**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

---

**NO. 09-11-00317-CV**

---

**IN THE INTEREST OF K.N.N.**

---

**On Appeal from the 418th District Court**
**Montgomery County, Texas**
**Trial Cause No. 10-06-06016-CV**

---

## MEMORANDUM OPINION

After a bench trial, the trial court terminated J.N.'s parental rights to K.N.N. In seven appellate issues, J.N. challenges the legal and factual sufficiency of the evidence to support termination, evidentiary rulings made by the trial court, and the trial court's failure to hear a recommendation from the attorney ad litem. We affirm the trial court's judgment.

### Factual Background

In 1994, J.N. was sentenced to fourteen years in prison for aggravated robbery and was released on parole in May 2008. J.N. married C.N., K.N.N.'s mother, in August 2009, and K.N.N. was born in October 2009. J.N. is not K.N.N.'s biological father, but is her presumed father, and he testified that he considers K.N.N. his child. In June 2010,

the Department of Family and Protective Services removed K.N.N. from her home based on concerns about the parents' alleged drug use. K.N.N. was placed with her great-aunt, M.B.

J.N. testified that he was a certified welder and made enough money to provide stable housing and food for K.N.N. and C.N. He explained that he rocked K.N.N. to sleep, fed her, changed her diapers, and ensured that she had a safe and stable living environment. C.N. testified that J.N. was dependable, worked a daily full-time job, did all he could to provide, and was not abusive. M.B. testified that when K.N.N. was removed from her parents' home, J.N. provided diapers, wipes, a toy, and a sippy cup for K.N.N. Caseworker Kerry Walling testified that when she first met K.N.N., she saw nothing to indicate that K.N.N. had not been properly cared for.

J.N. denied using methamphetamine or other illegal drugs while living with C.N., and he testified that he was unaware of any illegal drug use by C.N. C.N. took soma and vicodin for her back pain, but J.N. never had concerns about C.N. abusing prescription drugs or doubted that C.N. had legitimate prescriptions. C.N. testified that she began using methamphetamine in June 2010, but never used drugs in K.N.N.'s presence. C.N. testified that neither she nor J.N. had a drug problem. M.B. testified that J.N. and C.N. were good parents and she was unaware of either parent being under the influence around K.N.N.

In July 2010, J.N. was arrested for possession of methamphetamine with intent to deliver, pleaded guilty to possession, and was sentenced to ten years in prison. In August 2010, C.N. was arrested for forgery. J.N. testified that, before the summer of 2010, he did not have a drug problem and never used illegal drugs. He explained that when the Department removed K.N.N., he "fell off the wagon[]" as a result of the emotional stress, *i.e.*, he "lost all grip with reality" and "wanted to escape reality." J.N. testified that he was using drugs at the time of his arrest, but has been drug free since his arrest. He admitted that using methamphetamine is a danger to one's child and led to him being an absent parent, which has negatively affected K.N.N. both emotionally and physically.

Amanda Hill, K.N.N.'s conservatorship worker, testified that family reunification was the original goal until the parents became incarcerated. She explained that a parent's incarceration has a negative emotional impact on a child because of the "[i]nability to connect, depression, loneliness, [and] anxiety." CASA supervisor Pat Creighton explained:

> I spoke with the advocate about permanent managing conservatorship versus adoption. Based on the age of the child, length of time that she has been in the home, and the fact that parents haven't established any ability to care for her long term, and . . . there has been no substantial progress to show that they would be able to in the near future, we believe it would be in her best interest to be adopted.

M.B. testified that she wants to adopt K.N.N. C.N. wanted K.N.N. to be placed with her, but she testified that M.B.'s home is a safe and stable placement. J.N. believed that M.B. could provide a safe home for K.N.N., but he preferred that K.N.N. be placed

with C.N. J.N. knew C.N. was unemployed, could not support K.N.N., and had used illegal drugs, which concerned him regarding K.N.N.'s safety, but he believed C.N. had addressed her substance abuse. He agreed that a parent's drug use does not create a good environment for a child. J.N. believed it would be in K.N.N.'s best interest to be placed with C.N., but he acknowledged this was not a legitimate possibility. He testified that M.B. would care for K.N.N. and raise her properly.

