COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00166-CV

IN THE INTEREST OF Z.O.

FROM THE 158TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-10492-158

MEMORANDUM OPINION[1]

After a jury trial, the trial court terminated the parental rights of A.G. to her daughter Z.O.[2] The jury found that (1) A.G. had knowingly placed or knowingly allowed Z.O. to remain in conditions or surroundings that endangered Z.O.'s

[1]*See* Tex. R. App. P. 47.4.

[2]To protect the privacy of the parties in this case, we identify the child and her parent by their initials. *See* Tex. Fam. Code Ann. § 109.002(d) (West 2014).

physical or emotional well-being (Tex. Fam. Code Ann. § 161.001(b)(1)(D) (West Supp. 2016)); (2) A.G. had engaged in conduct, or knowingly placed Z.O. with persons who engaged in conduct, that endangered Z.O.'s physical or emotional well-being (Tex. Fam. Code Ann. § 161.001(b)(1)(E)); and (3) terminating the parent-child relationship between A.G. and Z.O. was in Z.O.'s best interest (Tex. Fam. Code Ann. § 161.001(b)(2)). On appeal, A.G. attacks the legal and factual evidentiary sufficiency on each of those three findings. We affirm.

EVIDENCE

For the stated reasons of escaping domestic violence and police brutality, A.G. left Illinois in August 2015 with two of her three daughters,[3] one of whom was Z.O., to start a new life in Texas. She left for Texas having no job and no plan other than to move in with her father, a man with whom she acknowledged not having a close relationship.

By December 2015, A.G.'s father had kicked them all out of his house, and A.G. and her daughters were homeless. So A.G. affirmatively sought the aid of the Texas Department of Family and Protective Services, which initially offered A.G. services that would have permitted her and her daughters to remain together or would have allowed her daughters to remain with family. But within a week, A.G. opted to place her children in foster care.

[3]A.G.'s oldest daughter remained in Illinois with her father. Each of A.G.'s daughters has a different father.

In compliance with A.G.'s wishes, the Department placed the two girls in foster care. Although the youngest daughter's father later took her back to Illinois, Z.O.'s father declined any involvement in the case, leaving Z.O. in foster care.[4] There, it quickly became evident that Z.O. had severe behavioral issues. Placements in a basic-needs foster home, a moderate-needs foster home, and a specialized-needs foster home all failed.

The trial court ordered services, and A.G. engaged in them and found rent-free housing at the Wheeler House. In October 2016, the trial court placed Z.O. back with A.G in a monitored return. Yet within five weeks, A.G. went to the Department's offices and again asked the Department to put Z.O. into foster care.

Once Z.O. was back in foster care, the Department proceeded to a jury trial to terminate A.G.'s parental rights. At trial, it was undisputed that A.G. and Z.O were very much mutually bonded. On the fifth day of trial, the jury nevertheless rendered a verdict terminating their parent-child relationship.

Conspicuously absent from the evidence were any alcohol abuse, drug abuse, physical abuse, sexual molestation, or neglect; the State proceeded on emotional abuse and on Z.O.'s overall best interest. Although the evidence lacked the more easily recognized forms of emotional abuse such as intentional

[4]The trial court terminated Z.O.'s father's parental rights, and he has not appealed.

cruelty or vindictiveness, the evidence did show that the abuse was the byproduct of the manner in which A.G. functioned as a person and as a parent.

After a psychological evaluation, A.G. was diagnosed as having severe depression, dependent personality features, and narcissistic personality features. The clinical psychologist testified that depression drains a person of energy and motivation, making it hard to function. A "dependency" diagnosis meant that the person felt incapable of taking care of herself and her responsibilities and needed someone else to take care of her and assume her responsibilities. "Narcissism" meant the person was self-centered, lacked empathy for others, and could become enraged when encountering criticism or disagreement.

