In the

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-20-00043-CV

IN THE INTEREST OF L.J. AND J.O.J.

On Appeal from the County Court a Law
Orange County, Texas
Trial Cause No. C180173-D

MEMORANDUM OPINION

Appellant J.J., the father of the minor children L.J. and J.O.J., appeals the trial court's order terminating his parental rights. In four issues, J.J. challenges the legal and factual sufficiency of the evidence supporting the trial court's findings that he (1) allowed the children to remain in conditions or surroundings that endangered their physical or emotional wellbeing; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional wellbeing; (3) failed to comply with the provisions of a court order; and

(4) that termination of the parent-child relationship was in the children's best interest. We affirm the trial court's order terminating J.J.'s parental rights.

BACKGROUND

Kendall Trahan, an investigator with the Department of Family and Protective Services ("the Department"), testified that she investigated potential child abuse by J.J. and the children's mother, T.B., beginning in April 2017. According to Trahan, the Department was concerned that J.J. and T.B. were using drugs. Trahan testified that T.B. admitted that she smoked marijuana and was in a relationship with J.J. According to Trahan, T.B. indicated that J.J. had "a history of prescription pill abuse[.]" Trahan explained that the Department had previously been involved with J.J. in March 2016, and T.B. had expressed concern regarding J.J.'s substance abuse at that time. T.B. told Trahan that she did not use marijuana around L.J., but when the Department drug tested L.J., L.J. tested positive for marijuana. According to Trahan, T.B. tested positive for marijuana, and J.J. refused to take drug tests. In addition, Trahan explained that J.J. did not appear for two scheduled drug and alcohol assessments.

Kimberly Shelton Nichols, a Family Base Safety Services caseworker with the Department, testified that a safety plan was put in place for the family, and L.J. was returned to T.B. because J.J. was out of the home. Nichols explained that she discussed completion of services, such as drug assessments and counseling, with J.J.

and T.B. According to Nichols, J.J. and T.B. both signed and agreed to the service plan. Nichols eventually learned that T.B. was pregnant. Nichols agreed that T.B. tested positive for marijuana and benzodiazepine. Nichols testified that she was unable to locate J.J. and T.B. for forty-five days.

Nichols testified that the children's grandmother told her about a location where they might be found, but when Nichols initially visited the location, it did not appear that anyone was there. When Nichols returned to the location, she saw J.J.'s vehicle. Nichols spoke with J.J., but J.J. told Nichols that he did not own the residence and refused to allow Nichols to enter. T.B. and J.J. allowed Nichols to see L.J. outside. Nichols explained that "it was agreed that [L.J.] would go stay with her paternal grandmother[.]" Nichols testified that on November 22, 2017, she asked J.J. and T.B. to undergo hair follicle drug testing, but T.B. told Nichols she had gone into premature labor, so she and J.J. would not be able to drug test that day. According to Nichols, T.B. tested positive for marijuana on November 28, 2017, when she was pregnant, but J.J. did not complete a drug screen.

Nichols testified that the Department planned for T.B. to move in with her stepmother with L.J., and J.J. was to be allowed supervised visits. According to Nichols, T.B. tried to obtain admission to an outpatient drug treatment program, but J.J. "was not doing anything." Nichols explained that in January 2018, she learned that J.J. had been arrested with syringes in his car. Nichols testified that on January

29, T.B. tested positive for marijuana, and J.J. did not appear for his drug tests. According to Nichols, J.J. was arrested for stealing guns on January 26, 2018. Nichols explained that the Department sought removal based upon T.B.'s continued positive drug tests, J.J.'s noncompliance with the Department and his "escalating arrests with criminal activity."

Skylar Runnels, an investigator with the Department, testified that when she became involved in the case, L.J. had already been removed, and Runnels removed J.O.J. from the hospital where he was born in March 2018. Runnels explained that T.B. admitted to using marijuana during part of her pregnancy, and T.B. also had a prescription for Xanax and took that medication throughout her pregnancy. Although J.J. and T.B. denied that they were in a relationship, Runnels received reports that they were seen together in public.

