In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00359-CV

IN THE INTEREST OF G.S.

On Appeal from the 258th District Court
San Jacinto County, Texas
Trial Cause No. CV13,984

MEMORANDUM OPINION

N.W., C.S., and E.G.[1] appeal from an order terminating their parental rights to the minor child, G.S. The trial court found, by clear and convincing evidence, that statutory grounds exist for termination of the parental rights of N.W., C.S., and E.G., and that termination of the parental rights of N.W., C.S., and E.G. would be in the best interest of the child. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N), (O) (West Supp. 2015). We affirm the trial court's judgment.

[1]N.W. is the mother of G.S. C.S. is the presumed father of G.S., and E.G. is the alleged father of G.S.

C.S. AND E.G.

Court-appointed appellate counsel for C.S. and E.G. each submitted a brief in which counsel contends there are no arguable grounds to be advanced on appeal. *See Anders v. California*, 386 U.S. 738 (1967); *In the Interest of L.D.T.*, 161 S.W.3d 728, 731 (Tex. App.—Beaumont 2005, no pet.). Each brief provides counsel's professional evaluation of the record. Counsel served C.S. and E.G. with a copy of the *Anders* brief. This Court notified C.S. and E.G. of their right to file a *pro se* response, as well as the deadline for doing so. This Court did not receive a *pro se* response from C.S. or E.G.

We have independently reviewed the appellate record and each counsel's brief, and we agree that any appeal would be frivolous. We find no arguable error requiring us to order appointment of new counsel to re-brief this appeal. *Compare Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We affirm the trial court's order terminating the parental rights of C.S. and E.G., and we grant both counsels' motion to withdraw.[2]

[2]With respect to withdrawing from the case, counsel for C.S. and E.G. shall inform C.S. and E.G. of the outcome of this appeal and inform C.S. and E.G. that they have the right to file a petition for review with the Texas Supreme Court. *See* Tex. R. App. P. 53; *In the Interest of K.D.*, 127 S.W.3d 66, 68 n.3 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

N.W.

N.W.'s counsel filed a brief on the merits. In four issues, N.W. alleges the trial court violated her fundamental right to be heard by proceeding to trial in her absence and challenges the legal and factual sufficiency of the evidence.

THE EVIDENCE

CPS case worker Traphena Lipscomb testified that G.S. is currently placed in a foster home. She explained that N.W. voluntarily placed G.S. in CPS's custody because N.W. was concerned that she did not have stable housing. Lipscomb testified that all of thirteen-month-old G.S.'s needs are being met in the foster home, G.S. is receiving physical therapy, occupational therapy, and speech therapy, and G. S. has been referred to a neurosurgeon. Lipscomb explained that the case does not involve abuse or neglect, but N.W. had tested positive for methamphetamine. According to Lipscomb, G.S. has been in the Department's custody continuously since August 2014. Lipscomb testified that in September 2014, she conducted a conference with N.W. and C.S., and although C.S. developed a service plan, N.W. "left before she could do that." Lipscomb testified that she mailed the family plan to N.W. while N.W. was incarcerated, but N.W. never signed the plan and mailed it back to Lipscomb. Lipscomb testified that the court found in its order that the plan had been provided to all three of the parents.

According to Lipscomb, the plan required N.W. "to complete parenting classes, an ADAC assessment, psychological evaluation, individual counsel[]ing to address anger management, and [to] stay in contact with the case worker at least monthly."

Lipscomb explained that the first time she spoke with N.W., N.W. was in jail. According to Lipscomb, N.W. was subsequently transferred to a substance abuse unit. In November 2014, N.W. informed Lipscomb that she had been released and told Lipscomb she had received a copy of the service plan. Lipscomb testified that she spoke with N.W. about the service plan when N.W. informed her that she had been released. Lipscomb testified that after N.W. was released, N.W. only visited G.S. once for a two-hour visit. N.W. left the visit thirty minutes early because the child was asleep, "and she didn't feel the need to stay any longer." According to Lipscomb, N.W. called Lipscomb in March 2015 and stated that she "felt that she was not getting her life together, and she wanted to relinquish her rights." Lipscomb testified that she spoke with N.W.'s attorney, and N.W.'s attorney stated that she intended to speak with N.W. about that "because she may not understand what she was doing."

