In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00070-CV

IN THE INTEREST OF H.L., H.L., AND C.L., CHILDREN

On Appeal from the County Court at Law No. 1
Randall County, Texas
Trial Court No. 11711L1; Honorable Jack Graham, Presiding

July 13, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Appellant, G.L., appeals the trial court's order terminating his parental rights to H.L., H.L., and C.L.[1] In five issues, G.L. challenges the sufficiency of the evidence to support the trial court's findings that (1) termination was in the children's best interest and that G.L. had (2) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being, (3) engaged in conduct or knowingly placed the children with persons who engaged in

[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 parental rights of M.L., the children's mother, were also terminated. She did not appeal.

conduct which endangered their physical or emotional well-being, (4) constructively abandoned the children, and (5) failed to comply with the provisions of a court order that specifically established the actions necessary for G.L. to obtain the return of his children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O) (West Supp. 2016). Logic dictates that we initially address G.L.'s issues two through five before we move on to address issue one. We affirm.

BACKGROUND

Appellant's three children are H.L. (five years old), H.L. (four years old), and C.L. (three years old). At birth, C.L. was premature and he tested positive for narcotics. He was also diagnosed with cerebral palsy. He has difficulty walking, is unable to communicate, and receives four types of therapy—speech, occupational, physical, and vision. The children have two older maternal siblings.[2]

The mother, M.L., has been a long-time heroin and prescription drug user. In March 2015, the Department of Family and Protective Services received a report that she was neglecting her children. When the children were removed, heroin was found in a hallway closet and M.L. was arrested on two warrants. Heroin and needles were also found in her purse. The children indicated M.L. had been using drugs in front of them. When the children were removed from their mother, G.L. had left the children with M.L. and moved to Colorado.

[2] C.J. (thirteen years old) and B.L. (eight years old) were born as a result of M.L.'s relationships with other men. In April 2016, M.L.'s parental rights to C.J. and B.L. were terminated pursuant to section 161.001(b)(1)(D), (E), (N), and (O) of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O) (West Supp. 2016). Throughout the remainder of this memorandum opinion, we will refer to provisions of the Texas Family Code as "section ___" or "§ ___."

On April 15, 2015, the Department filed its original petition seeking to terminate G.L.'s parental rights to H.L. and H.L. In addition to seeking to terminate the parental rights of the unknown father of C.L., the petition sought to terminate G.L.'s parental rights to C.L., should subsequent testing establish him as the child's father. That same day, the Department sought and obtained an emergency order appointing it the sole managing conservator of all three children.

On May 11, 2015, after an adversary hearing in which G.L. was not notified and did not appear, the trial court issued a temporary order establishing a service plan. The plan required G.L. to undergo a psychological or psychiatric evaluation, attend and cooperate in individual counseling sessions, attend and participate in parenting classes, and undergo drug/alcohol assessment and testing. The temporary order also required G.L. to comply with each requirement set out in the Department's original, or any amended, service plan during the pendency of the proceedings.

In January 2016, the Department sought and obtained an order for substituted service of process by publication as to G.L. The Department subsequently obtained personal service of process as to G.L. on March 31, 2016. On August 29, 2016, the Department filed its second amended petition seeking to terminate G.L.'s parental rights to the children pursuant to numerous provisions of section 161.001 including subsections (b)(1)(D), (E), (N), and (O). *See* § 161.001(b)(1)(D), (E), (N), (O). In September 2016, paternity testing established G.L. to be C.L.'s father, and in January 2017, the trial court held its final hearing. At the outset of the hearing, the trial court adjudicated G.L. as the father of H.L., H.L., and C.L.

During the hearing, G.L. testified telephonically that he and M.L. lived together for four years before he moved to Colorado in November 2013. He testified that he left because of M.L.'s drug use.[3] He indicated that he was given a copy of the petition when the children were first taken into custody, that he was aware he had been ordered to perform court-ordered services including a psychological evaluation, counseling sessions, a parenting class, drug/alcohol assessment and testing, and that he was to provide evidence of stable employment. With the exception of a parenting class, he did not complete any of these requirements.

G.L. indicated that because he was living in Georgia, Texas would not pay for any court-ordered services. He did not want to move back to Texas and testified that he could not afford to pay for the services in Georgia. He also indicated he did not return to Texas because he did not have a driver's license, although he has since obtained one. Furthermore, he did not contact child protective services in Georgia to inquire about services they might provide.

