In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00445-CV

IN THE INTEREST OF C.G., A CHILD

On Appeal from the 64th District Court
Swisher County, Texas
Trial Court No. A-12430-16-02, Honorable Robert W. Kinkaid, Jr., Presiding

May 14, 2018

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant, the father of C.G.,[1] appeals the trial court's order terminating his parental rights to C.G. Through three issues, the father challenges the sufficiency of the evidence supporting termination. We will affirm.

Background

In early 2016, the Texas Department of Family and Protective Services filed pleadings that included an original petition for protection of two-year-old C.G., for

[1] To protect the identity of the minor child, the parent will be referred to as "the father" and the child will be referred to as "C.G." TEX. R. APP. P. 9.8(b)(2).

conservatorship, and for termination in a suit affecting the parent-child relationship. The pleadings were filed after a Department family-based safety plan failed to resolve issues that arose from statements the child's mother made to her anger management counselor at MHMR. In March 2016, after a hearing, the trial court appointed the Department C.G.'s temporary managing conservator. The Department took C.G. into its possession, and placed him into foster care where he remained at the time of trial.

After periodic hearings, the case was set for trial on March 15, 2017. That morning, C.G.'s mother executed a voluntarily relinquishment of her parental rights. Her parental rights were terminated on that basis, and she has not appealed.

After the mother's relinquishment, and motions for continuance, a bench trial on the remaining issues in the case was held November 8, 2017. The Department called as witnesses a licensed professional counselor who had seen both the father and the mother; a therapist who had interviewed C.G.; the Department's investigator; the child's mother; the Department's caseworker; the Department's employee who monitored the father's visits with C.G.; and the father. In his case in chief, the father called his sister, and C.G.'s ad litem called Patience White.

The trial court concluded the evidence clearly and convincingly supported the termination of the father's parental rights to C.G. under Family Code sections 161.001(b)(1)(D) and (E) and found by the same standard termination was in C.G.'s best interest. On appeal, the father challenges each of the trial court's findings.

Analysis

Standard of Review and Applicable Law

The Constitution protects "[t]he fundamental liberty interest of natural parents in the care, custody, and management" of their children. *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Holick v. Smith,* 685 S.W.2d 18, 20 (Tex. 1985). Parental rights, however, are not absolute, and courts have recognized it is essential that the emotional and physical interests of a child not be sacrificed merely to preserve the parental rights. *In re C.H.,* 89 S.W.3d 17, 26 (Tex. 2002). 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. *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). Clear and convincing evidence is that measure or degree of proof which 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); *In re C.H.,* 89 S.W.3d at 25-26.

The Texas Family Code permits a trial court to terminate parental rights if the Department proves by clear and convincing evidence that the parent committed an action prohibited under section 161.001(b)(1) and termination is in the child's best interest. TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). Only one predicate finding under section 161.001(b)(1) is necessary to support an order of termination when there is also a finding that termination is in the child's best interest. *In re A.V.,* 113 S.W.3d 355, 362 (Tex. 2003); *In re T.N.,* 180 S.W.3d 376, 384 (Tex. App.—

Amarillo 2005, no pet.). Thus, a termination order may be affirmed if it is supported by legally and factually sufficient evidence of any statutory ground on which the trial court relied for termination, and the best interest finding. *In re E.A.G.,* 373 S.W.3d 129, 141 (Tex. App.—San Antonio 2012, pet. denied).

Under the legal sufficiency analysis, we examine all of the evidence in the light most favorable to the challenged finding, assuming the "factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.,* 96 S.W.3d at 266. We disregard all contrary evidence the factfinder could have reasonably disbelieved or found incredible. *Id.* However, we take into account undisputed facts that do not support the finding, so as not to "skew the analysis of whether there is clear and convincing evidence." *Id.* If the record presents credibility issues, we must defer to the factfinder's determinations provided they are not unreasonable. *In re J.P.B.,* 180 S.W.3d 570, 573 (Tex. 2005).

Evaluation of the factual sufficiency of evidence supporting termination of parental rights requires "an exacting review of the entire record." *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In a factual sufficiency review, we must give due consideration to the evidence the factfinder could reasonably have found to be clear and convincing. *In re C.H.,* 89 S.W.3d at 25. We determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *Id.* In doing so we consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *Id.* If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably

have formed a firm belief or conviction, then the evidence is factually insufficient. *In re J.F.C.,* 96 S.W.3d at 266.

