TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00137-CV

D. M., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 146TH JUDICIAL DISTRICT
NO. 282,662-B, HONORABLE CHARLES H. VAN ORDEN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

D.M. appeals from the trial court's order terminating his parent-child relationship with his daughter, J.N.[1] In two issues, D.M. contends that the evidence is legally and factually insufficient to support the termination of his parental rights. We will affirm the trial court's order terminating D.M.'s parental rights.

[1] To protect the privacy of the parties, we refer to the child and her father by their initials. *See* Tex. Fam. Code § 109.002(d).

BACKGROUND[2]

In January 2016, the Texas Department of Family and Protective Services (the Department) received a report that a drug screen of newborn J.N. was positive for marihuana, cocaine, and amphetamines. A few days later, the trial court appointed the Department as J.N.'s temporary managing conservator. In April 2016, the trial court found that D.M. was J.N.'s father based on the results of paternity testing.

The Department sought termination of the parent-child relationship between J.N. and her parents, and the trial court held a final hearing in January 2017. At the hearing, the Department presented evidence of D.M.'s criminal history and also presented evidence that he was incarcerated at the time of the hearing. At the conclusion of the hearing, the trial court found by clear and convincing evidence that D.M. "engaged in conduct and knowingly placed the child with persons who engaged in conduct which endangers the physical and emotional well-being of the child." The court further found by clear and convincing evidence that termination of D.M.'s parental rights was in J.N.'s best interest. The trial court therefore terminated the parent-child relationship between D.M. and J.N.[3] This appeal followed.

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[2] The facts recited in this opinion are taken from testimony and exhibits presented at the final termination hearing and are undisputed on appeal. Although we have considered the entire record, because this is a memorandum opinion affirming the trial court's termination order, we do not exhaustively detail the evidence. *See* Tex. R. App. P. 47.4 ("If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it."); *In re A.B.*, 437 S.W.3d 498, 507 (Tex. 2014) (holding courts of appeals need not detail the evidence when affirming termination findings).

[3] The trial court also terminated the parent-child relationship between J.N. and J.N.'s mother. J.N.'s mother is not a party to this appeal.

DISCUSSION

To terminate the parent-child relationship, a court must find by clear and convincing evidence that: (1) the parent has committed one of the enumerated statutory grounds for termination and (2) it is in the child's best interest to terminate the parent's rights. Tex. Fam. Code § 161.001(b). D.M. contends that the evidence is legally and factually insufficient to support the termination of his parental rights. "The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). When reviewing the legal sufficiency of the evidence in a parental-rights-termination case, we consider all the evidence in the light most favorable to the trial court's finding and determine whether a reasonable fact-finder could have formed a firm belief or conviction that its finding was true. *See id.*; *see also In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014). When reviewing the factual sufficiency of the evidence, we view all of the evidence in a neutral light and determine whether a reasonable fact-finder could form a firm belief or conviction that a given finding was true. *In re C.H.*, 89 S.W.3d 17, 18–19 (Tex. 2002). We assume that the fact-finder resolved disputed facts in favor of its finding if a reasonable person could do so, and we disregard evidence that a reasonable fact-finder could have disbelieved or found incredible. *In re J.F.C.*, 96 S.W.3d at 266. Evidence is factually insufficient only if a reasonable fact-finder could not have resolved the disputed evidence in favor of its finding and if that disputed evidence is so significant that the fact-finder could not reasonably have formed a firm belief or conviction that its finding was true. *Id.*

Statutory Ground for Termination

The trial court found by clear and convincing evidence that D.M. "engaged in conduct and knowingly placed the child with persons who engaged in conduct which endangers the physical and emotional well-being of the child." *See* Tex. Fam. Code § 161.001(b)(1)(E). In his first issue, D.M. challenges the sufficiency of the evidence supporting the trial court's findings under subsection (E).

Subsection (E) requires proof of child endangerment, i.e., exposing a child to loss or injury or jeopardizing a child's emotional or physical well-being. *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Endangerment does not need to be established as an independent proposition but may be inferred from parental misconduct alone. *Id.* To constitute endangerment under subsection (E), the parent's conduct need not be directed at the child. *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012). Conduct may endanger a child even if it does not cause the child to suffer actual injury. *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (quoting *Boyd*, 727 S.W.2d at 533).