J.N. testified that he had rehabilitated himself and, thus, did not understand the concern that he had spent the majority of his life in prison. He testified that he enrolled in Quest for Manhood, parenting classes, and a Bible class, attends church, sings in the choir, signed up for professional trades, and attends both AA and NA. J.N. testified that he is eligible for parole in January 2013, but did not know whether he would be paroled. J.N. testified that, if he received parole, he would abide by any conditions required to be able to see K.N.N. C.N. testified that she had no concerns with K.N.N. being around J.N. and that it would be in K.N.N.'s best interest to have J.N. in her life. M.B. testified that it would probably be good for K.N.N. to see J.N. Conservatorship supervisor Brandi McKnight testified that incarcerated parents can rehabilitate their lives and become good parents, but McKnight did not believe that J.N. has reformed. Creighton testified that J.N. cannot provide emotional, physical, or financial support for K.N.N. either now or in the immediate future.

Hill, Creighton, and McKnight all believed that it was in K.N.N.'s best interest that her parents' parental rights be terminated. Hill testified that M.B. provided a safe and stable environment, but that K.N.N.'s parents have not demonstrated an ability to provide for K.N.N.'s needs. She believed it was in K.N.N.'s best interest to have stability and that M.B. could provide that stability. Creighton explained that the parents could not provide a safe and stable home for K.N.N., but that adoption by M.B. was in K.N.N.'s best interest. McKnight testified that M.B. is a solid candidate for adoption. M.B. believed a stable environment was in K.N.N.'s best interest and that K.N.N.'s parents could not provide stability. M.B. testified that she could provide a stable environment for K.N.N. and that it is in K.N.N.'s best interest for her parents' parental rights to be terminated. She also believed it was in K.N.N.'s best interest to have her parents as an integral part of her life and to have a relationship with them.

At the conclusion of trial, the trial court found that the Department proved its allegations by clear and convincing evidence and that it was in K.N.N.'s best interest that C.N.'s and J.N.'s parental rights be terminated. The trial court named the Department as permanent managing conservator. The trial court subsequently issued findings of fact and conclusions of law, which included findings that J.N. (1) "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[;]" and (2) "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 child for not less than two years from the date of filing the petition[.]"

Legal and Factual Sufficiency

In issues one, two, three, and four, J.N. contends that the evidence is legally and factually insufficient to support the trial court's findings that the Department proved its allegations by clear and convincing evidence and that termination is in K.N.N.'s best interest.

Under a legal sufficiency review, we review 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.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could, and we disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* If no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, the evidence is legally insufficient. *Id*.

Under a factual sufficiency review, we must determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *Id*. We give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id*. We consider whether disputed evidence is such that a reasonable factfinder could not have resolved

that disputed evidence in favor of its finding. *Id.* "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.*

The decision to terminate parental rights must be supported by clear and convincing evidence, *i.e.*, "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); s*ee also In the Interest of J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). The movant must show that the parent committed one or more predicate acts or omissions and that termination is in the child's best interest. *See* Tex. Fam. Code Ann. § 161.001 (West Supp. 2010); *see also J.L.*, 163 S.W.3d at 84. A judgment will be affirmed if any one of the grounds is legally and factually sufficient and the best interest finding is also legally and factually sufficient. *In the Interest of C.A.C.*, No. 09-10-00477-CV, 2011 Tex. App. LEXIS 3385, at *2 (Tex. App.—Beaumont May 5, 2011, no pet.) (mem. op.).