There is a 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). But prompt and permanent placement of a child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West 2015). The best interest analysis evaluates the best interest of the child, not that of the parent. *In the Interest of A.C.B.,* 198 S.W.3d 294, 298 (Tex. App.—Amarillo 2006, no pet.). The following factors are among those the court may consider in determining the best interest of a child: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interests of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holley,* 544 S.W.2d at 371-72. The *Holley* factors "are not exhaustive; some listed factors may be inapplicable to some cases; other factors not on the list may also be considered when appropriate." *In the Interest of D.E.B.,* No. 07-15-00442-CV, 2016 Tex. App. LEXIS 5139, at *14 (Tex. App.—Amarillo May 13, 2016, no pet.) (mem. op.) (citing *In re C.H.*, 89 S.W.3d at 27).

Section 161.001(b)(1)(D) and (E)

The trial court found the father knowingly placed or allowed C.G. to remain in conditions which endangered the child's physical or emotional well-being. TEX. FAM. CODE ANN. § 161.001(b)(1)(D). The trial court also found the father engaged in conduct or knowingly placed C.G. with persons who engaged in conduct which endangered his physical or emotional well-being. TEX. FAM. CODE ANN. § 161.001(b)(1)(E). On appeal, the father contends the evidence is insufficient to establish the statutory grounds for termination found in section 161.001(b)(1)(D) and (E).

The term endangerment means to expose to loss or injury or to jeopardize. *Tex. Dep't of Human Servs. v. Boyd,* 727 S.W.2d 531, 533 (Tex. 1987). While endangerment "means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment," it is not necessary that the conduct creating the endangering conditions be directed at the child or that the child actually suffer injury. *Id.; In re M.C.T.,* 250 S.W.3d 161, 168-69 (Tex. App.—Fort Worth 2008, no pet.).

Subsections (D) and (E) both focus on endangerment. *In re N.M.L.,* No. 07-17-00310-CV, 2018 Tex. App. LEXIS 607, at *14 (Tex. App.—Amarillo Jan. 19, 2018, pet. denied) (mem. op.) (citing *In re B.S.T.,* 977 S.W.2d 481, 484 (Tex. App.—Houston [14th Dist.] 1998, no pet.)). The subsections differ with regard to the source of the physical or emotional endangerment to the child. *Id.* (citation omitted). Subsection (D) focuses on the child's surroundings and environment, and requires for termination that the environment was endangering to the child's physical or emotional well-being. *Id.* Conduct of the parent or another person in the home can create an environment that

endangers the physical or emotional well-being of the child. *Id.* (citation omitted). Under subsection (E), the cause of the danger to the child must be the parent's conduct alone and may be shown by the parent's actions or omissions. *Id.* (citations omitted). The conduct does not have to be directed at the child and the child does not have to be harmed but termination under subsection (E) must be based on more than a single act or omission. *Id.* (citation omitted). Evidence of "a voluntary, deliberate, and conscious course of conduct by the parent is required." *Id.* (citation omitted).

Environment refers to the acceptability of living conditions, as well as a parent's conduct in the home. *In re W.S.*, 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no writ). A child is endangered when the environment creates a potential for danger of which the parent is aware but consciously disregards. *In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.). "Inappropriate, abusive, or unlawful conduct by persons who live in the child's home or with whom the child is compelled to associate on a regular basis in his home is a part of the 'conditions or surroundings' of the child's home" under subsection (D). *Id.*

Application of Law to Facts

Our evaluation of the evidence will focus on subsection (D). As noted, caselaw establishes that endangerment under subsections (D) and (E) means more than "the possible ill effects of a less-than-ideal family environment." *Boyd,* 727 S.W.2d at 533. The trial court here heard evidence supporting a conclusion the household in which C.G. lived was not merely a "less-than-ideal family environment," but was endangering at least to his emotional well-being.

