In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00277-CV

IN THE INTEREST OF N.K., N.K. AND C.K.

On Appeal from the 317th District Court
Jefferson County, Texas
Trial Cause No. C-205,272

MEMORANDUM OPINION

Appellant M.C. appeals from the trial court's judgment terminating her parental rights concerning her children N.K., N.K., and C.K.[1] Clear and convincing evidence supports the trial court's decision to terminate her parental rights. The trial court's judgment is affirmed.

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

[1]The trial court also terminated the father's parental rights, and the father filed an appeal. The father's attorney later filed a motion stating the father had died. The motion asked for dismissal of the appeal. The State submitted a death certificate. No brief was filed. We dismiss the father's appeal.

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(1), (2) (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

M.C. argues the evidence is legally and factually insufficient to support termination of her parental rights. Under a legal sufficiency standard in the termination-of-parental-rights context, the reviewing court views 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).

The court found statutory grounds for termination under section 161.001(1)(D), (E), and (R). Appellant challenges the trial court's findings under subsections (D) and (E), and she also raises issues regarding subsections (N)(i), (N)(iii), and (O).

Section 161.001(1)(D), (E) provides that a parent's parental rights may be terminated if the trial court, in addition to finding that termination is in the best interest of the child, finds the parent did the following:

> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
>
> (E) 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(1)(D), (E). Subsections (D) and (E) have an endangerment component. *See id*. To "'endanger' means to expose a child to loss or injury or to jeopardize a child's emotional or physical health." *Robinson v. Tex. Dep't of Protective & Regulatory Servs.*, 89 S.W.3d 679, 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)). The term "endanger" means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment[.]" *Boyd*, 727 S.W.2d at 533. Conduct which subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied).

M.C. argues that subsection (D) refers only to the acceptability of the child's living conditions and does not concern the parent's conduct toward her children. Although the endangerment analysis under subsection (D) focuses on evidence of the child's living environment, the environment produced by the parents' conduct bears on the determination of whether the child's surroundings threaten his well-being. *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Subsection D allows termination if the parent's conduct causes a child to be placed or remain in an "endangering environment." *In re R.D.*, 955 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, pet. denied). A parent's use of illegal drugs and drug-related criminal activity may support a finding that the child's surroundings endanger his emotional or physical well-being. *In re Z.C.*, 280 S.W.3d 470, 474 (Tex. App.—Fort Worth 2009, pet. denied); *Lumpkin v. Dep't of Family & Protective Servs.*, 260 S.W.3d 524, 528 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (Courts have held that a parent's criminal history and illegal drug use are a sufficient basis to establish environmental endangerment (subsection D) and course-of-conduct endangerment (subsection E)). "An environment which routinely subjects a child to the probability that she will be left alone because her parents are once again jailed, whether because of the continued violation of probationary conditions or because of a new offense growing out of a continued use of illegal drugs, or because the parents are once again committed to a rehabilitation

program, endangers both the physical and emotional well-being of a child." *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied).

The relevant inquiry under subsection (E) is whether the parent's course of conduct endangered the child's physical or emotional well-being. *See In re C.R.*, 263 S.W.3d 368, 372 (Tex. App.—Dallas 2008, no pet.). As with subsection (D), the courts, in evaluating subsection (E), look to parental conduct both before and after the child's birth. *In re M.N.G.*, 147 S.W.3d 521, 536 (Tex. App.—Fort Worth 2004, pet. denied). "[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. The parent's conduct does not have to be directed at the child, and the child does not have to have actually suffered injury. *Boyd*, 727 S.W.2d at 533; *see also Vasquez v. Tex. Dep't of Protective & Regulatory Servs.*, 190 S.W.3d 189, 195 (Tex. App. —Houston [1st Dist.] 2005, pet. denied) ("The manner in which a parent treats other children in the family can be considered in deciding whether that parent engaged in a course of conduct that endangered the physical or emotional well-being of a child."). From past conduct endangering the child's well-being, the trial court may infer that similar conduct will recur if the child is returned to the parent. *In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.).

The evidence relating to subsections (D) and (E) is interrelated. We conduct a consolidated evidentiary review. *In re M.C.T.*, 250 S.W.3d 161, 170 (Tex. App.—Fort

Worth 2008, no pet.). In June 2008, the police found M.C. unconscious in the driver's seat of her car. The car engine was running. N.K., one of the twins, was found huddled in fear on the floorboard of the car. M.C. was in the first trimester of her pregnancy with C.K. In the car were two cans of beer, one of which was empty, and the other almost full. M.C. told the officer she had consumed thirty-eight ounces of beer that day. She was arrested at the scene.

After C.K. tested positive for cocaine at birth, CPS removed the children from M.C. CPS provided a plan under which M.C. agreed to leave N.K. and N.K. with their father with the condition that M.C. would not have unsupervised contact with the children until she successfully completed a drug and alcohol treatment program. A later safety plan provided that M.C. could not have unsupervised contact with the children and could not be "under the influence" around them. A CPS investigator testified M.C. violated the safety plan when she went to the father's home to see the twins N.K. and N.K. Because of outstanding warrants, M.C. was arrested while at the home.

Charged with child endangerment related to the June 2008 offense, M.C. received deferred adjudication in April 2009 and was placed on community supervision for five years. The community supervision order required M.C. to attend SAFP (Substance Abuse Felony Punishment), and upon release from SAFP, to spend a period of time at a halfway house.

