In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00188-CV

IN THE INTEREST OF G.E., A.E., AND L.E.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. F-206,433

MEMORANDUM OPINION

Appellant G.E. appeals from the trial court's judgment terminating her parental rights concerning her children G.E., A.E., and L.E. We conclude based on a review of the record that clear and convincing evidence supports the trial court's decision, and appellant's due process rights were not violated. The trial court's judgment is affirmed.

THE RECORD

The Department of Family and Protective Services filed a petition to terminate appellant's parental rights. That same day, the trial court signed an emergency order permitting the Department to remove the three children, and named the Department as temporary sole managing conservator.

At the trial on the termination petition, Kirsten O'Neal, a Department case worker, testified that several of appellant's children tested positive for drugs at birth, and that CPS[1] removed several of appellant's children in the past. The youngest child in this proceeding, L.E., tested positive for cocaine at birth. O'Neal indicated that throughout appellant's life, appellant has had a significant drug problem that has affected her children.

After the removal of G.E., A.E., and L.E., the Department set up a service plan for appellant. Appellant was required to attend a substance abuse treatment program. O'Neal testified that appellant did not comply with that requirement. Appellant has continued to test positive for drugs since the drug screening requirement went into effect, and has not had a "clean" drug screening at any time during this case.

O'Neal testified that appellant has not satisfied other requirements of the Department's service plan. During the last six months, while CPS has had temporary managing conservatorship of the children, appellant has not maintained significant visitation with the children and has not had any kind of contact that would indicate she was seeking to continue a relationship with G.E., A.E., and L.E. Appellant has not shown that she was able to provide a suitable environment for the children. Although the agency has made reasonable efforts to work with appellant, and has set up appointments to help appellant comply with the service plan, she has not complied. Based on the mother's drug

[1]Child Protective Services (CPS) is a division of the Texas Department of Family and Protective Services. *In re E.A.K.*, 192 S.W.3d 133, 137 n.1 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

use while she was pregnant and while she was in charge of raising her other children, O'Neal testified that appellant engaged in conduct that endangered the physical or emotional well-being of G.E., A.E., and L.E. In addition, based on appellant's lengthy history of drug abuse, allegations regarding sexual and physical abuse of her other children, and the failure to demonstrate the ability to take care of the children in the future, O'Neal testified she believes termination is in the best interest of the children. O'Neal stated that the Department's plan for the children is adoption.

On cross-examination, O'Neal acknowledged that appellant cooperated with the Department by giving genetic history regarding the children. In addition, she attended each court hearing until the termination hearing. She cooperated with the Department in providing names of possible placements for the children, but O'Neal did not find any that were "appropriate." One placement study was pending, but not promising. Although appellant offered names of men that were possible fathers of the children, research on the names did not identify any of them as the father of any of the three children.

O'Neal testified that the children are "doing very well" in their current placement where they have lived since the Department assumed care over them in June 2009. O'Neal explained that in their current environment the children are improving in school, they are "current on medical and dental and immunizations[,]" and the "baby appears to be developmentally on target." The foster parent, who desires to adopt the children, "is really working with [G.E.] and [A.E.] with their special needs."

The CASA report established that appellant was non-compliant with her service plan in various ways, including failure to participate in a psychological evaluation; positive drug tests for marijuana and cocaine; continued use of marijuana and cocaine; failure to pay court-ordered child support; failure to successfully complete parenting classes and provide a certificate of completion; and failure to participate in counseling and to follow all recommendations. The CASA report indicated that G.E.'s and A.E.'s speech was for the most part unintelligible at the time of their removal from appellant.

TERMINATION OF PARENTAL RIGHTS

The involuntary termination of parental rights implicates fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex.1985). Before parental rights may be terminated, the petitioner must establish by clear and convincing evidence that the respondent parent has committed one or more of the statutory acts or omissions in section 161.001(1) of the Family Code, and that termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001 (West Supp. 2010); *see also In re J.P.B.*, 180 S.W.3d 570, 572 (Tex. 2005). "'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 2008).

LEGAL AND FACTUAL SUFFICIENCY

In six of her eight appellate issues, appellant argues that the evidence is legally and factually insufficient to support termination. Under a legal sufficiency standard in this context, the reviewing court "'should look at all the evidence in the light most favorable to the 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) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). Under a factual sufficiency review, "'[i]f, 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.* at 345 (quoting *In re J.F.C.*, 96 S.W.3d at 266)).

TERMINATION GROUNDS

The trial court's judgment sets out the following grounds for termination of appellant's parental rights to the children G.E., A.E., and L.E. under section 161.001(1)(E), (N), (O), (P), and (R):

> [E]ngaged in conduct or knowingly placed the child(ren) with persons who engaged in conduct which endangers the physical or emotional well-being of the child(ren);
>
> [C]onstructively abandoned the child(ren) who has/have been in the permanent or temporary managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the child(ren) to the mother; (2) the mother has not regularly visited or maintained significant contact with the child(ren);

> and (3) the mother has demonstrated an inability to provide the child(ren) with a safe environment;
>
> [F]ailed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the child(ren) who has/have been in the permanent or temporary managing conservatorship of the Department . . . for not less than nine months as a result of the child(ren)'s removal from the parent under Chapter 262 for the abuse or neglect of the child(ren);
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> [U]sed a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child(ren), and (1) failed to complete a court-ordered substance abuse treatment program; or (2) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
>
> [B]een the cause of the child(ren) being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by § 261.001, Texas Family Code.