The record shows that the family situation into which C.G. was born, and from which he was removed at the age of two years, was unusual. The father was seventy-one years old at the time of removal; the mother was thirty-two. The father and his wife initially took the mother into their home to help her overcome her drug use and deal with her disability. It is undisputed the father and his wife did much to help the mother. As examples, they paid for her badly-needed dental work, helped her overcome the ill effects of abuse she had suffered, and assisted her to obtain social security disability benefits. The mother suffered from mental illness, took medication to manage her illness, and became violent when she failed to take it. At a point, the record indicates, the father's wife left their home. His relationship with the mother became sexual and he deliberately impregnated the mother. The father told the caseworker he "intentionally bred" the mother "to help her have a purpose to live with the bipolar and schizophrenia."

The mother's tendency toward violence when she did not take her medication remained after the birth of C.G. The counselor's assessment, dated in July 2016, states his opinion that the mother would not "intentionally hurt [C.G.] physically or emotionally if she were med compliant, though if she were off her meds she could be a danger to him (her behavior is erratic and CAN [sic] be violent when she is not taking her meds)." The assessment also stated the mother's judgment was "markedly impaired when she is not on her meds." In her testimony, the mother said that, when angry, she "would hit on [the father] and push him and slap him across his face."

In his own efforts to deal with the mother's violence, the father also resorted to physical restraint. The mother told the court the father on one occasion "knock[ed] me down on the ground" and sat on her until she "calmed down." The counselor's progress

notes also refer to instances in which the father physically restrained the mother when she was "out-of-control." The mother testified also that the father was verbally abusive to her. She said he told her she was "a bitch," "an idiot," and "stupid."

Before his removal, this conduct occurred in front of C.G. Asked if the child witnessed the father's emotional abuse of her, the mother responded affirmatively, and said that witnessing such conduct by his parents was "[b]ad for [C.G.]." She said the child "should not be around when things like that are happening because it's not good for the parents to be fighting in front of a child." She agreed that witnessing such emotional abuse was harmful to the child. The mother told the court also that law enforcement had been called to their home "[a]t least twice" before C.G.'s removal, and "[f]our or five times, maybe more," since then. On those occasions, she said, the calls were caused by her "abusing [the father], hitting on him and slapping him across his face and threatening to kill him and stuff like that, being mean to him."

The father acknowledged that the mother sometimes "goes off the deep end." His methods of restraining and calming the mother included biting on her finger to gain control of her. He explained to the counselor that "pain works" to control behavior. The father recalled one instance in which the mother hit C.G. and "went into one of her fits after she hit him." The father testified he told her, "don't do that unless you want to go one on one with me." The father told the investigator that C.G. would cry when his parents engaged in such altercations. The Department's investigator specifically stated he believed the father was engaging in conduct that was endangering to C.G.

The Department's caseworker testified the mother and father "have a very long history of a very volatile and chaotic relationship" and that she had witnessed some verbal abuse by the father toward the mother. The caseworker told the court that hearing "verbal abuse as a child is extremely detrimental to their emotional development and emotional well-being." The counselor described the relationship between the mother and the father as "[c]onsistently chaotic." Even the father's sister, whose testimony generally was favorable to him, testified she was aware of the violence between the father and the mother.

On appeal, the father cites *In re R.W., E.W., and B.W.*, No. 01-11-00023-CV, 2011 Tex. App. LEXIS 4556 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (mem. op.).[2] In the course of its analysis of the evidence before it, the court pointed out there was no evidence the children suffered from any illness, malnutrition or physical abuse. *Id*. at *34. The father asserts the same is true here. We can agree that the only evidence of a physical consequence to C.G. of his mother's conduct is that on the one occasion the father described in his testimony, when the mother hit C.G. Otherwise, there is no evidence of anything that could be called physical abuse. Nor is there evidence C.G. was ill or malnourished under his parents' care.

The father's argument, however, disregards the language of subsections (D) and (E), which speaks of endangerment to a child's emotional well-being, and disregards the definition of endangerment, which includes conditions or conduct that jeopardizes the

[2] The court's analysis led it to conclude the evidence was factually insufficient to establish termination of a mother's parental rights was in her children's best interest. *In re R.W., E.W., and B.W.,* 2011 Tex. App. LEXIS 4556, at *35.

child's well-being. As noted, the law is clear that proof of conduct creating endangering conditions need not show that the child actually suffered injury. *Boyd,* 727 S.W.2d at 533; *In re M.C.T.*, 250 S.W.3d at 168-69.

