeated exposure to violence even though the violence may not be directed at the child; and (F) an understanding of the child's needs and capabilities; and
>
> (13) whether an adequate social support system consisting of an extended family and friends is available to the child.

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.*

At trial, there was evidence that Ashley D. had no place to live and was living with different friends. Both Stephens and Ashley D.'s mother testified Ashley D. was incapable of taking care of herself, let alone a small child. Both also testified that Ashley D. was violent and that family violence had occurred between Ashley D. and her parents. According to Stephens, Ashley D. cannot provide a safe and stable home for L.T.P., has "struggled with mental health issues for her whole life," and has not shown "consistency in taking her medications." There was also evidence that marijuana was present in L.T.P.'s meconium at birth and that Ashley D. had continued to use marijuana after L.T.P.'s birth.

With regard to L.T.P.'s current placement with his foster parents, Stephens testified that L.T.P. has lived with them since he was four or five months old. His foster parents want to adopt him. Stephens testified that the foster parents had taken excellent care of L.T.P. for sixteen months and had met all his special needs. L.T.P.'s foster father had a Ph.D. in physical therapy and testified he had used his professional skills to help L.T.P.

Stephens and both foster parents testified about L.T.P.'s strong bond with his foster family. An expert witness, Le Pere, testified about the dangers of removing a child from people with whom he had developed strong bonds. L.T.P.'s foster mother testified that L.T.P. thought of her other children as his brother and sister. While L.T.P.'s foster father testified that they wanted to adopt L.T.P., he also testified that they would try to keep contact with L.T.P.'s biological family, which would include L.T.P.'s sibling, N.

In considering all the evidence in the light most favorable to the finding, we conclude the evidence is legally sufficient to support the trial court's finding that termination of Ashley D.'s parental rights was in L.T.P.'s best interest. *See In re J.O.A.*, 283 S.W.3d at 344. Further, in considering the entire record, including any disputed evidence, we conclude the evidence is factually sufficient to support the trial court's finding that termination of Ashley D.'s parental rights was in L.T.P.'s best interest. *See In re J.O.A.*, 283 S.W.3d at 345.

NAMING THE DEPARTMENT AS MANAGING CONSERVATOR

Finally, Ashley D. argues the trial court erred in appointing the Department as permanent managing conservator instead of her parents, L.T.P.'s maternal grandparents. However, because we have determined the trial court did not err in terminating Ashley D.'s parental rights, Ashley D. no longer has any legal rights with respect to L.T.P. and cannot challenge the portion of the termination order that relates to the appointment of conservators for L.T.P. *See In re M.M.S.*, No. 11-15-00009-CV, 2015 WL 4732904, at 1 (Tex. App.—Eastland 2015, no pet.); *In re Y.V.*, No.

02-12-00514-CV, 2013 WL 2631431, at *1-2 (Tex. App.—Fort Worth 2013, no pet.); *In re A.S.*, No. 10-09-00076-CV, 2009 WL 3488336, at *4 (Tex. App.—Waco 2009, pet. denied); *In re H.M.M.*, 230 S.W.3d 204, 204-05 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Moreover, even if Ashley D. could challenge the trial court's rulings as to conservatorship, the trial court did not err in appointing the Department as permanent managing conservator. When a trial court terminates the parent-child relationship with respect to both parents, the court must appoint a suitable and competent adult, the Department, or a licensed child-placing agency as the managing conservator of the child. TEX. FAM. CODE ANN. § 161.207 (West Supp. 2016). The Texas Supreme Court has explained that different standards of review apply to termination decisions than conservatorship decisions. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). Because of due process concerns in terminations, heightened standards apply to legal and factual sufficiency review of a termination decision. *See id.* "Conservatorship determinations, in contrast, are subject to review only for abuse of discretion, and may be reversed only if the decision is arbitrary and unreasonable." *Id.*

The trial court's decision in this case was not arbitrary or unreasonable. There was evidence the maternal grandmother had a seizure disorder and sometimes forgot to take her medication. There was also evidence that the maternal grandfather had recently been convicted of D.W.I. and did not have a driver's license. There was testimony about violence in the home between the maternal grandparents and Ashley D. There was also evidence that their eldest son was incarcerated for family violence assault and that their third child had been told he was no longer welcome in the home because of his frequent violence. While it is true that L.T.P.'s relationship with her sibling, N., is important, there was also evidence that L.T.P. had formed a strong bond with his foster family and thought of his foster siblings as his siblings. Finally, there was evidence

that the foster parents plan to keep contact with L.T.P.'s biological family. Given this evidence, we cannot hold that the trial court abused its discretion.

We affirm the trial court's order of termination.

Karen Angelini, Justice