In addition to the child endangerment offense, M.C.'s criminal record includes a ten-year history of misdemeanor convictions: Class B theft, criminal mischief (two convictions), "failure to identify," dangerous drug possession (carisoprodol and hydrocodone) (two convictions), driving while intoxicated, Class A theft, and criminal trespass (two convictions). When a parent is incarcerated, she is absent from the child's daily life and unable to provide support to the child, thereby negatively impacting the child's living environment and emotional well-being. *See In re M.R.J.M.*, 280 S.W.3d at 503. Evidence of numerous arrests and incarceration may constitute grounds for termination of parental rights. *See In re W.A.B.*, 979 S.W.2d 804, 807 (Tex. App.—Houston [14th Dist.] 1998, pet. denied), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d at 256, 267 & n.39.

The record shows improvement in M.C.'s life after the child endangerment offense and the completion of her courses at SAFP and the halfway house. She complied with much of the Department's service plan that was in effect during the time she spent in SAFP. M.C. completed courses on substance abuse and parenting skills at SAFP, and she also received her GED. She had a psychological evaluation. While in the SAFP facility, M.C. maintained contact with CPS, the caseworker, and her children. Following her release from SAFP and the halfway house, she has held down a job and continued counseling sessions on substance abuse, parenting skills, and anger management. Shortly before trial, M.C. secured housing.

The evidence reveals that M.C. has a history of alcohol and drug abuse, used cocaine during her pregnancies, caused C.K. to be born testing positive for cocaine, permitted N.K., N.K., and C.K. to be in surroundings where drugs were being used; tested positive for drugs several times herself; failed to appear for a drug screening in May 2010, and has a criminal history (including ten misdemeanor convictions and one felony child endangerment case). The record further shows that when she visited N.K. and N.K. at the father's house in February 2009, she was arrested. M.C. violated safety plans and failed to complete parts of her court-ordered service plan even after the trial court extended the deadline. Although M.C. completed courses at SAFP, a CPS employee testified the SAFP material did not have the scope or depth that CPS finds necessary for the children's return to the parent.

The evidence reflects that M.C. worked at acquiring parenting skills and overcoming her drug problem; however, clear and convincing evidence was presented that M.C. engaged in conduct proscribed by section 161.001(1)(D) and (E), including evidence of continued drug use while CPS was involved in the case. The evidence is legally and factually sufficient to support the fact-finder's decision. Because the trial court did not find subsections (N)(i), N(iii), or (O) as termination grounds, we do not consider M.C.'s arguments relating to them. M.C. does not challenge subsection (R) on appeal and, in effect, concedes she engaged in the conduct proscribed by subsection (R). Even had M.C. challenged that finding, the evidence is undisputed that she tested positive

for cocaine at the time of C.K.'s birth and was the cause of C.K.'s testing positive for cocaine at birth. *See* Tex. Fam. Code Ann. § 161.001(1)(R). We overrule issues one, two, four, five, and six.

BEST INTEREST

In issue three, M.C. argues the evidence is legally and factually insufficient to support a finding that termination is in the children's best interest. Under section 263.307(a) of the Family Code, "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 2008). There is also a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). 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, 371-72 (Tex. 1976); *see also* Tex. Fam. Code

Ann. § 263.307(b) (West 2008). 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 record reveals that M.C. took parenting classes and substance abuse classes, attended counseling sessions, and stayed in contact with CPS and CASA while she was in SAFP and the halfway house. The record also shows a history of drug abuse and a history of commission of criminal offenses, including a child endangerment offense. A child born to M.C. in 2004 tested positive for cocaine. There is evidence that M.C. used cocaine during her pregnancy with the twins. C.K. tested positive for cocaine at birth. Even after CPS and CASA were involved in the case, M.C. relapsed and continued to use drugs. In February 2009, M.C. tested positive for cocaine and benzodiazepine. In considering the *Holley* factors, the trial court could conclude, by clear and convincing evidence, that M.C.'s continued and prolonged drug use endangers the children's emotional and physical well-being both now and in the future, that such conduct does not meet the children's physical and emotional needs, and that the children's exposure to this conduct and environment has a demonstrably negative impact on the stability of the children's home life.

The Agency's proposed plan for the twins is adoption by the foster parents. There is evidence that while in the custody of foster parents, N.K. and N.K. have "stabilized" and flourished. Initially, they were developmentally delayed, experienced "night terrors," "acted out" after visits with their parents, and had unmanageable behaviors. N.K. and N.K. were dismissed from their daycare because of their repeated use of profanity. By March 2010, the twins had become "very secure." Although they had been developmentally behind by twelve to eighteen months, the twins had caught up to within six months of other children. C.K., who tested positive for cocaine at birth and was removed from M.C.'s care shortly after his birth, is likewise flourishing in his foster home. His development is on target. The CPS foster care supervisor, the CASA representative, and the attorney ad litem for the children concluded that termination of M.C.'s parental rights to N.K., N.K., and C.K. is in their best interest.

Various factors, including the emotional and physical needs of N.K., N.K., and C.K., the emotional and physical danger to the children now and in the future, the acts and omissions of M.C., and the plans for the children by the agency seeking custody, weigh heavily in favor of the finding that termination of M.C.'s parental rights to the three children is in their best interest. *See* Tex. Fam. Code Ann. § 161.001(2). We overrule issue three.

CASA REPORT

In issue seven, M.C. argues the trial court, by admitting a CASA report without M.C.'s being able to cross-examine the report's author, violated M.C.'s constitutional right to confront all witnesses. M.C. did not object to the report's admission on this ground, and the complaint asserted on appeal about its admission was waived. *See* Tex. R. App. P. 33.1. We overrule issue seven.

We affirm the judgment of the trial court.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on February 10, 2011
Opinion Delivered March 10, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.