Consistent with those diagnoses, concerns with A.G.'s anger and her ability to control it surfaced. In 2012, Illinois CPS had investigated A.G. for over-disciplining her oldest child by spanking her. When she herself was a child, A.G. was forced to leave a foster home after she beat up her foster mother. Within the two years preceding trial, A.G. acknowledged getting in a fight with one of her cousins and getting fired after beating up a co-worker. Adding to the concern was that A.G. thought spanking was the only way to "get through to" Z.O.

The clinical psychologist described A.G. as using poor judgment. All through A.G.'s adult life, unemployment and housing instability were constant companions. Years earlier, in 2005 in Illinois, A.G. had sought CPS's help to care

for her child (at the time she had only one) while she established stability.[5] In December 2015, A.G. was still seeking stability, but by that year she had two additional children.

STANDARD OF REVIEW

Generally

In a termination case, the State seeks not just to limit parental rights but to erase them permanently—to divest the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except the child's right to inherit. Tex. Fam. Code Ann. § 161.206(b) (West 2014); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently, "[w]hen the State seeks to sever permanently the relationship between a parent and a child, it must first observe fundamentally fair procedures." *In re E.R.*, 385 S.W.3d 552, 554 (Tex. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92 (1982)). We strictly scrutinize termination proceedings and strictly construe involuntary-termination statutes in the parent's favor. *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *E.R.*, 385 S.W.3d at 563; *Holick*, 685 S.W.2d at 20–21.

Termination decisions must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001(b), § 161.206(a); *E.N.C.*, 384 S.W.3d at 802. Due process demands this heightened standard because "[a] parental rights termination proceeding encumbers a value 'far more precious

[5]This 2005 incident would have necessarily involved only A.G.'s oldest daughter, as neither Z.O. nor A.G.'s youngest daughter had yet been born.

than any property right.'" *E.R.*, 385 S.W.3d at 555 (quoting *Santosky*, 455 U.S. at 758–59, 102 S. Ct. at 1397); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see also E.N.C.*, 384 S.W.3d at 802. Evidence is clear and convincing if it "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); *E.N.C.*, 384 S.W.3d at 802.

For a trial court to terminate a parent-child relationship, the party seeking termination must establish, by clear and convincing evidence, that the parent's actions satisfy just one of the many grounds listed in family code section 161.001(b)(1) and also that termination is in the child's best interest under section 161.001(b)(2). Tex. Fam. Code Ann. § 161.001(b); *E.N.C.*, 384 S.W.3d at 803; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). Both elements must be established; that is, termination may not be based solely on the child's best interest as determined by the factfinder. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re C.D.E.*, 391 S.W.3d 287, 295 (Tex. App.—Fort Worth 2012, no pet.).

Legal sufficiency

In evaluating the evidence for legal sufficiency in parental-termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the Department proved both the particular ground for termination and the child's best interest. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). We review all the evidence in the light most

favorable to the finding and judgment, and we resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We also must disregard all evidence that a reasonable factfinder could have disbelieved, in addition to considering undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.* In doing our job, we cannot weigh witness-credibility issues that depend on the witness's appearance and demeanor because that is the factfinder's province. *Id.* at 573–74. And even when credibility issues appear in the appellate record, we defer to the factfinder's determinations as long as they are not unreasonable. *Id.* at 573.

Factual sufficiency

We must perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support terminating a parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In reviewing the evidence for factual sufficiency, we give due deference to the factfinder's findings and do not supplant the verdict with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated an alleged ground and that termination was in the child's best interest. Tex. Fam. Code Ann. § 161.001(b); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). 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 in the truth of its finding, then the evidence is factually insufficient. *H.R.M.*, 209 S.W.3d at 108.