The father further cites the language of *In re R.W.* stating the mother's actions in that case were "not due to indifference or malice toward her children." 2011 Tex. App. LEXIS 4556, at *34 (citation omitted). Again, we can agree that the evidence shows that both parents care for C.G., but the trial court was not required to conclude that either parent intended to put C.G. at risk, or that their conduct was directed at the child. *See In re M.C.T.,* 250 S.W.3d at 168-69. The question for the trial court was whether the evidence showed the father *knowingly* placed or allowed C.G. to remain in conditions which endangered his physical or emotional well-being. When the evidence is viewed in the light most favorable to the trial court's decision, we find it was such as to allow a reasonable factfinder to form a firm belief or conviction that C.G. was subjected to conditions that endangered his physical or emotional well-being, and that the father knowingly allowed him to remain there.

In assessing the factual sufficiency of the evidence to support the jury's findings under section 161.001(b)(1)(D) and (E), we review all of the evidence to determine whether the evidence contrary to the court's finding is such as to preclude its satisfaction of the clear-and-convincing standard. *In re J.F.C.,* 96 S.W.3d at 266.

The father contends the July 2016 recommendation by the counselor, to whom the father was referred by the Department, is evidence of such strength that a reasonable factfinder could not reach a firm conviction that conditions in the home were endangering

to C.G. The father refers to the counselor's testimony acknowledging that his July 2016 report recommended reunification. The father's argument is accurate but not complete. The report recommended reunification, but on five conditions. One of the conditions was that the mother "remain med-compliant." The counselor's conditional recommendation at that date thus was not inconsistent with a finding that the home was endangering to C.G. when the mother was not "med-compliant."[3] Too, the counselor's testimony made clear that later events caused him to recommend against family reunification.

We do not perceive in the record any dispute over the erratic and violent nature of the mother's conduct when she failed to take her medication, or over the contentious relationship the parents developed. Both parents and other witnesses testified to those facts. The father might dispute that the violence in the household was endangering to C.G.'s emotional well-being, but the mother did not dispute that fact. She distinctly testified that the fighting and emotional abuse between the parents was harmful to their son. The caseworker and the counselor agreed. Regardless of the sincerity of the father's belief that having a child would be a good thing for the mother, the trial court heard clear and convincing evidence that the result was a chaotic, unstable and unhealthy home environment unsuitable for a small child like C.G. The trial court did not err by resolving any dispute over the endangering nature of the conditions in the home in favor of its finding.

[3] The July 2016 report is the same report as that containing the counselor's assessment the mother "CAN be violent" when she did not take her medication. The report did not address the possibility that C.G. would be reunified only with the father.

There were peripheral issues on which evidence was disputed. After C.G. was removed, but while the mother was still living with him, the father brought into the home another woman, Patience White, who also suffered from some form of mental illness as well as some intellectual disabilities. The mother testified that the father's sexual conduct with White was at times indiscreet. The father strongly denied any impropriety in his sexual conduct. We do not regard resolution of the factual dispute over the sexual conduct to be important in our evaluation of the evidence of endangerment.

The record reflects also disagreement over the import of some of the father's statements. Consistent with the father's demonstrated strong and controlling temperament, he sometimes said he "owned" the mother, and that White was his "servant." The Department's caseworker expressed some alarm at such statements, suggesting they demonstrated a degrading view of people that would be detrimental to C.G. as he grew older. But we think the court could have taken the father's statements to mean only that the mother and White, so long as they lived under his roof, must take their instructions from him. The counselor acknowledged in his testimony that C.G. could benefit from the father's example of taking the mother and White into his home. Asked whether the father's help of the women was a "good example" for C.G., the counselor responded, "it's never bad to show a child that you help other people." Here again, we do not regard it as important to our resolution of appellant's issues on appeal to evaluate whether the father's unusual statements demonstrated attitudes that contributed to an endangering environment for C.G. The evidence demonstrated an endangering environment without regard to the effect of such language.