When asked to rate on a scale of one to ten all three parents' level of cooperation with regard to providing a safe environment to G.S., Lipscomb testified that she would rate the parents with a one, and she added that the fathers

have not visited at all, and N.W. only visited once. Lipscomb testified that a second visit for N.W. with the child was arranged, but N.W. "did not show up." Lipscomb testified that at the permanency hearing, the trial court found that N.W. had not demonstrated adequate and appropriate compliance with the service plan. According to Lipscomb, after the permanency hearing, she mailed letters to N.W. notifying her of the court's findings in the case. Lipscomb testified that N.W. has not maintained continuous contact with Lipscomb. According to Lipscomb, the substance abuse facility where N.W. was to be confined offered the classes that the service plan required her to complete, but N.W. never sent Lipscomb certificates of completion for any such classes.

Lipscomb testified that N.W. was incarcerated at the time of trial. Lipscomb explained that all of the parents had Lipscomb's contact information. Lipscomb testified that at the next permanency hearing, the trial court again found that N.W. had not adequately complied with the service plan. According to Lipscomb, at the time of the final hearing in August 2015, N.W. still had not complied with the service plan. Lipscomb testified that N.W. has been incarcerated since May of 2015. Lipscomb opined that it is in G.S.'s best interest for the parental rights of N.W. to be terminated. Lipscomb explained that the Department had investigated other options for placement, but no acceptable options existed.

Sherry Williamson, a CASA supervisor, testified that she supervises the CASA advocate who is assigned to G.S.'s case. Williamson testified that CASA favored termination of parental rights based upon the parents' lack of interest toward G.S. since CASA became involved in the case. At the conclusion of the evidence and the arguments of counsel, the trial court found that N.W. constructively abandoned G.S. and failed to comply with the Court's orders that would establish the actions necessary for her to obtain the return of G.S.

N.W.'S ISSUE ONE

In her first issue, N.W. argues that the Department of Family and Protective Services (the Department) and the trial court violated her fundamental right to be heard. Specifically, N.W. contends that she "never received actual notice of [the] trial date, and, even if she had constructive notice through her trial counsel, the actions of the Department led to a situation whereby [N.W.] was never given notice of the trial because her trial counsel was misled regarding her location." In her brief, N.W. asserts that the Department knew she had been incarcerated since May 2015, yet filed two documents that identified two different residential addresses as her mailing address. According to N.W., "[h]ad [N.W.]'s trial counsel not been misled by the Department's filings, she could have filed a motion with the

trial court for a bench warrant or requested other arrangements that would allow [N.W.] to participate."[3]

When the case was called for the final hearing on termination, counsel for N.W. appeared and announced ready. N.W.'s counsel cross-examined Lipscomb, had the ability to make objections, and requested that the trial court make specific findings as to its grounds for termination if the court were to determine that termination was appropriate. Service upon a party's attorney of record satisfies the notice requirements of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 21a(a). An attorney's knowledge of a trial setting is imputed to her client. *In the Interest of D.W.*, 353 S.W.3d 188, 192 (Tex. App.—Texarkana 2011, pet. denied) (citing *Magana v. Magana*, 576 S.W.2d 131, 133-34 (Tex. Civ. App.—Corpus Christi 1978, no writ)). N.W.'s attorney appeared at the final hearing; therefore, N.W.'s attorney obviously had notice of the hearing, and that knowledge is imputed to N.W. *See id*. In addition, N.W.'s counsel did not object to the case proceeding to trial in N.W.'s absence. For all of these reasons, N.W. has waived this argument. *See* Tex. R. App. P. 33.1(a); *In the Interest of L.M.I.*, 119 S.W.3d 707, 710-11

[3]N.W. does not allege that trial counsel was ineffective, and N.W. does not challenge the trial court's denial of her motion for new trial, in which she asserted that at the time of the final hearing, her attorney was unaware that N.W. was incarcerated and therefore could not request a bench warrant.