Regarding the first requirement, the Department sought termination of J.N.'s parental rights pursuant to section 161.001(1)(E) and (Q). We first address section 161.001(1)(Q), which allows for termination when the parent "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than

two years from the date of filing the petition[.]" Tex. Fam. Code Ann. § 161.001(1)(Q); *In the Interest of H.R.M.*, 209 S.W.3d 105, 110 (Tex. 2006). Once the Department establishes that the parent is incarcerated for at least two years from the date of the termination petition, the parent must produce some evidence as to how he would provide or arrange to provide care for the child during that period. *In the Interest of Caballero*, 53 S.W.3d 391, 397 (Tex. App.—Amarillo 2001, pet. denied) (op. on reh'g). "When the Department proves by clear and convincing evidence that a parent knowingly commits criminal conduct and the conduct results in [his] incarceration for more than two years, the trial court can reasonably infer that the parent will be unable to provide personal care for the child." *Id*. at 397-98.

The Department filed its petition on June 7, 2010. In September 2010, J.N. was sentenced to ten years in prison for possession of a controlled substance. He will not be eligible for parole until January 2013 and parole is not guaranteed at that time. J.N. contends, however, that the evidence shows his ability to provide for K.N.N. during his incarceration, given M.B.'s testimony that she is willing to care for K.N.N.

"Cases discussing the incarcerated parent's provision of support through other people contemplate that the support will come from the incarcerated parent's family or someone who has agreed to assume the incarcerated parent's obligation to care for the child." *H.R.M.*, 209 S.W.3d at 110. In this case, the record shows that M.B. believed K.N.N. should have a relationship with her parents, but that the parents' parental rights

should be terminated. M.B. wanted to adopt K.N.N. She did not testify that she agreed to assume J.N.'s obligation to care for K.N.N. during his incarceration.

The trial court could reasonably have formed a firm belief or conviction that J.N. would be both incarcerated and unable to care for K.N.N. for at least two years from the filing date of the Department's termination petition. *See* Tex. Fam. Code Ann. §§ 101.007, 161.001(1)(Q); *see also H.R.M.*, 209 S.W.3d at 110 ("Showing that Stacey [the non-incarcerated parent] cared for H.R.M. and maintained contact with Keith . . . does not show that she agreed to care for H.R.M. *on his behalf*, particularly where . . . she is seeking to terminate his rights."); *Caballero*, 53 S.W.3d at 397-98. Thus, we need not decide whether the evidence supports a finding pursuant to section 161.001(1)(E). *See C.A.C.*, 2011 Tex. App. LEXIS 3385, at *2; *see also* Tex. R. App. P. 47.1.

"[T]here is a strong presumption that the best interest of a child is served by keeping the child with a parent." *In the Interest of R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). When determining whether termination is in a child's best interest, we consider a non-exhaustive list of factors: (1) desires of the child; (2) emotional and physical needs of the child now and in the future; (3) emotional and physical danger to the child now and in the future; (4) parental abilities of the individuals seeking custody; (5) programs available to assist these individuals to promote the best interest of the child; (6) plans for the child by these individuals or by the agency seeking custody; (7) stability of the home or proposed placement; (8) acts or omissions of the parent which may indicate that the

existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

When determining whether parents are willing and able to provide the child with a safe environment, we consider:

(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 or other agency;

(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 the 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.

Tex. Fam. Code Ann. § 263.307(b) (West 2008).

K.N.N. was too young to express her desires at trial. The record demonstrates that M.B. had been caring for K.N.N. for ten months, had bonded with K.N.N., treated K.N.N. as her own, loved K.N.N., and acted as K.N.N.'s mother. The record also shows that K.N.N. has adjusted well, has bonded with M.B., calls M.B. "Momma," and is "extremely happy." M.B. testified that K.N.N. has no special needs other than "lots of love." J.N. testified that K.N.N. is "loved and cared for" and no one would harm her or place her in harm's way. He testified that his family is willing to do whatever they can to help K.N.N.