Having undertaken the required detailed review of the entire record, *In re A.O.,* No. 07-16-00331-CV, 2017 Tex. App. LEXIS 1838, at *4 (Tex. App.—Amarillo Mar. 3, 2017, pet. denied) (mem. op.) (citing *In re A.B.,* 437 S.W.3d at 500), we see nothing in these disputed peripheral issues that the trial court reasonably could not have resolved in favor of its finding of endangerment. The evidence is factually sufficient. *In re J.F.C.,* 96 S.W.3d at 266 (standard for factual sufficiency).

We resolve the father's first and second issues against him.

Best Interest

By his third issue, the father challenges the trial court's finding that it is in C.G.'s best interest that the father's parental rights to him are terminated.

By the time of the final hearing, C.G. was almost three years old. His mother had relinquished her parental rights. He had been with his foster parents for almost twenty months. When a child is too young to express his desires, the factfinder may consider that the child has bonded with the foster family, is well cared for by them, and has spent minimal time with a parent. *In re A.O.,* 2017 Tex. App. LEXIS 1838, at *12 (citing *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.)). The caseworker testified C.G. was doing "spectacularly well." His foster parents expressed a desire to adopt him.[4] The therapist testified C.G. "appeared to be developmentally delayed when he came into this home" but he is now "recognized as being on target both with speech and occupational therapy." He "has grown a tremendous amount in this

[4] The mother testified the foster parents had agreed to permit her to maintain contact with C.G.

home" and he "would hesitate to change that up, it seems to be a healthy placement for the child." The caseworker told the court from her observations with C.G. and from statements he had made to her, C.G. "loves his foster parents very, very much. He loves his foster sister, he refers to them as mom, dad and Sissy." The caseworker told the court that termination of the father's parental rights to C.G. was in the child's best interest so that the child could be adopted.

There was testimony regarding the father's ability to care for C.G. in view of the mother's relinquishment. The mother had moved from the father's home a few weeks before trial. The father has diabetes and sometimes uses a wheelchair to avoid standing for long periods. The father said he is physically able to raise C.G. but hoped Patience White would stay to help him. He said if she leaves, he will "move another woman in." White testified she performs the household tasks and said "I don't know" when asked whether she was willing to be the primary caregiver for C.G.

The caseworker testified that from her observations the father did not appear capable of caring for C.G. The visitation supervisor expressed similar concerns.[5]

The father's sister testified she had observed the father and mother interact with C.G. and those interactions were "positive." C.G. appeared clean and dressed appropriately. She also stated she did not see the father take any inappropriate physical or verbal action against C.G. She agreed the father and C.G. appeared to have a bond.

[5] In a progress note written before the mother's relinquishment, the counselor expressed his doubt that the father understood "just how difficult" raising C.G. would be, at the father's age and with the mother's mental health issues. Nothing in the record suggests that raising the child without his mother would be any less difficult.

But she also testified she did not know whether the father could care for C.G. and said he would need someone like White there to help him.

The mother testified she did not believe the father had the ability to care for the child. Asked whether the father was capable or able to care for C.G. as a parent, she said, "in my heart, no, I don't think he can."

The father testified to his desire to have C.G. returned to him. The father told the court his home was ready for C.G.'s return, he had a bedroom ready, and had food and toys. But when asked whether he believed it would be best for C.G. to return to him instead of staying with the foster parents, the father said, "I have no opinion on that. This is a win win for [C.G.]. If I don't get him back he'll live with some damn good people. If I get him back he'll be with some damn good people."

The record contains some evidence of the father's efforts to secure the return of C.G. The caseworker acknowledged that the father had completed some of the services required for return. But both the caseworker and the counselor testified the father saw the services as a "joke." Neither believed the father had used the services to make a better life for his child, and neither felt the father demonstrated an ability to protect and parent C.G. In his progress notes, the counselor observed he did not believe the father will "change the way he thinks, perceives or behaves."

Although there was evidence contrary to a finding termination was in the child's best interest, there was strong evidence in favor of that finding. We conclude any evidence that the court could not have credited in favor of its best interest finding was not so significant as to make its finding unreasonable. *See In re J.F.C.,* 96 S.W.3d at 266.

The evidence is legally and factually sufficient to support the trial court's finding that termination of the father's parental rights was in the best interest of C.G. We overrule the father's third issue.

Conclusion

Having resolved each of the father's issues against him, we affirm the order of the trial court.

James T. Campbell
Justice