DISCUSSION

The evidence supports the endangering-conduct finding

Parental rights may be terminated under subsection (E) if 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." Tex. Fam. Code Ann. § 161.001(b)(1)(E); *In re M.C.*, 482 S.W.3d 675, 685 (Tex. App.—Texarkana 2016, pet. denied). *Endanger* means "more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment." *E.N.C.*, 384 S.W.3d at 803. It means "to expose to loss or injury." *In re N.S.G.*, 235 S.W.3d 358, 367 (Tex. App.—Texarkana 2007, no pet.) (quoting *Boyd*, 727 S.W.2d at 533). Subsection (E) "refers only to the parent's conduct, as evidenced not only by the parent's acts, but also by the parent's omissions or failures to act." *Id.* at 366–67 (quoting *In re S.K.*, 198 S.W.3d 899, 902 (Tex. App.—Dallas 2006, pet. denied)). "The conduct to be examined includes what the parent did both before and after the child was born." *Id.* at 367 (quoting *S.K.*, 198 S.W.3d at 902); *see E.N.C.*, 384 S.W.3d at 804–05. And to be relevant, "the conduct does not have to have been directed at the child, nor must actual harm result to the child from the conduct." *In re Z.M.*, 456 S.W.3d 677, 686 (Tex. App.—Texarkana 2015, no pet.) (quoting *Perez v. Tex. Dep't of Protective &*

Regulatory Servs., 148 S.W.3d 427, 436 (Tex. App.—El Paso 2004, no pet.)); *see E.N.C.*, 384 S.W.3d at 803; *N.S.G.*, 235 S.W.3d at 367. Rather, "[u]nder subsection (E), it is sufficient that the child's well-being is jeopardized or exposed to loss or injury." *In re L.E.S.*, 471 S.W.3d 915, 923 (Tex. App.—Texarkana 2015, no pet.) (citing *Boyd*, 727 S.W.2d at 533; *N.S.G.*, 235 S.W.3d at 367). "Further, termination under subsection (E) must be based on more than a single act or omission. Instead, a 'voluntary, deliberate, and conscious course of conduct by the parent is required.'" *Id.* (quoting *Perez,* 148 S.W.3d at 436).

With this standard in mind, the evidence showed that A.G. not only threatened to place Z.O. in foster care if she misbehaved, A.G. also affirmatively requested—with Z.O. present—that Z.O. be placed in foster care due to her behavior. The Department supervisor who was with A.G. when A.G. said these things in Z.O.'s presence did not mince words about their inappropriateness: "It's harmful to a child. It's unacceptable. It's ridiculous. It should never happen."

And A.G.'s threats were not isolated. The caseworker overheard A.G. threaten Z.O. on another occasion, when A.G. told Z.O. that "if she's bad, she would go back to foster care. That [A.G.] would . . . go back to Illinois and take care of [Z.O.'s] siblings who behaved." Children cannot feel safe, added the caseworker, when their parents are constantly trying to give them away. Indeed, threats to have others take a child away for bad behavior have "a profound impact on [the child's] emotional stability," the Department program administrator admonished. Not surprisingly, a therapist who specialized in treating traumatized

children averred that Z.O. exhibited "separation fear-based behaviors" and that the threat of losing her home at any time created the type of anxiety that "handicaps a child's ability to make effective developmental progress across all domains." *See In re A.N.*, No. 02-14-00206-CV, 2014 WL 5791573, at *18 (Tex. App.—Fort Worth Nov. 6, 2014, no pet.) (mem. op.) ("As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being.").

The evidence further showed, poignantly, that when the trial court removed Z.O. from the monitored return, Z.O. was persuaded that A.G. would kill herself and shouted, "Mommy, please don't kill yourself." (A.G. had ill-advisedly brought Z.O. to the removal hearing.) A.G. admitted being the source of Z.O.'s fears because Z.O. had overheard her tell someone over the phone that, "[i]n so many words," she would kill herself if Z.O. went back into care. Notwithstanding the Department supervisor's admonishing A.G. to reassure Z.O. that A.G. would not kill herself, A.G. stubbornly balked. The best she could muster was "I don't know." When asked if the second removal damaged Z.O.'s emotional well-being, the trauma therapist responded, "It made a pretty good dent."