In July 2010, he pled guilty to assault involving domestic violence for striking M.L.'s head against a wall or grabbing her arm with his hand. Adjudication was deferred and he was sentenced to one year community supervision and assessed a $600 fine. A month later, he was charged with possession of marijuana and drug paraphernalia. In November of that year, the State filed its motion to proceed to an adjudication of guilt on the assault charge, and in February 2011, G.L. pled true to the allegations contained in that motion. He was found guilty of assault and was sentenced

[3] In a contradictory statement, he also testified that he was unaware M.L. was taking drugs while he was living with her and did not discover the truth until he had moved to Colorado in 2013.

to thirty-three days in jail and assessed a fine of $600. In 2014, he was convicted in Colorado for criminal mischief.

In December 2014, he spoke to the children by telephone, and while he was unsure whether M.L. had custody of the children, he felt they sounded normal. He testified he has not visited the children in three years. He was not present at C.L.'s birth and was unfamiliar with any of his medical issues. Although he testified he was always concerned about the children because he knew M.L. was going down a "bad path," he paid no support to anyone caring for the children during his absence.

G.L. indicated that he currently lives at his mother's place on thirty-two acres in Georgia. He was leaving his job with a pool company after eight to nine months to work as a technician at an automotive shop. He testified he was aware he could go to the government for support for the children and would apply for food stamps.

Julie Moore, the Department's caseworker since the inception of the case, testified that her first contact with G.L. was in May 2016. She had attempted to locate him by telephone and mail in Colorado, but to no avail. She testified G.L. had not visited the children since April 2015 and had not paid any support to anyone caring for the children. He was not present at any of the proceedings until he appeared telephonically for the final hearing. She further testified that although his service plan indicates that, if he were to travel to Texas, he could be given visitation with the children, he never appeared in Texas nor asked for visitation.

She also testified that, although G.L. has supplied proof he completed a parenting class, he had not completed any other task in the service plan. Although she

attempted to determine whether he had a suitable place for the children to live, G.L. failed to provide any pay stubs, information on where he lives, or the names of any roommates as requested. Moore testified she advised him Texas would not pay for out-of-state services and that, if he could not afford to pay for them himself in Georgia, he should look into local resources, including those that might be provided by the Georgia department of child protective services. She further testified that, in a May 2016 telephone call, G.L. told her that the reason he left Amarillo was because M.L. was using drugs and he described her as "crazy" and "psycho." He also reported a history of personal marijuana usage. G.L. indicated that he had moved to Georgia in February 2016, and started working for Aquarian Pools in March. He also indicated he was aware of M.L.'s circumstances.

Moore testified that for the previous two years the children and their older siblings have been living with Linda Sherrill, their great-grandmother, and they were doing well. C.L. had been diagnosed with cerebral palsy, was significantly delayed developmentally, and was legally blind. The long-term plan was for the children to be adopted and remain with their great-grandmother. She testified this placement was in the best interest of the children.

Sherrill testified that the children were doing well and she loved them very much. She testified that they had bonded with her and adjusted to life in her home. The children seldom, if ever, asked about G.L. or spoke of him. She testified that G.L. knew M.L. was using drugs before he left for Colorado because M.L. was using drugs during the time the two were together. She also testified that G.L. knew where the children were because he called once on one of the children's birthday and left a message. She

stated the she had never received any support from G.L. during the time she has been caring for the children.

Sherrill testified C.L.'s cerebral palsy affected the left side of his body, and although he was not currently walking, she hoped that he would be able to walk with a brace. At age three, C.L. spoke approximately five words and was unable to communicate. To remedy this condition, she was teaching him sign language. She testified that, when he starts school, he will be attending a disabilities class. He currently receives speech, occupational, physical, and vision therapy. She testified that he requires pretty much full-time care.

Sherrill also indicated the children were happy where they were and needed to be near their older siblings. She opined that it was in the best interest of the children that they remain under her care. Based on the evidence, the trial court found clear and convincing evidence to support termination under section 161.001(b)(1)(D), (E), (N), and (O). *See* § 161.001(b)(1)(D), (E), (N), (O). The trial court also found clear and convincing evidence that termination was in the children'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* § 161.001(b)(1), (2); *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 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).