Before his incarceration, J.N. maintained employment, provided housing and food for K.N.N., and cared for K.N.N. When K.N.N. was removed by the Department, J.N. provided items for K.N.N.'s care. The trial court heard evidence that J.N. did not use illegal drugs before K.N.N.'s removal, was a good parent, and had been drug free since his arrest. The record shows that J.N. became involved in illegal drug use during summer 2010, which led to his incarceration. J.N. explained that his drug use resulted from the emotional impact of K.N.N.'s removal, but that he is now drug free. Although he has spent the majority of his life in prison, J.N. testified to the steps he has taken to become a better father and his willingness to comply with the conditions required to see K.N.N.

The trial court also heard evidence of the parents' inability to provide for K.N.N.'s needs and to provide safety and stability for K.N.N. The record contains testimony regarding the negative impact of a parent's incarceration on a child, as well as J.N.'s admission that his illegal drug use had negatively affected K.N.N. emotionally and physically. J.N. also admitted that a parent's drug use does not create a positive environment for a child. Creighton testified to J.N.'s inability to provide emotional, physical, or financial support for K.N.N. and explained that the parents had not shown an ability to care for K.N.N. long term or shown that they would be able to in the near future.

The record contains testimony from several witness, including J.N., that M.B.'s home is a safe and stable placement for K.N.N. J.N. believed that M.B. would care for

and properly raise K.N.N. M.B. explained that she could provide the stability that K.N.N.'s parents could not provide. She also testified to her willingness to allow J.N. to have contact with K.N.N., provided he remained drug free, sober, and out of trouble.

"[T]he 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). As trier of fact, the trial court could reasonably conclude that J.N. was unable to provide a safe environment for K.N.N. The trial court could reasonably have formed a firm belief or conviction that termination of J.N.'s parental rights was in K.N.N.'s best interest. *See id.* §§ 101.007, 161.001(2), 263.307(b); *see also J.L.*, 163 S.W.3d at 84; *J.F.C.*, 96 S.W.3d at 266; *Holley*, 544 S.W.2d at 371-72.

In summary, we conclude that the Department established, by clear and convincing evidence, that J.N. committed the predicate act enumerated in section 161.001(1)(Q) and that termination is in K.N.N.'s best interest. *See* Tex. Fam. Code Ann. § 161.001; *see also J.L.*, 163 S.W.3d at 84. Because the evidence is legally and factually sufficient to support termination, we overrule issues one through four.

Evidentiary Rulings

In issue five, J.N. contends that Creighton's recommendation of termination and adoption was based on hearsay and that he was not given the opportunity to cross-examine the CASA advocate. In issue six, J.N. contends that the trial court should have

allowed him to address the topic of alternatives to termination, such as the possibility of a permanent managing conservator for K.N.N.

We review a trial court's evidentiary rulings for abuse of discretion. *In the Interest of J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). We will reverse only if the trial court's ruling is arbitrary or unreasonable. *Id*. at 839.

According to the record, the trial court appointed CASA, Child Advocates of Montgomery County, as K.N.N.'s guardian ad litem. Creighton testified that she supervised the advocate assigned to K.N.N.'s case, but that the advocate was unavailable to testify at trial. Creighton testified that she had several conversations with the advocate, and she based her opinion on what she personally heard in court in addition to the advocate's recommendation. She testified that she has no personal knowledge regarding visits, but had worked in conjunction with the advocate, attended all court hearings, heard all previous testimony, and met with C.N. She testified that she has personal knowledge regarding the facts of the case and that her personal knowledge is not based solely on information received from the advocate.

