In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00470-CV

IN THE INTEREST OF R.N.P., A CHILD

On Appeal from the 316th District Court
Hutchinson County, Texas
Trial Court No. 41,977; Honorable James Mosley, Presiding

May 25, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, J.D.B., appeals the trial court's order terminating her parental rights to her son, R.N.P.[1] By her first issue, Appellant concedes there was sufficient evidence to support three of the four statutory grounds for termination. However, by her second issue, she challenges the sufficiency of the evidence to support the trial court's best interest finding. We affirm.

[1] To protect the privacy of the parties involved, we refer to them by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014). *See also* TEX. R. APP. P. 9.8(b). The child's father is deceased.

BACKGROUND

Appellant has two children who are not quite yet teenagers. This appeal involves her son, who is twelve years old. His father is deceased. Appellant's daughter, J.K.H., who is the subject of a companion appeal, is eleven years old.[2]

Appellant's saga begins in 2002, when she was convicted of possession of methamphetamines and placed on community supervision.[3] That same year, she met R.N.P.'s father and she eventually became pregnant. He was verbally and physically abusive toward Appellant. While she was pregnant, he was murdered and she moved in with her maternal grandmother. She gave birth to R.N.P. in 2004.

In early 2005, Appellant was involved in a brief relationship that resulted in a second pregnancy. When she was seven months pregnant, her community supervision was revoked and she was incarcerated for approximately thirty days. During that time, R.N.P. was cared for by his great-grandmother. Later in 2005, Appellant gave birth to J.K.H. At that time, the infant and Appellant both tested positive for methamphetamines. The Department placed J.K.H. with Appellant's grandmother, who was still caring for R.N.P.

In 2006, Appellant was again arrested for possession of methamphetamines and served twelve months in a state jail facility. She was released in 2007, and again arrested in 2008 for possession of methamphetamines. That case was not resolved until 2013 when Appellant received a six-month sentence. She was also incarcerated

[2] Appellant is also challenging termination of her parental rights to her daughter, J.K.H., in appellate cause number 07-16-00464-CV, disposed of this same day.

[3] Appellant has a juvenile record that precedes her 2002 conviction.

on a forgery charge. While she was incarcerated, her children were both placed at Boy's Ranch for six months.

After her release from incarceration, in February 2014, she and her children moved to Kansas; however, she returned to Texas later that year and rented a house from her son's paternal grandfather. She remained employed for a few years mostly as a waitress. She began dating Daniel Loftis, and in January 2015, he moved in with her and the children.

On May 20, 2015, an incident of domestic violence by Loftis against Appellant resulted in a report of neglectful supervision. While both were intoxicated, Loftis allegedly head-butted Appellant and bit her in the children's presence. Appellant called the police. There was some evidence that Loftis got physical with R.N.P., although Appellant testified she never saw Loftis hit her son.

The Department, Appellant, and Loftis entered into a safety plan and agreed that Loftis would vacate Appellant's home for thirty days. Before the expiration of that period, the Department's investigator visited Appellant's home and believed that Loftis had spent the night there.[4] Violation of the safety plan resulted in removal of the children from the home. R.N.P. was placed in foster care while J.K.H. was placed with her father. Appellant moved in with her grandmother because Loftis refused to leave her home. She later reunited with Loftis, but after at least two more incidents of domestic violence, she called the police and he was incarcerated.

[4] Appellant denied that Loftis spent the night at her house. She testified that he had come to her house to pick up his vehicle.

More than a year after R.N.P. was removed from Appellant's care, a permanency review hearing was held on June 7, 2016. The trial court entered an order finding that Appellant had "demonstrated adequate and appropriate compliance with the service plan" and extended the dismissal date of the underlying case to permit Appellant to re-take her OSAR evaluation. However, following a subsequent permanency review hearing held on September 29, 2016, the trial court found that Appellant had *not* "demonstrated adequate and appropriate compliance with the service plan." The Department moved forward with its case to terminate Appellant's parental rights.

At the final hearing, Appellant admitted her substance abuse history, criminal history, and her past abusive relationships. The evidence established that she had completed all her services except for her in-patient substance abuse treatment. She excused her failure to complete her treatment with her grandmother's illness. Although she previously expressed an intent to return for treatment, she never did.

Appellant testified that she was currently living with a new boyfriend who was providing a stable home and who had no criminal or substance abuse history. She testified that he, her preacher, and her NA and AA sponsors would provide her with a suitable support system.

She candidly testified to being incarcerated eight times for driving without a valid license and not paying her fines. She has not had a valid driver's license for four years and is not eligible for one until 2018. She did testify she would engage counsel to assist her in obtaining an occupational driver's license. She further testified to two pending charges for driving without a valid driver's license and failure to identify.

Appellant testified that she had a friend who had undergone a home study and had been approved to adopt her children. However, she was uncertain whether anyone would adopt her children.

