In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00230-CV

IN THE INTEREST OF T.B. JR.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. F-224,541-A

MEMORANDUM OPINION

Appellant, M.W., appeals the trial court's order terminating her parental rights to her son, T.B., Jr.[1] In four points of error, M.W. ("Mother") contends that the evidence was legally and factually insufficient to support termination of her parental rights under any of the three statutory predicate grounds found by the trial court or that termination was in the best interest of the child. We affirm.

[1] To protect the identity of the minors, we have not used the names of any children, parents, or other family members. *See* Tex. R. App. P. 9.8(a), (b).

I. Background

Mother and T.B.[2] are the biological parents of T.B., Jr. Mother also has three other children, two of whom were fathered by T.B. In July 2015, one year before T.B., Jr. was born, the Department of Family and Protective Services (the "Department") removed Mother's three older children from her care as a result of Mother testing positive for marijuana while pregnant with her third child and subsequently leaving the three children, then two toddlers and an infant, at home alone.

The Department developed a service plan for Mother and T.B., which set forth the various tasks required of each parent in order to obtain the return of the children, and began working with them in an attempt to achieve family reunification. During the course of that case, Mother became pregnant with T.B., Jr. In March 2016, while still working services in the prior case and while five months pregnant with T.B., Jr., Mother tested positive for marijuana.

Upon T.B., Jr.'s birth in July 2016, the Department commenced the instant suit by filing an original petition seeking conservatorship of T.B., Jr. and termination of parental rights. On the day the Department filed its original petition, the trial court

[2] The trial court's order also terminated parental rights of T.B. to T.B., Jr. He has not appealed the termination of his parental rights.

entered an ex parte order for protection of a child in an emergency, and the child was soon placed in a nonrelative foster home. On August 16, 2016, the court held an adversary hearing and named the Department temporary managing conservator of the child. Following the hearing, the trial court signed temporary orders that required Mother and T.B. to complete certain specific actions in order to obtain the return of the child, including counseling and drug testing, and also "to comply with each requirement set out in the Department's original, or any amended, service plan during the pendency of this suit."

Approximately six weeks later, at a status hearing attended by both parents, the Department announced that the parties had reached an agreement that permanent managing conservatorship of all three of Mother's older children would be transferred to other relatives, concluding the Department's case involving those children, and that Mother and T.B. would continue to work the prior plan of service in this case in an effort to achieve reunification with T.B., Jr., only. Following the hearing, the trial court approved the parties' agreements regarding the older children and entered an order in this case that incorporated the Department's service plans and made them an order of the court.

On May 30, 2017, the Court held a bench trial in this cause. Mother and T.B. were both represented by counsel at trial, but neither attended in person. At the trial,

the Department's caseworker testified that she had spoken with Mother the day before and that Mother knew she was expected to be present for trial, but Mother had told her she could not miss work. At the conclusion of the hearing, the court terminated Mother's parental rights after finding by clear and convincing evidence that Mother had:

> knowingly placed or knowingly allowed the child(ren) to remain in conditions or surroundings which endanger the physical or emotional well-being of the child(ren);
>
> engaged 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);
>
> . . .
>
> failed 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 of Protective and Regulatory Services 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)[.]

The court further found by clear and convincing evidence that termination of parental rights was in the best interest of the child.

II. Standard of Review

The Family Code provides that parental rights may be terminated upon proof by clear and convincing evidence that the parent has committed one or more of the

acts prohibited by Section 161.001(b)(1) and that termination is in the child's best interest. *See* Tex. Fam. Code Ann. §161.001(b)(1), (2) (West Supp. 2016). Because parental rights are of constitutional magnitude, a decision to terminate such rights must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. §161.206(a) (West 2014); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re D.R.A.*, 374 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The clear and convincing evidence standard is defined as "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).