Caseworker Choisee Davis testified that she became involved with the case in March 2018. Davis explained that she saw a report indicating that J.J. had been arrested for a heroin-related offense in January 2018. After discussing the case with Nichols, Davis believed that J.J. and L.B. were in a relationship. Davis testified that J.O.J. tested positive for marijuana at birth. Davis explained that L.J. was placed with her grandparents, who intervened in the termination proceeding, and J.O.J. was in a foster home. According to Davis, J.O.J.'s foster parent has a good relationship with the children's grandparents, and L.J. and J.O.J. are able to see each other.

Additionally, Davis agreed that L.J. is thriving in her placement with her grandparents and is bonded to them and to J.O.J. Davis testified that J.O.J. is also thriving with his foster family, has bonded with his foster parents and L.J., and has a relationship with his grandparents.

Davis opined that the tasks in the family service plan are in the children's best interest, and she explained that the Department's original goal was family reunification. Davis testified that the Department's current goal is for the children to be adopted by their paternal grandparents, and she testified that terminating the parents' rights and adoption would be in both children's best interest. Davis explained that termination of parental rights would enable the children to have permanency and stability.

According to Davis, J.J. did not start working on his service plan until March 2019. Davis testified that although J.J. denied residing with T.B., the Department believed that they were still in a relationship and residing together. According to Davis, J.J. and T.B. appeared together in a Facebook post of what appeared to be a vacation on June 20, 2019. Davis stated that although J.J. had told her he was residing in Louisiana, J.J. provided T.B.'s address to his counselor as his address. According to Davis, J.J. tested positive for morphine at "extremely increased levels" in March 2019. In addition, Davis explained that after the trial judge ordered both

parents to submit to drug screens, J.J. tested positive for codeine, hydromorphone, and morphine.

Davis testified that she had attempted to obtain drug tests from J.J. thirty-one times, and he failed to appear for drug testing on eighteen occasions. According to Davis, failure to submit to a drug screen is considered a positive test. Davis explained that J.J. tested positive four times. Davis also testified that both parents missed scheduled visits with the children in May and June 2019, and J.J. had missed scheduled visits since October 2019. Davis agreed that J.J. had not had regular visitation with the children. In addition, Davis agreed that T.B. tested positive for nordiazepam, oxazepam, and temazepam in February 2019. Davis agreed that J.J. has failed to demonstrate that he can provide a safe environment for the children.

Davis opined that both T.B. and J.J. have exposed the children to an unreasonable risk of physical or emotional danger and have left the children in a situation that endangered their physical or emotional wellbeing. According to Davis, termination of both parents' rights is in the children's best interest.

J.J. testified that he currently resides with T.B. J.J. estimated that he has seen L.J. and J.O.J. approximately six times over the last two years. J.J. denied that his arrest in January 2018 was related to syringes or heroin possession, and he testified that he does not have any felony convictions. J.J. explained that his work schedule made it impossible for him to comply with Davis's drug test requests. According to

J.J., T.B. once had a problem with smoking synthetic marijuana near the beginning of their relationship. J.J. testified, "We can't make a visit if you don't do the drug test; can't do the drug test if it's during my work schedule." J.J. denied ever ingesting the drugs for which he had tested positive. J.J. admitted that he and T.B. "may have fibbed a little bit about our [living] situation."

ANALYSIS

As discussed above, J.J. challenges the legal and factual sufficiency of the evidence supporting the trial court's findings that he (1) allowed the children to remain in conditions or surroundings that endangered their physical or emotional wellbeing; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional wellbeing; (3) failed to comply with the provisions of a court order; and (4) that termination was in the best interest of the children. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (O), (2). 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 ruling. *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; *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. We will affirm a judgment if any one of the grounds is supported by legally and factually sufficient evidence and the best interest finding is also

supported by legally and factually sufficient evidence. *In the Interest of C.A.C., Jr.*, No. 09-10-00477-CV, 2011 WL 1744139, at *1 (Tex. App.—Beaumont May 5, 2011, no pet.) (mem. op.). However, when, as here, a parent challenges a trial court's rulings under section 161,001(b)(1)(D) or (E), we must review the sufficiency of those grounds as a matter of due process and due course of law. *In the Interest of N.G.*, 577 S.W.3d 230, 236-39 (Tex. 2019).