Even though appellant preserved the failure-to-comply-with-court-order ground by raising it below and on appeal, there are other termination grounds found by the trial court that appellant did not challenge. "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." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Appellant did not challenge the abandonment ground or the use-of-a-controlled-substance ground in her statement of points or on appeal. She also did not challenge the ground that she caused one of the children to be born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription. Even had appellant challenged these grounds, the evidence is clear and convincing that she has had

a significant drug problem that has affected G.E., A.E., L.E., and herself. "[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct." *In re J.O.A.*, 283 S.W.3d at 345. Under a clear and convincing standard, the evidence in the record is sufficient, both legally and factually, to support the grounds under section 161.001(1)(E), (P), and (R). We need not address appellant's issues on other termination grounds. We overrule issues one, two, four, five, and six.

BEST INTEREST

In issue three, appellant argues that the trial court's finding that termination is in the children's best interest is legally and factually insufficient. In determining whether termination is in a child's best interest, the Texas Supreme Court has set forth a non-exhaustive list of several factors: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-372 (Tex. 1976). The party seeking termination is not required to prove

that each *Holley* factor favors termination. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The same evidence of acts or omissions used under section 161.001(1) may be probative in determining the best interest of the child. *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App. – Houston [1st Dist.] 2008, pet. denied).

The factfinder heard evidence that appellant did not complete a substance abuse treatment program and did not comply with other requirements of her service plan. The record reveals that G.E. and A.E. have "bounced to and from various relatives" throughout their lives. Appellant has a history of a lack of stable employment or stable housing, continues to use drugs, and did not complete services offered by the Department to help remedy her parenting problems. G.E. and A.E. have special needs. A psychologist stated that the oldest child "may not have received much training in his previous environment[,]" and he is behind in school. The Department previously removed five or six older children whom relatives were raising.

The record also contains evidence that the children are thriving in their current placement and that this placement is a potential adoptive family for the children. Their medical needs are being met, and they are improving in school. On this record, applying the appropriate standards of review and considering the *Holley* factors, we hold that the evidence is legally and factually sufficient for a reasonable factfinder to have formed a firm belief or conviction that it is in the best interest of the children for appellant's parental rights to G.E., A.E., and L.E. to be terminated. We overrule issue three.

DUE PROCESS

In issues seven and eight, appellant argues that the trial court should have granted her request for a continuance or recess to allow her to be present at the hearing on termination. Appellant contends the trial court's refusal to postpone the hearing abridged her due process rights to notice and a fair hearing, and her right to confront witnesses under the confrontation clause.

We review a trial court's denial of a continuance motion for abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). We do not reverse the trial court's decision unless the trial court acted unreasonably or arbitrarily without reference to any guiding rules principles and rules. *In re C.P.V.Y.*, 315 S.W.3d 260, 270 (Tex. App.—Beaumont 2010, no pet.). Rule 251 of the Texas Rules of Civil Procedure provides that a continuance motion must be supported by affidavit, or consent of the parties, or operation of law. Tex. R. Civ. P. 251. When the trial court denies a motion that does not comply with Rule 251's requirements, it is presumed to have correctly exercised its discretion. *Villegas*, 711 S.W.2d at 626. Counsel made an oral motion, possibly because of evolving circumstances at trial concerning appellant's non-appearance. The record does not contain an affidavit supporting the request.

We will nevertheless address appellant's due process challenge. The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U. S. Const. amend. VI. The right to confront witnesses applies to criminal proceedings; the Sixth Amendment does not reference civil cases. *See id.* Although appellant cites various cases applying the confrontation clause to criminal cases, she does not refer us to any civil cases applying the confrontation clause.

Constitutional due process requires notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) ("Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") (citations omitted); *see also* U.S. Const. amend XIV; Tex. Const. art. I, § 19. Appellant did not appear at the trial on the termination of her parental rights. There is evidence in the record that appellant had notice of the hearing. Trial counsel was present and represented her during the hearing. Counsel cross-examined the State's witnesses and was not prevented from presenting any witnesses she desired to present. During the hearing, trial counsel explained to the trial judge that the bailiff had informed her that morning that appellant had called the court

and stated she did not have a ride. Trial counsel checked her messages and found that appellant had also called her and left that same message. According to the contact number (appellant's sister), appellant had just left that residence. The sister did not know whether appellant was going to court. The case worker for the Department testified that if the Department had known in advance it would have provided transportation for appellant, as had been done in the past. The trial judge refused trial counsel's request for a recess to await arrival of appellant, but expressly stated he would re-open the evidence if appellant made it to court that day.

Appellant relies in part on *Mathews v. Eldridge* for her due process argument. Termination of parental rights is permanent and irrevocable; therefore, any significant risk of erroneous deprivation is unacceptable. *In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003); *In re C.P.V.Y.*, 315 S.W.3d at 270. The State has a compelling interest in preserving and promoting the welfare of children. *Rodarte v. Cox*, 828 S.W.2d 65, 79 (Tex. App.—Tyler 1991, writ denied) (citing *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). Given the compelling private and governmental interests, we focus here on whether the procedures followed risk an erroneous deprivation of the parent's interest.

Although appellant was not present at the termination hearing, her counsel was present and participated in the trial of the case. Appellant had notice of the hearing. Although the Department had assisted her with transportation to court in the past,

appellant did not notify the Department in advance that she needed a ride. The trial court could have rejected appellant's explanation and reasonably concluded that her absence from the court was not involuntary. Under the circumstances, the trial court was not required to grant the motion for continuance. Appellant has not shown a deprivation of due process. We overrule issues seven and eight and affirm the trial court's judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on December 10, 2010
Opinion Delivered January 20, 2011

Before Gaultney, Kreger, and Horton, JJ.