Additional evidence showed that A.G. was not functioning as a parent. For example, when Z.O. would protest about going to school in the morning, A.G. would simply tell Z.O. to go back to bed. And once when A.G. and Z.O. accidentally found themselves locked out of A.G.'s room at the Wheeler House, A.G., having no solution to the problem, got frustrated, sat down, and declined to

ask for any help. It fell to Z.O. to find the help they needed. Testimony established that a parent's failure to function as a parent is emotionally detrimental to a child: the clinical psychologist testified that parents who are not empathetic to their children's needs "create confusion, despair, sadness, resentment, anger, rage[, and trust issues]" for the child.

During visits with Z.O., A.G. was described as not being engaged. Visitations would consist largely of A.G.'s braiding Z.O.'s hair with very little interpersonal interaction. The visitation observer said that normally she preferred for parents and their children to "actually talk, play[,] and interact with each other." A.G.'s cell phone was also a distraction, as sometimes A.G. would let Z.O. play with it or would try to place or take a call for one reason or another. Inexplicably, A.G. even forgot Z.O.'s birthday. When A.G. spoke with Z.O., A.G. chose topics that were more appropriate for an eighteen-year-old than an eight-year-old, and one witness described Z.O. as acting more like an eighteen-year-old than an eight-year-old in the way she interacted with adults. *See In re D.L.N.*, 958 S.W.2d 934, 939 (Tex. App.—Waco 1997, pet. denied) (stating that "a course of behavior showing [the mother's] inability to deal with [her child's] emotional needs," including observations of "little meaningful interaction" between the mother and child during their supervised visits, supported the finding that the mother engaged in conduct that endangered the child's physical or emotional well-being), *overruled on other grounds by C.H.*, 89 S.W.3d at 26.

Viewing the evidence in the light most favorable to the verdict, we hold that the evidence is such that a factfinder could reasonably form a firm belief or conviction that A.G. engaged in conduct or knowingly placed Z.O. with persons who engaged in conduct that endangered Z.O.'s physical or emotional well-being and that the evidence is thus legally sufficient on section (E) grounds. *See J.P.B.*, 180 S.W.3d at 573; *see also* Tex. Fam. Code Ann. § 161.001(b)(1)(E).

Based on the entire record and giving due deference to the factfinder's findings, we also hold that a factfinder could reasonably form a firm conviction or belief that A.G. engaged in conduct or knowingly placed Z.O. with persons who engaged in conduct that endangered Z.O.'s physical or emotional well-being and that the evidence is therefore also factually sufficient on section (E) grounds. *See H.R.M.*, 209 S.W.3d at 108; *C.H.*, 89 S.W.3d at 28; *see also* Tex. Fam. Code Ann. § 161.001(b)(1)(E).

We overrule A.G.'s second point.

For purposes of this appeal, we need not decide whether the evidence supports the dangerous-conditions-or-surroundings finding

When we find that one of the alleged predicate grounds for termination under section 161.001(b)(1) is supported by sufficient evidence, we need not review the remaining predicate grounds. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *In re S.K.A.*, 236 S.W.3d 875, 900 (Tex. App.—Texarkana 2007), *pet. denied*, 260 S.W.3d 463 (Tex. 2008). Accordingly, we do not address whether the evidence sufficed to support the ground alleged under subsection

161.001(b)(1)(D)—that A.G. placed or knowingly allowed Z.O. to remain in conditions or surroundings that endangered Z.O.'s physical or emotional well-being. For purposes of termination, one ground is sufficient. *See In re A.O.*, No. 02-09-00005-CV, 2009 WL 1815780, at *6 (Tex. App.—Fort Worth June 25, 2009, no pet.) (mem. op.).

We overrule A.G.'s first point. *See* Tex. R. App. P. 47.1.