Section 161.001(b)(1)(D) of the Family Code allows for termination of a parent's rights if the trier of fact finds by clear and convincing evidence that the parent has "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child[.]" Tex. Fam. Code Ann. § 161.001(b)(1)(D). Section 161.001(b)(1)(E) allows for termination if the trier of fact finds by clear and convincing evidence that the parent has "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[.]" *Id*. § 161.001(b)(1)(E). Under section 161.001(b)(1)(O), a parent's rights may be terminated for failure to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child. *Id*. § 161.001(b)(1)(O). A parent's conduct in the home, such as illegal drug use, can create an environment that endangers the child's physical and emotional well-being. *In the Interest of J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no

pet.). One parent's drug-related endangerment of the child may be imputed to the other parent. *Edwards v. Tex. Dep't of Protective and Regulatory Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997), *overruled on other grounds, In the Interest of J.F.C.*, 96 S.W.3d 256. "The factfinder may infer from past conduct endangering the child's well-being that similar conduct will recur if the child is returned to the parent." *In the Interest of M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.). Conduct occurring before children are born may be relevant in establishing an endangering course of conduct. *In the Interest of J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). A parent's sporadic attendance at scheduled visits can emotionally endanger a child's well-being. *In the Interest of R.M.*, No. 07-12-00412-CV, 2012 WL 6163100, at *4 (Tex. App.—Amarillo Dec. 11, 2012, no pet.) (mem. op.).

Regarding the children's best interest, we consider a non-exhaustive list of factors: (1) the 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). No particular *Holley* factor is controlling, and evidence of one factor may be sufficient to support a finding that termination is in the children's best interest. *See In the Interest of A.P.*, 184 S.W.3d 410, 414 (Tex. App.—Dallas 2006, no pet.). The best interest determination may rely on direct or circumstantial evidence, subjective facts, and the totality of the evidence. *See In the Interest of N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.).

The trial court heard evidence that, during the pendency of the Department's case, J.J. tested positive for drugs on approximately four occasions and failed to appear and submit to drug testing on multiple occasions. In addition, the trial court heard evidence that J.J. had a history of abusing prescription medication. The trial court also heard evidence that J.O.J. tested positive for marijuana at birth. Moreover, the trial court heard evidence that J.J. had not had regular visitation with the children. Furthermore, the trial court heard evidence that J.J. maintained a relationship with T.B., who was also using drugs. Viewing the evidence in the light most favorable to the trial judge's findings, we conclude that the trial judge could reasonably have formed a firm belief or conviction that J.J. (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children and (2) engaged in conduct that

endangered the children's physical or emotional well-being. Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E); *In the Interest of J.F.C.*, 96 S.W.3d at 266; *In the Interest of J.T.G.*, 121 S.W.3d at 125; *Edwards*, 946 S.W.2d at 138.

With respect to the children's best interest, the trial court heard evidence that the children are thriving in their current placements, and the children are able to have relationships with each other and their grandparents. The trial judge heard evidence that termination of J.J.'s parental rights is in both children's best interest because they could have permanency and stability. The trial judge heard evidence that J.J. had a history of problems with prescription medication, and J.J. tested positive for drugs approximately four times during the pendency of the Department's case. Prompt and permanent placement of the children in a safe environment is presumed to be in their best interest. *See* Tex. Fam. Code Ann. § 263.307(a). As the sole judge of the credibility of the witnesses and the weight to be given to their testimony, the trial court could reasonably conclude that termination of J.J.'s parental rights was in the best interest of L.J. and J.O.J. *See id*. § 161.001(b)(2), 263.307(a); *see also In the Interest of J.F.C.*, 96 S.W.3d at 266; *Holley*, 544 S.W.2d at 371-72.

We conclude that the Department established, by clear and convincing evidence, that J.J. committed the predicate acts enumerated in sections 161.001(b)(1)(D) and (E) and that termination of J.J.'s parental rights is in the best interest of L.J. and J.O.J. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (2); *In*

the Interest of C.A.C., Jr., 2011 WL 1744139, at *1. We therefore overrule issues one, two, and four. Having concluded that the evidence was legally and factually sufficient to support the trial court's findings as to subsections 161.001b)(1)(D) and (E), we need not address issue three, in which J.J. challenges the sufficiency of the evidence that he failed to comply with the provisions of a court order that set forth the necessary actions to obtain the return of the children. *See In the Interest of N.G.*, 577 S.W.3d at 236-39; *see also* Tex. R. App. P. 47.1. We affirm the trial court's order terminating J.J.'s parental rights.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on May 26, 2020
Opinion Delivered July 16, 2020

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