The record reflects that J.N. did not object when Creighton first gave her recommendation and explained the basis for her recommendation. *See* Tex. R. Evid. 103(a)(1); *see also* Tex. R. App. P. 33.1(a). Instead, he objected on hearsay grounds

when Creighton later attempted to elaborate by testifying to C.N's actions. To the extent J.N.'s complaint is preserved, the trial court was required to ensure that K.N.N.'s guardian ad litem had an opportunity to testify regarding the recommendations relating to the best interests of the child and the bases for those recommendations. *See* Tex. Fam. Code Ann. § 107.002(e) (West 2008). The Department established that Creighton, as the CASA advocate's supervisor, had personal knowledge of the facts of the case sufficient to make a recommendation regarding K.N.N.'s best interest and to explain the bases for her recommendation. *See* Tex. R. Evid. 602. Additionally, this Court has declined to apply the Confrontation Clause to civil proceedings. *See In the Interest of G.E.*, No. 09-10-00188-CV, 2011 Tex. App. LEXIS 380, at *13 (Tex. App.—Beaumont Jan. 20, 2011, no pet.) (mem. op.); *see also In re Commitment of Polk*, 187 S.W.3d 550, 556 (Tex. App.—Beaumont 2006, no pet.). The trial court did not abuse its discretion by admitting Creighton's testimony. We overrule issue five.

In issue six, J.N. argues that the trial court erred by excluding evidence related to alternatives to termination. The record does not indicate that J.N. attempted to ask any questions regarding this topic, but was denied the ability to do so.[1] Moreover, to preserve error regarding the exclusion of evidence, a party must make an offer of proof to "show the nature of the evidence specifically enough so that the reviewing court can determine

[1] According to the record, C.N. attempted to question certain witnesses about permanent managing conservatorship, but the trial court sustained objections to the proffered testimony. We also note that the record contains some evidence regarding the issue of permanent managing conservatorship.

its admissibility." *In the Interest of N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *see* Tex. R. Evid. 103(a)(2). The record does not indicate that J.N. made an offer of proof concerning alternatives to termination at trial. Under these circumstances, we conclude that J.N. has failed to preserve his complaint for appellate review. We overrule issue six.

Recommendation of Attorney Ad Litem

In issue seven, J.N. contends that the trial court erred by failing to obtain the attorney ad litem's recommendation regarding termination. J.N. raises this issue for the first time on appeal, but contends that it would be unconstitutional to prohibit him from presenting a "meritorious complaint regarding the insufficiency of the evidence which supports the order of termination[.]"

At the time the trial court entered its order of termination, section 263.405(b) of the Family Code required a party desiring to appeal from the order to file a statement of points. *See* Act of May 21, 2007, 80th Leg., R.S., ch. 526, § 2, 2007 Tex. Gen. Laws 929, *amended by* Act of May 5, 2011, 82nd Leg., R.S., ch. 75, § 4, 2011 Tex. Sess. Law Serv. 348, 349 (current version at Tex. Fam. Code Ann. § 263.405(b) (West Supp. 2011)). Section 263.405(i) prohibited appellate courts from considering any appellate point not identified in the statement of points. *See* Act of May 12, 2005, 79th Leg., R.S., ch. 176, § 1, 2005 Tex. Gen. Laws 332, *repealed by* Act of May 5, 2011, 82nd Leg., R.S., ch. 75, § 5, 2011 Tex. Sess. Law Serv. 348, 349. The current version of the statute no

longer requires a statement of points. *See* Tex. Fam. Code Ann. § 263.405 (West Supp. 2011). The statute does not expressly state whether the repeal of section 263.405(i) is retroactive or prospective. *See* Tex. Fam. Code Ann. § 263.405.

Assuming without deciding that, in this case, we are not limited to issues presented in J.N.'s statement of points, we conclude that J.N.'s complaint is not preserved for appeal. At trial, J.N. did not object to the trial court's failure to inquire into the attorney ad litem's recommendation. *See* Tex. R. App. P. 33.1(a). Therefore, we overrule issue seven. Having overruled J.N.'s seven appellate issues, we affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on November 2, 2011
Opinion Delivered December 1, 2011

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