The clear and convincing standard does not mean that the evidence must negate all reasonable doubt or that the evidence must be uncontroverted. *In the Interest of T.N.*, 180 S.W.3d 376, 382 (Tex. App.—Amarillo 2005, no pet.). The reviewing court must recall that the trier of fact has the authority to weigh the evidence, draw reasonable inferences therefrom, and choose between conflicting inferences. *Id.* Also, the trier of fact, as opposed to the reviewing body, enjoys the right to resolve credibility issues and conflicts within the evidence. *Id.* It may freely choose to believe all, part, or none of the testimony espoused by any particular witness. *Id.* at 382-83 (citing *In re R.D.S.*, 902 S.W.2d 714, 716 (Tex. App.—Amarillo 1995, no writ)).

Only one statutory ground is required to support termination. *In re K.C.B.*, 280 S.W.3d 888, 894 (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 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 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.*

ISSUES TWO, THREE, FOUR, AND FIVE

G.L. asserts there was insufficient evidence for the trial court's findings that he had (2) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being, (3) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being, (4) constructively abandoned the children, and (5) failed to comply with the provisions of a court order that specifically established the actions necessary for G.L. to obtain the return of his children. *See* § 161.001(b)(1)(D), (E), (N), (O). Although only one statutory ground is required to support termination; *In re K.C.B.*, 280 S.W.3d at 894-95, we find there is sufficient evidence of multiple grounds in this case to support termination. § 161.001(b)(1)(D), (E).

ISSUES TWO AND THREE—SECTIONS 161.001(b)(1)(D), (E)

A trial court may order termination of a parent-child relationship if the court finds by clear and convincing evidence that a parent has knowingly placed or knowingly allowed a child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child and/or engaged in conduct that knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. *See* § 161.001(b)(1)(D), (E). "Endanger" means "to expose to

loss or injury; to jeopardize." *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (per curiam) (citing *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)).

Section 161.001(b)(1)(D) concerns the child's living environment, rather than the conduct of the parent, though parental conduct is certainly relevant to the child's environment. *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). Under section 161.001(b)(1)(E), the cause of the endangerment must be the parent's conduct and must be the result of a conscious course of conduct rather than a single act or omission. *In the Interest of S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

A parent may endanger a child through a course of conduct that includes both the parent's actions and the parent's omissions or failures to act. *In the Interest of M.J.M.L.*, 31 S.W.3d 347, 350-51 (Tex. App.—San Antonio 2000, pet. denied). Further, it is not necessary that the parent's conduct be directed at the child or that the child actually be injured; rather, a child is endangered when the environment or the parent's course of conduct creates a potential for danger of which the parent is aware but disregards. *In the Interest of S.M.L.*, 171 S.W.3d at 477.

G.L. testified that he and M.L., a long-time heroin and prescription drug user, lived together for four years before he moved to Colorado in November 2013. He testified that he left because of M.L.'s drug use. This testimony was corroborated by Moore, the Department's caseworker, and Sherrill, the children's great-grandmother. In a May 2016 telephone call, when G.L. admitted to Moore that he had left M.L. because she was using drugs, he described her behavior as "crazy" and "psycho." When the children were removed in March 2015, heroin was found in the hall closet and M.L.'s

purse contained heroin and needles. The children told the Department that M.L. used drugs in front of them multiple times. When G.L.'s son, C.L., was born in November 2014, he tested positive for narcotics. In the May 2016 telephone conversation with Moore, G.L. also admitted to a history of personal marijuana usage. During the final hearing, he testified that he was always concerned about the children because he knew M.L. was going down a "bad path."

G.L. contends he repeatedly testified he did not have any knowledge M.L. was using drugs when he went to Colorado because the children were primarily residing with their maternal grandmother when he left, and an investigative report by another Department employee failed to mention that he left for Colorado because of M.L.'s drug use. We defer to the trial court when there are credibility issues and conflicts within the evidence. *In the Interest of T.N.*, 180 S.W.3d at 382-83. Further, even if the children were *primarily* residing with their maternal grandmother as G.L. testified, there remained a period, or periods, of time when the children were in M.L.'s care and they observed her using drugs. It also stands to reason that M.L. cared for the children while she was under the influence of the drugs she used in the children's presence.