The evidence supports the best-interest finding

We acknowledge the 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). To determine the child's best interest, we review the entire record. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). The same evidence may be probative of both the subsection (1) ground and subsection (2)'s best-interest determination. *Id.* at 249; *C.H.*, 89 S.W.3d at 28. Nonexclusive factors that the factfinder in a termination case may also use in determining the child's best interest include—

- the child's desires;
- the child's emotional and physical needs now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parental abilities of the individuals seeking custody;
- the programs available to assist these individuals to promote the child's best interest;
- the plans for the child by these individuals or by the agency seeking custody;

- the stability of the home or proposed placement;
- the parent's acts or omissions that may indicate that the existing parent-child relationship is not a proper one; and
- any excuse for the parent's acts or omissions.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (citations omitted); *see E.C.R.*, 402 S.W.3d at 249 (stating that in reviewing a best-interest finding, "we consider, among other evidence, the *Holley* factors"); *E.N.C.*, 384 S.W.3d at 807. These factors are not exhaustive, and some of them may not apply to some cases. *C.H.*, 89 S.W.3d at 27. Furthermore, undisputed evidence of just one of these factors may suffice in a particular case to support a finding that termination is in the child's best interest. *Id.* On the other hand, in some cases, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

Keeping this standard in mind, we note that although there was evidence that Z.O. wanted to stay with A.G., there was also evidence that Z.O. was traumatized upon learning that she would be returning to A.G.'s care for the monitored return. This seeming ambivalence was consistent with other testimony that children in Z.O.'s situation are often torn between being safe and being loyal to their parents.

As we discussed in connection with point two, the evidence showed that A.G. had failed to meet Z.O.'s emotional needs, and, once homeless, A.G. had to resort to foster placement even to meet Z.O.'s physical needs. The evidence further showed that A.G.'s entire adult life was plagued with unemployment and

housing instability, and nothing suggested that A.G.'s employment prospects would change or that her free housing would continue indefinitely or, even assuming she had free housing, whether it would make any difference. After all, A.G. was in free housing when she returned Z.O. to foster care. And despite living rent-free, A.G. had no savings.

Another important consideration is Z.O.'s severe behavioral issues; the evidence showed that A.G. was simply not capable of parenting her. Of course other evidence showed that A.G. was not alone in that respect, as several of Z.O.'s foster placements had failed. Nevertheless, the evidence showed that returning Z.O. to A.G. was not a viable option: A.G.'s proposed solutions to her daughter's behavioral issues were to spank Z.O., threaten to leave Z.O. with others, and actually leave Z.O. with the Department.

In contrast, at the time of trial Z.O. was in a therapeutic foster home for children with "more emotional problems and more behaviors" that offered some hope. Z.O.'s current foster mother testified that she was committed to Z.O., wanted to adopt her, and appeared to have both the training and the experience to raise Z.O.

Finally, A.G. failed to comprehend or acknowledge the consequences of her acts and omissions. A.G. disagreed that Z.O. was in foster care because of A.G.'s inability to care for her and implied that Z.O. was in foster care because of Z.O.'s own behavior; A.G. maintained that the only deficiency the Department could show was her failure to keep up Z.O.'s school attendance, which A.G.

asserted was not a basis for termination; in short, A.G. did not see the calamitous effects that her acts and omissions had on her life and on her children's lives.

Viewing the evidence in the light most favorable to the verdict, we hold that a factfinder could reasonably form a firm belief or conviction that terminating A.G.'s parental rights was in Z.O.'s best interests, and that the evidence is therefore legally sufficient to support the best-interest finding. *See J.P.B.*, 180 S.W.3d at 573; *see also* Tex. Fam. Code Ann. § 161.001(b)(2).

Based on the entire record and giving due deference to the factfinder's findings, we also hold that a factfinder could reasonably form a firm conviction or belief that terminating A.G.'s parental rights was in Z.O.'s best interest, and that the evidence is thus also factually sufficient to support the best-interest finding. *See H.R.M.*, 209 S.W.3d at 108; *C.H.*, 89 S.W.3d at 28; *see also* Tex. Fam. Code Ann. § 161.001(b)(2).

We overrule A.G.'s third point.

Conclusion

Having overruled A.G.'s three points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and KERR, JJ.

DELIVERED: September 7, 2017