COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00194-CV

IN THE INTEREST OF D.W. AND
M.R., CHILDREN

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-103501-16

MEMORANDUM OPINION[1]

Appellant Mother J.R. appeals the termination of her parental rights to D.W. and M.R., her children. Appellant Father A.W. appeals the termination of his parental rights to D.W. We affirm the trial court's judgment terminating both parents' parental rights in all respects.

Background

D.W. and M.R., the children who are the subjects of the instant suit, are two of Mother's six children. By the time of trial in May 2017, M.R. was seven

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

years old and D.W. was eight. Father is the biological father of D.W. M.R.'s biological father and Mother's other four children are not part of this appeal.

I. Mother

Mother has a history of abusing various drugs, including heroin, methamphatamine, and cocaine, and in January 2016, the Department of Family and Protective Services (the Department) received a report that Mother was using drugs while her children, including D.W. and M.R., were in her care. The Department then took custody of the children in July 2016 after Mother dropped them off with a family friend, did not return for the children, and called two days later to inform the friend that she would not be coming back for the children.

However, Mother eventually expressed a desire to have custody of D.W. and M.R., so Jessica Burciaga, the Child Protective Services (CPS) caseworker for the children, developed a service plan for Mother and explained to her the tasks assigned by the plan. Those tasks included completing a drug and alcohol assessment and following all recommendations for treatment resulting therefrom, completing a mental health assessment through MHMR, completing a psychological assessment, taking a parenting class, participating in visitation sessions with the children, obtaining suitable housing, and maintaining employment. Burciaga testified that she explained those tasks to Mother and Mother stated that she understood what was expected of her.

Mother attempted to complete some of the tasks, but, apart from passing a single drug test, she did not complete any of them successfully. While she

completed three drug and alcohol assessments, she did not complete the inpatient or outpatient treatments that were recommended as a result. She also visited MHMR to complete a mental health assessment, but, according to Burciaga, she was asked to leave the facility "due to her irate behavior and inappropriate behavior." Mother did not have significant contact with the children during the proceedings and attended only one visitation session with them. Mother did not obtain employment, nor did she secure suitable housing. Burciaga described her lifestyle as "bouncing place to place with family members and friends." And, according to Burciaga, Mother appeared at a court hearing exhibiting symptoms of extreme intoxication—swollen eyes that she could barely open and the inability to speak or explain to Burciaga what was wrong.

Following a phone call between Burciaga, Mother, and Mother's attorney in March 2017, a new caseworker, Willie Copeland, was assigned to work with Mother. But shortly thereafter, both Copeland and Burciaga lost contact with Mother—she did not return their phone calls, and at some point, her phone number was disconnected. By the time Mother did not attend trial in May 2017, Burciaga's predominant concern had become Mother's mental health—she did not believe that Mother had made any progress toward addressing the Department's concerns about her mental health, her history of drug abuse, and her history of involvement in violent relationships.

II. Father

Burciaga located Father in September 2016. He was living in Kansas City, Missouri. According to Burciaga, Father told her that he had not seen D.W. since 2010, when Father and Mother had split up and D.W. was two years old. Father claimed to Burciaga that he had tried to stay in touch with D.W. by phone after their split but was rebuffed by Mother's boyfriends, who disrespected and threatened him and told him not to call back. Father had not traveled to Texas to visit D.W. since 2010, and he did not travel to Texas to attend any of the termination proceedings.

Despite her concerns about Father's lack of a relationship or any bond with D.W. and Father's confession to her that he had allowed D.W. to stay with Mother even though he knew that Mother struggled with substance abuse and "relationship issues," Burciaga developed a service plan for Father and they discussed it in a January 2017 phone call. Like Mother's service plan, Father was required to obtain suitable employment, participate in drug screenings, obtain and maintain stable housing, engage in counseling, participate in parent-child visitation sessions, complete a psychosocial assessment and follow any recommendations resulting therefrom, complete a psychiatric evaluation and follow any recommendations resulting therefrom, provide the Department with proof of any prescription medications he was taking, complete parenting education classes, and form and maintain a healthy and supportive network.

According to Burciaga, Father said that he understood what was expected of him and agreed to work on the service plan.

Burciaga offered to facilitate in-person or electronic visitation sessions or phone calls between D.W. and Father, but, according to Burciaga, Father declined the offer, explaining that he was "in the middle of moving" and did not want to start phone contact until he "got settled" but indicated that he wanted to come to Texas to visit in March of 2017. But Father did not come to Texas in March, nor did he explain to Burciaga why not. By the time of trial, Father was unemployed and had not completed any other task assigned by his service plan. Burciaga testified that, in a phone call shortly before trial, Father again blamed his failure to complete the service plan on the moving process, although he never told her where he moved to. Based on this phone call, Burciaga concluded that Father had not demonstrated that he had a suitable place for D.W. to live if he were to be given custody.