Mother has challenged both the legal and factual sufficiency of the trial court's findings in this case. In reviewing legal sufficiency of the evidence supporting termination, we "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.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We show the necessary deference to the trial court's findings by presuming that the court "resolved disputed facts in favor of its finding if a reasonable factfinder could do so" and we "disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* In conducting a factual sufficiency

review, we "consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding," and find factual insufficiency "[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[.]" *Id.*

III. Analysis

The trial court in this case predicated termination of Mother's parental rights on multiple grounds. *See* Tex. Fam. Code, §161.001(b)(1)(D), (E), and (O). We will affirm the court's order if the evidence is both legally and factually sufficient to support any statutory ground upon which the trial court based the termination order, provided the record also supports the trial court's best interest finding. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (holding that only one predicate finding under section 161.001(b)(1) is necessary to support an order of termination when the court also finds that termination is in the best interest of the child).

A. Failure to Comply

In her third issue on appeal, Mother contends that the evidence is factually and legally insufficient to support the trial court's finding that she had failed to comply with court orders that established the actions necessary for her to obtain the return of the child. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(O). Specifically,

Mother argues that she "made every reasonable effort[] to comply with the service plan" and that she "completed many of the tasks stated in the service plan and continue[d] to work it up until the final hearing . . . ."

The record does contain evidence that Mother worked some of the services set forth in the trial court's orders and the incorporated service plan, such as completing a psychological evaluation, attending parenting classes and some counseling sessions, and maintaining consistent visitation with the child; however, her caseworker testified that overall, Mother's compliance was "hit and miss" and "inconsistent." The caseworker also specifically identified numerous tasks for which Mother's compliance was inadequate. For example, Mother failed to maintain stable housing, as she was evicted from her last apartment due to nonpayment of rent and was, at the time of trial, living in conditions that were neither appropriate for children nor for Mother herself. Mother was employed at McDonalds at the time of trial but she had not demonstrated an ability to maintain stable employment, working on and off at different fast food restaurants throughout her cases with periods of unemployment in between jobs. She failed to fully comply with orders regarding random drug testing by missing some of the required tests and by testing positive on others. She also failed to adequately comply with the requirement to attend counseling sessions to address the specific issues that led to the removal of her

children. The caseworker testified that in the counseling sessions Mother did attend, she failed to take any responsibility for her children being in care, failed to focus on what she needed to do as a parent, and was not truthful with the counselor about her circumstances. Beyond those concerns, Mother was dismissed as a client by her first counselor for inconsistent attendance and dismissed by the second counselor because she was making no progress.

Historically, courts have applied section 161.001(b)(1)(O) strictly, as the statute neither "provide[d] a means of evaluating partial or substantial compliance with a plan" nor made any provision for a parent's excuses for failure to comply.[3] *In re D.N.*, 405 S.W.3d 863, 877 (Tex. App.—Amarillo 2013, no pet.). As detailed above, the evidence was undisputed that Mother failed to complete at least some of the services that were ordered by the trial court, including the trial court's specific

[3] We recognize that very recently, the Legislature enacted Amendments to the Family Code that include what amounts to an affirmative defense to termination based on failure to comply with specific provisions of the trial court's orders. *See* Act of May 26, 2017, 85th Leg., R.S., ch. 317, § 12, eff. Sept. 1, 2017. The statute now allows a parent to avoid termination of parental rights under subsection (b)(1)(O) upon proof by a preponderance of evidence that: "(1) the parent was unable to comply with specific provisions of the court order; and (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent." Tex. Fam. Code Ann. § 161.001(d). However, as the order in this case was entered before the effective date of the new subsection (d), it would not be applicable herein even if Mother had presented any evidence at trial to meet that burden of proof.

order for counseling as an action necessary to obtain the return of the child. Indeed, her brief on appeal concedes as much, arguing not that she complied with the court's orders, but rather that she made "reasonable efforts," and that she "completed many" tasks. However, Mother failed to offer any evidence that the failure to comply with the order was not attributable to any fault of her own but, instead, there is evidence that the failure to comply in some instances were directly attributable to her own actions or inaction. Accordingly, under the standard of review set forth herein and in light of the record as a whole, we conclude that the evidence is both legally and factually sufficient to support the trial court's finding that that Mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of T.B., Jr. as required by section 161.001(b)(1)(O) of the Texas Family Code.