(Tex. 2003) (Even constitutional complaints must be preserved.). Accordingly, we overrule issue one.

N.W.'S ISSUES THREE AND FOUR

In issue three, N.W. challenges the legal and factual sufficiency of the evidence to support the trial court's finding that she failed to comply with the requirements of the service plan that set forth the means by which she could obtain the return of G.S. In issue four, N.W. challenges the legal and factual sufficiency of the evidence to support a finding that terminating N.W.'s parental rights was in G.S.'s best interest. We address these issues together.

Under 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 the Interest of 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 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, 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 2014); *see 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; *see also In the Interest of 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 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); *see* Tex. Fam. Code. Ann. § 263.307(b) (West Supp. 2015).

In this case, there was evidence before the trial court that the service plan required N.W. to complete parenting classes; have an ADAC assessment and a psychological evaluation; obtain individual counseling for anger management; and to stay in contact with the case worker. Lipscomb testified that N.W. had failed to comply with the service plan despite receiving a copy of it and being released from

incarceration during part of the pendency of the case. The trial court also heard evidence that, although the substance abuse unit where N.W. was placed offered classes that N.W. could have taken to complete part of the service plan, N.W. did not provide evidence to the Department that she had done so. The trial court also heard evidence that N.W. had not maintained continuous contact with the case worker.

Viewing the evidence in the light most favorable to the finding, we conclude that a reasonable trier of fact could have formed a firm belief or conviction that N.W. failed to comply with the terms of a court order that specifically established the actions necessary for N.W. to obtain the return of G.S. *See In the Interest of J.F.C.*, 96 S.W.3d at 266. Therefore, the evidence is legally sufficient to support the trial court's finding. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(O). In addition, the disputed evidence is not such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding. See *In the Interest of J.F.C.*, 96 S.W.3d at 266. We conclude that the evidence is factually sufficient to support the trial court's finding that N.W. failed to comply with the terms of a court order that specifically established the actions necessary for N.W. to obtain the return of G.S. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(O).

Regarding the trial court's best interest finding, the trial court heard evidence that all of thirteen-month-old G.S.'s needs are being met in the foster home, and G.S. is receiving needed medical attention, as well as physical therapy, occupational therapy, and speech therapy. The trial court also heard evidence that N.W. had tested positive for methamphetamine, and that N.W. had told Lipscomb she was considering voluntarily relinquishing her parental rights because she "was not getting her life together[.]" The trial court also heard evidence that N.W. had only visited G.S. once during the pendency of the case, and that N.W. failed to appear for a second scheduled visit.

"[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 the sole judge of the witnesses' credibility and the weight to be given their testimony, the trial court could reasonably have formed a firm belief or conviction that termination of N.W.'s parental rights was in G.S.'s best interest, and the disputed evidence is not such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding. *See id*. §§ 161.001(b)(2), 263.307(b); *see also J.F.C.*, 96 S.W.3d at 266; *Holley*, 544 S.W.2d at 371-72.

Accordingly, we conclude that the Department established, by clear and convincing evidence, that N.W. committed the predicate act enumerated in section

161.001(b)(O) and that termination is in G.S.'s best interest. *See* Tex. Fam. Code Ann. § 161.001. We overrule issues three and four and need not address issue two, which challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that N.W. constructively abandoned G.S. *See In the Interest of C.A.C.*, 2011 Tex. App. LEXIS 3385, at *2; *see also* Tex. R. App. P. 47.1. We affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on January 18, 2016
Opinion Delivered February 25, 2016

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