Bearing in mind the two principles that drug abuse in a child's home can be a course of endangering conduct and that a parent bears the responsibility to guard against potential dangers in the child's environment, Texas courts have consistently found that a parent's decision to leave a child in the care of a known drug user is relevant to the predicate acts or omissions outlined in section 161.001(b)(1)(D) and (E). *See In the Interest of J.J.*, No. 07-13-00117-CV, 2013 Tex. App. LEXIS 11194, at *12-13 (Tex. App.—Amarillo Aug. 29, 2013, no pet.) (mem. op.) (collected cases cited

therein). *See also In the Interest of J.W.M.*, 153 S.W.3d 541, 548 (Tex. App.—Amarillo 2004, pet. denied). Having examined the entire record, we find that the trial court could reasonably form a firm belief or conviction that G.L. knowingly placed or knowingly allowed his children to remain in conditions or surroundings which endangered their physical or emotional well-being and engaged in conduct that knowingly placed his children with persons who engaged in conduct which endangered their physical or emotional well-being. *See* § 161.001(b)(1)(D), (E). Issues two and three are overruled.

ISSUES FOUR AND FIVE

Having found two statutory grounds supporting termination, any discussion of G.L.'s fourth and fifth issues regarding whether termination is proper under section 161.001(b)(1)(N), (O) is pretermitted. TEX. R. APP. P. 47.1. *See In re K.C.B.*, 280 S.W.3d at 894-95 (only one statutory ground is required to support termination).

ISSUE ONE—SECTION 161.001(b)(2)

By his first issue, G.L. 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.

The Department was required to prove by clear and convincing evidence that termination of G.L.'s parental rights was in the children'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 his 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) (West Supp. 2016). In resolving questions concerning the best interest of a child, section 263.307(b) provides a non-exhaustive list of factors to consider. *Id.* at (b). 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 at 677. 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

In support of his assertion that it is in the best interest of the children to move them to Georgia and live with him, G.L. primarily recycles many of the contentions he made in support of overturning the statutory bases for termination. He points to (1) the absence of testimony of the desires of the children, (2) the lack of emotional or physical danger to the children in Georgia, (3) his completion of a parenting class, and (4) the possibility he may qualify for financial assistance in Georgia.

Although there was no testimony regarding the children's desires, Sherrill testified the children had bonded with her and adjusted to life in her home. She testified that the children seldom, if ever, asked about G.L. or speak of him. G.L. testified he has not seen the children since he moved to Colorado in November 2013, or provided them any support during his absence. As such, the trial court was entitled to find that this evidence weighed against G.L.'s contention.

Furthermore, although he asserts there will be no emotional or physical danger to the children in Georgia, there is no evidence to support this contention. Other than his testimony that he lives with his mother on thirty-two acres in Georgia and he is leaving one job for a better one, there is no evidence that his employment will be stable, the children's living arrangements will be suitable, or the persons with whom the children will come into contact will not endanger them. G.L. is also unfamiliar with C.L.'s special needs and he presented no evidence regarding how he intended to care for C.L. or who would be caring for the children while he was at work. The trial court was also entitled to find that this evidence weighed against G.L.'s contention.

Although G.L. did complete a parenting class, there were many services he did not complete because he preferred to live out-of-state and could not afford necessary services. For instance, he admitted to Moore that he had a history of marijuana usage but failed to complete a drug/alcohol assessment or undergo periodic testing. In addition, his testimony that he *may* qualify for financial assistance in Georgia hardly qualifies as a plan to provide for the needs of the three children, one of whom has special needs.

On the other hand, the testimony showed the children have been living with Sherrill for the past two years and are doing well. She is familiar with C.L.'s disabilities and is providing the care necessary to ensure his condition improves. The children also live with their older siblings and are in a proven environment that is stable and drug-free. In the past two years, Sherrill has supported the children without any assistance from G.L. and she testified the children were happy. Her plan is to adopt the children and continue to care for them.

Accordingly, 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 one is overruled.

CONCLUSION

The trial court's order terminating G.L.'s parental rights to his children, H.L., H.L., and C.L. is affirmed.

Patrick A. Pirtle
Justice