Mother further contends that the evidence was insufficient to establish a "causal connection or nexus between the act or omission shown [and] alleged harm to the child," arguing that Mother never had physical possession of her minor son. We find this argument unpersuasive, as the court is permitted in a termination proceeding to "consider parental conduct that did not occur in the child's presence, including conduct before the child's birth or after he was removed from a parent's care." *In Interest of R.S.-T.*, 522 S.W.3d 92, 110 (Tex. App.—San Antonio 2017, no

pet.); *see also In re C.J.O.*, 325 S.W.3d 261, 265 (Tex. App.—Eastland 2010, pet. denied) ("If a parent abuses or neglects the other parent or other children, that conduct can be used to support a finding of endangerment even against a child who was not yet born at the time of the conduct."). There was evidence presented at trial that Mother's three older children were removed for abuse or neglect and that after more than a year of working services with the Department, Mother was unable to make sufficient progress to obtain the return of those children. There was also evidence that, even after the older children were in the custody of relatives, Mother continued to take them to inappropriate places and expose them to a registered sex offender during her periods of visitation, requiring one of the relatives to take legal action against Mother to prevent her from continuing to do so. Finally, there was evidence that Mother used drugs when she was approximately five months pregnant with T.B., Jr., endangering his health in utero. We therefore conclude that there was sufficient evidence to support that the child had been removed from Mother as a result of abuse or neglect as required by section 161.001(b)(1)(O) of the Texas Family Code. We therefore overrule Mother's third issue.

Having determined that the evidence is legally and factually sufficient to support the trial court's finding under section 161.001(b)(1)(O) of the Texas Family

Code, we need not address the sufficiency of the evidence to support the trial court's other findings under subpart (1) of the statute. *See In re A.V.*, 113 S.W.3d at 362.

B. Best Interest

In her fourth issue, Mother challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination is in the best interest of the child. *See* Tex. Fam. Code Ann. § 161.001(b)(2).

"[T]here 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). Some of the factors we consider in reviewing whether termination is in a child's best interest include the following: (1) desires of the children; (2) emotional and physical needs of the children now and in the future; (3) emotional and physical danger to the children 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 children; (6) plans for the children 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 improper; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). No single factor among this non-exhaustive list is controlling, and the fact-finder is not required to consider all of

them; however, "[u]ndisputed evidence of just one factor may be sufficient to support a finding that termination is in the best interest of a child." *M.C. v. Tex. Dept. of Fam. & Prot. Servs.*, 300 S.W.3d 305, 311 (Tex. App.—El Paso 2009, pet. denied).

The undisputed evidence presented at trial reveals that T.B., Jr. was placed with a foster family within a week of his birth, that he remained in that placement through the time of trial, and that the family loved him dearly and desired to adopt him. The caseworker testified that the child had thrived in that placement and that he responds to the family as though he were meant to be there. In comparison, the guardian *ad litem* for the child testified that she had attended visits between Mother and the child, and that the interaction was more like a "baby-sitting type situation" rather than a "natural mom situation," and there was no real bonding between Mother and child.

The caseworker also testified about the environment that the foster family could provide as compared to the environment the child would be in with his biological parents, in that the foster family had no drug problems, unattended mental health needs, or criminal problems. This stands in contrast to the evidence regarding Mother's circumstances at the time of trial, in that Mother was still living in inappropriate conditions, and she remained in that environment even after the

Department advised her that it was not an appropriate place for a child to live. The Department presented testimony about the foster parents' plans for the child's educational and moral upbringing through adulthood; Mother offered nothing to indicate any plans or hopes for the child and his future, much less any evidence of how she would achieve such plans or fulfill such hopes.

Further, the evidence indicates that throughout the two years that the Department worked with Mother between her two cases, she failed to cooperate with the plan of service and simply "didn't do the things that a regular parent would do in order to take care of [her] children[.]" *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (holding that evidence concerning a parent's failure to comply with court-ordered services is probative as to the question of best interest). This evidence of a lack of parental abilities stands in contrast to the evidence regarding the parental abilities of the foster family, who had successfully raised other children.

In light of the record as a whole, we find that the evidence is both legally and factually sufficient to support the trial court's finding that termination of Mother's parental rights is in the best interest of the child. We therefore overrule issue four. Having already found sufficient evidence to support at least one statutory predicate ground for termination, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on October 3, 2017
Opinion Delivered November 9, 2017

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