When Burciaga spoke to Father on the phone the day before trial, she explained that the Department was recommending his parental rights be terminated. According to her, Father simply replied, "[O]h," and did not seem concerned. He did not attend trial.

III. The children's placement

After the Department's attempt to place D.W. and M.R. with family members who had taken custody of their four siblings proved unsuccessful, the two were placed in a foster home together. Burciaga testified that although there

had been reports of rough moments—D.W. in particular had some behavioral issues—M.R. and D.W. had "progressed greatly" in the Department's care. She described their performance in school as "excellent" and reported that they were regularly participating in therapy. With regard to their parents, Burciaga testified that they "very, very rarely" asked or talked about either of them, adding that "[a]t one point [D.W.] actually told me he didn't want to visit with [Mother] because it was a waste of his time."

At the time of trial, the Department was looking at a permanent placement for the children with a maternal great-aunt in California whom Burciaga felt comfortable in recommending as a good placement for D.W. and M.R. The great-aunt had also previously been licensed in California as a foster parent and had cared for D.W. in the past.

IV. The trial court's order

The trial court granted the Department's request to terminate Mother's and Father's parental rights, finding that Mother had constructively abandoned M.R. and that termination was in M.R.'s best interest, that both Mother and Father had constructively abandoned D.W. and that termination was in D.W.'s best interest, and that Father did not respond by timely filing an admission of paternity or by filing a counterclaim for paternity. *See* Tex. Fam. Code Ann. §§ 161.001(b)(1)(N), (b)(2), 161.002 (West Supp. 2017). This appeal followed.

Discussion

I. Mother's appeal

Mother's appellate counsel filed an *Anders* brief and a motion to withdraw, declaring that there are no arguable issues and that any appeal by Mother would be frivolous. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967); *In re K.M.*, 98 S.W.3d 774, 776–77 (Tex. App.—Fort Worth 2003, no pet.) (holding that *Anders* procedures apply in parental termination cases). The brief meets the requirements of *Anders* by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds to be advanced on appeal. Although given the opportunity, Mother did not file a response.

As the reviewing appellate court, we must independently examine the record to decide whether counsel is correct in determining that an appeal in this case is frivolous. *See Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991); *In re K.R.C.*, 346 S.W.3d 618, 619 (Tex. App.—El Paso 2009, no pet.). Having carefully reviewed the record and the *Anders* brief, we agree with counsel that the appeal is frivolous. *See K.R.C.*, 346 S.W.3d at 619. We find nothing in the record that might arguably support Mother's appeal. *See In re D.D.*, 279 S.W.3d 849, 850 (Tex. App.—Dallas 2009, pet. denied).

Accordingly, we affirm the trial court's termination of Mother's parental rights to D.W. and M.R.

However, we deny the motion to withdraw filed by Mother's counsel in light of *In re P.M.* because, other than counsel's determination that an appeal would

be frivolous, it does not show "good cause". *See* 520 S.W.3d 24, 27 (Tex. 2016) ("[A]n *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature."); *see also In re C.J.*, 501 S.W.3d 254, 258 (Tex. App.—Fort Worth 2016, pets. denied) (denying a motion for withdrawal in light of *In re P.M.* where it did not show "good cause" other than counsels' determination that an appeal would be frivolous); *In re A.M.*, 495 S.W.3d 573, 582 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pets. denied) (noting that since *In re P.M.* was handed down, "most courts of appeals affirming parental termination orders after receiving *Anders* briefs have denied the attorney's motion to withdraw"). The supreme court has held that in cases such as this, "appointed counsel's obligations [in the supreme court] can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief." *P.M.*, 520 S.W.3d at 27–28.

II. Father's appeal

A. Admission of paternity

Father's first ground for appeal challenges the trial court's finding that he failed to timely file an admission of paternity or counterclaim for paternity. *See* Tex. Fam. Code Ann. § 161.002 (providing that an alleged father's rights may be terminated if he does not respond to citation by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160). The Department concedes this ground of error and admits that Father established paternity through the following statement in his request for counsel: "I, [Father], am a

parent of the child named above." *See, e.g.*, *In re K.W.*, 138 S.W.3d 420, 430 (Tex. App.—Fort Worth 2004, pet. denied) (holding that father's letters to the trial court and state agency admitting paternity were sufficient to put both on notice of his admission and intent to oppose termination of his parental rights). We therefore sustain Father's first ground.