The Department's witnesses testified in favor of terminating Appellant's parental rights. However, R.N.P.'s counselor testified that the "children have not been adoptable." Testimony was offered that termination would be in R.N.P.'s best interest because he was thriving with his foster family. The Department's caseworker testified that the foster family did not want to adopt the siblings but referenced an individual who had expressed interest in adopting them. However, details on an adoption were not given and the testimony was vague on a permanency plan by the Department. Appellant's trial counsel vigorously cross-examined the witnesses. Based on the evidence, the trial court found clear and convincing evidence to support termination under section 161.001(b)(1)(D), (E), (O), and (P). The trial court also found clear and convincing evidence that termination was in R.N.P.'s best interest.

APPLICABLE LAW

The Texas Family Code permits a court to terminate the relationship between a parent and a child if the Department establishes (1) one or more acts or omissions enumerated under section 161.001(b)(1) and (2) that termination of that relationship is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(b)(1), (2) (West Supp. 2016)[5]; *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). The burden of proof is by clear and convincing evidence. § 161.206(a) (West 2014). "'Clear and convincing

[5] Unless otherwise designated, all references to sections are to the Texas Family Code Annotated (West Supp. 2016).

evidence' means 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." § 101.007 (West 2014).

Only one statutory ground is required to support termination. *In re K.C.B.*, 280 S.W.3d 888, 894-95 (Tex. App.—Amarillo 2009, pet. denied). Although evidence presented may be relevant to both the statutory grounds for termination and best interest, each element must be established separately and proof of one element does not relieve the burden of proving the other. *See In re C.H.,* 89 S.W.3d 17, 28 (Tex. 2002).

STANDARD OF REVIEW

The natural right existing between parents and their children is of constitutional dimension. *See Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). *See also Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently, termination proceedings are strictly construed in favor of the parent. *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012). Parental rights, however, are not absolute, and it is essential that the emotional and physical interests of a child not be sacrificed merely to preserve those rights. *In re C.H.*, 89 S.W.3d at 26. The Due Process Clause of the United States Constitution and section 161.001 of the Texas Family Code require application of the heightened standard of clear and convincing evidence in cases involving involuntary termination of parental rights. *See In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

In a legal sufficiency challenge, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. *In re K.M.L.*, 443 S.W.3d 101, 112-13 (Tex. 2014). However, the reviewing court should not disregard undisputed facts that do not support the verdict to determine whether there is clear and convincing evidence. *Id.* at 113. In cases requiring clear and convincing evidence, even evidence that does nothing more than raise surmise and suspicion will not suffice unless that evidence is capable of producing a firm belief or conviction that the allegation is true. *Id.* If, after conducting a legal sufficiency review, a court determines that no reasonable fact finder could form a firm belief or conviction that the matter that must be proven is true, then the evidence is legally insufficient. *Id.* (citing *In re J.F.C.*, 96 S.W.3d at 266).

In a factual sufficiency review, a court of appeals must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266 (citing *In re C.H.*, 89 S.W.3d at 25). We must determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *In re J.F.C.*, 96 S.W.3d at 266. We also consider whether disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

ISSUE ONE

Appellant concedes the evidence is legally and factually sufficient to support termination under section 161.001(b)(1) (D), (E), and (O). However, she argues that the Department did not establish that termination was supported under subsection (P). Because only one statutory ground is required to support termination, *In re K.C.B.*, 280 S.W.3d at 894-95, we need not address the grounds any further.

ISSUE TWO

By her second issue, Appellant maintains the evidence is insufficient to support the trial court's best interest finding, the second element necessary for upholding a termination order. We disagree.

SECTION 161.001(b)(2)—BEST INTEREST

The Department was required to prove by clear and convincing evidence that termination of Appellant's parental rights was in R.N.P.'s best interest. § 161.001(b)(2); *In re K.M.L.*, 443 S.W.3d at 116. Only if no reasonable fact finder could have formed a firm belief or conviction that termination of her parental rights was in the child's best interest can we conclude the evidence is legally insufficient. *Id.* (citing *In re J.F.C.*, 96 S.W.3d at 266).

There is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *See* § 263.307(a). Section 263.307(b) provides a non-exhaustive list of factors to consider in deciding best interest. Additionally, the Supreme

Court has set out other factors to consider when determining the best interest of a child. *See Holley*, 544 S.W.2d at 371-72. Those factors include (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individual seeking custody; (5) the programs available to assist the individual to promote the best interest of the child; (6) the plans for the child by the individual or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.*

Evidence that supports one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *See In re C.H.*, 89 S.W.3d at 28. *See also In re E.C.R.*, 402 S.W.3d 239, 249-50 (Tex. 2013). The best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as direct evidence. *See In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). Additionally, a child's need for permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in determining best interest. *See In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

ANALYSIS

Appellant's argument challenging the best interest finding relies heavily on the Department's lack of a permanent plan for R.N.P. at the time of the final hearing. Relying on *In re N.R.T.*, 338 S.W.3d at 677, she argues that it is in a child's best interest

to have prompt and permanent placement in a safe environment. While she correctly cites case law, the Texas Supreme Court has held that although evidence of permanency is relevant to a best interest finding, "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor." *In the Interest of E.C.R.*, 402 S.W.3d at 250 (citing *In re C.H.*, 89 S.W.3d at 28). The entire record must be examined to determine whether a fact finder could reasonably form a firm conviction or belief that termination is in a child's best interest—even if the Department is "unable to identify with precision the child's future home environment." *In re C.H.*, 89 S.W.3d at 28.