B. Constructive abandonment

Father's second ground for appeal challenges the factual and legal sufficiency of the evidence supporting the trial court's finding that he constructively abandoned D.W.

1. Standard of review

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 Supp. 2017); *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 favor of the parent. *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *E.R.*, 385 S.W.3d at 554–55; *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 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 one ground listed in family code section 161.001(b)(1) and that termination is in the best interest of the child. 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; termination may not be based solely on the best interest of the child as determined by the trier of fact. *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.).

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 the

challenged ground for termination. *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. *Id.* We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved. *Id.* We consider 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.*

We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder's province. *Id.* 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.*

We are required to perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support the termination of 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 judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Here, we must determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that Father constructively abandoned D.W. Tex. Fam. Code Ann. § 161.001(b)(1)(N); *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.

2. Application

Parental rights may be terminated where it is in the child's best interest and a parent has

> constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
>
> > (i) the department has made reasonable efforts to return the child to the parent;
> >
> > (ii) the parent has not regularly visited or maintained significant contact with the child; and
> >
> > (iii) the parent has demonstrated an inability to provide the child with a safe environment[.]

Tex. Fam. Code Ann. § 161.001(b)(1)(N).

Father does not dispute that D.W. was in the Department's care for more than six months. As to the remaining three elements, Father likewise does not dispute that the Department made reasonable efforts to return D.W. to him and that he did not regularly visit or maintain significant contact with D.W. Father's argument on appeal is limited to the third element—he asserts that the record

was devoid of any evidence that he was unable to provide D.W. with a safe environment. We disagree.

Father does not dispute that he failed to complete any of the tasks assigned to him by the service plan. Instead, he offered continued excuses to Burciaga that he was in the process of moving which somehow prevented him from attempting to comply with the service plan. Yet, he never revealed to the Department where he was moving or in any other manner demonstrated that he had suitable housing for D.W. *See In re M.R.J.M.*, 280 S.W.3d 494, 506 (Tex. App.—Fort Worth 2009, no pet.) (op. on reh'g) (holding constructive abandonment was shown even though father had spent $3,000 to restore his 20-year-old trailer home but home was still not safe for child); *In re J.J.O.*, 131 S.W.3d 618, 630 (Tex. App.—Fort Worth 2004, no pet.) (holding that mother's failure throughout CPS investigation to maintain steady housing or employment was some evidence of her inability to provide the child with a safe environment). He also did not obtain employment or complete a drug assessment; complete psychiatric evaluations or counseling; attend parent-child visits; complete drug tests; or provide proof that he had formed a healthy and supportive network. *See In re G.P.*, 503 S.W.3d 531, 534 (Tex. App.—Waco 2016, pet. denied) (holding constructive abandonment was shown where mother did not provide the Department with any information about her living or employment circumstances, failed to make child support payments, failed to seek out and accept counseling services, refused to take required drug tests, and failed to even maintain contact

with her child); *J.J.O.*, 131 S.W.3d at 630 (considering evidence that mother had failed a drug test, had attended only half of her parenting classes, and did not complete a psychological evaluation or participate in counseling in determining whether she had demonstrated an inability to provide her child with a safe environment).

Father asserts in his brief that he provided his mother as a possible placement option for D.W., but the record does not bear this out. Burciaga testified that while Father had suggested possible placement options, they were the same as those that were provided by Mother. The Department investigated those suggestions—including the maternal grandmother and a maternal aunt who had taken custody of one of the other children—but only the maternal great-aunt was willing and able to take custody of D.W.

On this record, we conclude that the evidence is legally and factually sufficient to support the trial court's finding that Father constructively abandoned D.W. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(N). We therefore overrule Father's second ground on appeal.

Conclusion

We deny the motion to withdraw filed by Mother's counsel in light of *In re P.M.*, 520 S.W.3d at 27. Having held that Mother's appeal is frivolous, we affirm the trial court's judgment terminating Mother's parental rights.

Having concluded that the evidence is sufficient to support the trial court's finding that Father constructively abandoned D.W., *see* Tex. Fam. Code Ann.

§ 161.001(b)(1)(N), and because Father does not challenge the trial court's finding that termination is in D.W.'s best interest, *id.* § 161.001(b)(2), we affirm the trial court's judgment terminating Father's parental rights.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL, and PITTMAN, JJ.

DELIVERED: November 9, 2017