The record demonstrates that Appellant loves her children. R.N.P.'s counselor testified that R.N.P. expressed his desire to be with his mother. He loves her very much and is very protective of her. However, consideration of other factors weighs in favor of the trial court's best interest finding.

Appellant struggles with methamphetamine issues and has been incarcerated numerous times during R.N.P's life. She used methamphetamines twice during the underlying proceedings. She expressed concern during her testimony that J.K.H.'s father had tested positive for methamphetamines and agreed with the Department's counsel's comment that "anybody that's on methamphetamine should not be around children." She testified she did not use methamphetamines in her children's presence but admitted having been around her children while under the influence of methamphetamines. She candidly acknowledged the possibility of relapsing and her inability to control her substance abuse for the past eighteen months. She testified, "I know to stay clean. I mean, it's common sense to stay clean." Yet, she was unable to

do so, and despite the opportunities to complete a substance abuse program, she never did. She used her grandmother's illness to excuse her failure to complete in-patient treatment.

Appellant has a history of abusive relationships with R.N.P.'s father and with her former boyfriend. There was also evidence that she was involved in a bar room altercation.

In addition to her numerous incarcerations, at the time of the final hearing, she still had two charges pending—one for driving with an invalid license and another for failure to identify herself. Although she claimed to currently have a stable home with a new boyfriend and she was employed, she conceded that the possibility of future incarceration would be detrimental to her children. Her support system for caring for her children was a new boyfriend on which there was very little testimony. There was also only a passing mention of Appellant's preacher and NA and AA sponsors as offering support should she relapse or be incarcerated again.

R.N.P. suffers from adjustment disorder with mixed disturbance of emotions and conduct. His counselor described him as sad, anxious, and prone to depression. He also has behavioral issues.[6] While in foster care, he was diagnosed with dyslexia and was provided with a coach. He began to thrive in school and his grades improved.

R.N.P. told his counselor that his mother and her former boyfriend drank daily and that he witnessed multiple instances of domestic violence against his mother by her

[6] A permanency report filed January 26, 2017, recited that R.N.P.'s placement gave a fourteen-day discharge notice because his behavioral issues increased after his great-grandmother passed in December 2016.

former boyfriend. He acknowledged his mother was not doing well. His caseworker testified that family therapy sessions were going well until Appellant tested positive for drug use. R.N.P. realized the setback and became angry, more anxious, and more depressed. He expressed to the caseworker that he knew it was not safe for him to be with his mother if she was using methamphetamines.

The caseworker testified that R.N.P. and his sister had bonded well with their foster family and were thriving in the home. They were active in sports and had the opportunity to experience "good things" with their foster family. Although she had no idea whether the foster family was interested in adopting the children, she testified the children would thrive under that family's care. She did not minimize the love the children have for their mother; however, she opined they would move past their grief and thrive under a more stable and permanent environment.

Additionally, Appellant's concession on sufficiency of the evidence on at least three of the four statutory grounds for termination also constitutes evidence illustrating that termination is in R.N.P.'s best interest. Appellant has a long history of methamphetamine and marihuana use and of abusive relationships. She has been incarcerated on numerous occasions and can no longer rely on her grandmother for assistance.[7]

Appellant's childhood was not ideal. On her seventh birthday, her stepfather stabbed and killed her mother. She and her sister were placed in a group home in Lubbock. She was then taken in by an aunt and later her grandmother. Her

[7] The record shows that her grandmother passed away in December 2016.

psychological evaluation, which was introduced into evidence, shows a diagnosis of persistent depressive disorder, methamphetamine use disorder, and cannabis use disorder. Her psychologist concluded that Appellant minimizes psychological problems, has weak coping skills, and is prone to dysfunctional and self-defeating behavior. He concluded she would require services and ongoing support to address her destructive emotions.

Although the Department had no permanency plan for R.N.P. at the time of the final hearing, it is only one of many factors to consider in deciding the child's best interest. While we are not unsympathetic to Appellant's well-intended desire to maintain a parent-child relationship with R.N.P., based on a totality of the evidence, we find that the Department presented clear and convincing evidence to support the trial court's best interest finding. Issue two is overruled.

CONCLUSION

The trial court's order terminating Appellant's parental rights to her son, R.N.P., is affirmed.

Patrick A. Pirtle
Justice