A parent's illegal drug use may constitute endangerment under subsection (E). *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) ("[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct."); *In re M.C.*, 482 S.W.3d 675, 685 (Tex. App.—Texarkana 2016, pet. denied) ("Because it exposes the child to the possibility that the parent may be impaired or imprisoned, illegal drug use may support termination under [subsection (E)]."") (internal quotation marks omitted); *T.M. v. Texas Dep't of Family & Protective Servs.*, No. 03-14-00784-CV, 2015 WL 3393943, at *2 (Tex. App.—Austin

May 21, 2015, no pet.) (mem. op.) ("It is well-established that a parent's illegal drug use may constitute endangerment."); *Walker v. Texas Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("Because it exposes the child to the possibility that the parent may be impaired or imprisoned, illegal drug use may support termination under [subsection (E)].").

Moreover, although a parent's incarceration, standing alone, will not support a finding of endangerment, the trial court may consider it as a factor in determining whether the parent has engaged in a course of conduct that endangers the child. *See In re M.C.*, 482 S.W.3d at 685 ("[W]hile we recognize that imprisonment, standing alone, is not conduct which endangers the physical or emotional well-being of the child, intentional criminal activity which expose[s] the parent to incarceration is relevant evidence tending to establish a course of conduct endangering the emotional and physical well-being of the child.") (internal quotation marks omitted); *In re B.C.S.*, 479 S.W.3d 918, 926 (Tex. App.—El Paso 2015, no pet.) ("Evidence of criminal conduct, convictions, and imprisonment and its effect on a parent's life and ability to parent may establish an endangering course of conduct."); *In re M.D.S.*, 1 S.W.3d 190, 199 (Tex. App.—Amarillo 1999, no pet.) ("If the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under [subsection (E)] is supportable.").

A parent's criminal background is particularly relevant if it demonstrates a tendency towards violence, especially violence against family members. *See D.N. v. Texas Dep't of Family & Protective Servs.*, No. 03-15-00658-CV, 2016 WL 1407808, at *2 (Tex. App.—Austin Apr. 8,

2016, no pet.) (mem. op.) ("[D]omestic violence may constitute endangerment, even if the violence is not directed at the child."); *In re A.A.*, No. 06-14-00060-CV, 2014 WL 5421027, at *3 (Tex. App.—Texarkana Oct. 23, 2014, no pet.) (mem. op.) ("Domestic violence, want of self-control, and the propensity for violence may be considered as evidence of endangerment."); *In re T.G.R.-M.*, 404 S.W.3d 7, 14 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Another factor that may contribute to an environment that endangers a child's well-being is a parent's abusive or violent criminal conduct . . . . Evidence that a parent previously has engaged in abusive conduct allows an inference that the parent's violent behavior will continue in the future."); *In re S.M.*, 389 S.W.3d 483, 492 (Tex. App.—El Paso 2012, no pet.) ("Evidence that a person has engaged in abusive conduct in the past permits an inference that the person will continue violent behavior in the future.").

When determining whether a parent has engaged in an endangering course of conduct, a court may consider the parent's actions and inactions that occurred both before and after the child was born. *See In re M.C.*, 482 S.W.3d at 685 ("The conduct to be examined includes what the parent did both before and after the child was born.") (internal quotation marks omitted); *In re B.C.S.*, 479 S.W.3d at 926 (same); *In re S.M.*, 389 S.W.3d at 491–92 ("[I]n considering whether a relevant course of conduct has been established, a court properly may consider both actions and inactions occurring both before and after a child's birth."); *In re C.A.B.*, 289 S.W.3d 874, 886 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("If a parent abuses the other parent or children, that conduct can support a finding of endangerment even against a child who was not yet born at the time of the conduct."); *In re M.J.M.L.*, 31 S.W.3d 347, 351 (Tex. App.—San Antonio 2000, pet. denied) ("[W]hile knowledge of paternity is a prerequisite to a showing of knowing placement of a child in

an endangering environment, it is not a prerequisite to a showing of a parental course of conduct which endangers a child under [subsection (E)]."); *In re M.D.S.*, 1 S.W.3d at 198 ("A father's conduct prior to the establishment of his paternity can be considered under [subsection (E)].").

Here, the Department presented uncontested evidence of D.M.'s criminal history, which included the following events, among others:

- October 1996: arrest for possession of marihuana, deferred
- August 2001: conviction for "man del sell/possession of a controlled substance"
- December 2001: conviction for "man del sell/possession of a controlled substance"
- April 2002: conviction for criminal mischief
- September 2003: arrest for assault causing bodily injury to a family member, deferred
- July 2004: arrest for assault causing bodily injury to a family member, dismissed
- August 2004: conviction for evading arrest/detention, driving without a valid license, "man del sell/possession of a controlled substance," and "abandonment/endangering a child with criminal negligence"
- June 2007: conviction for "man del sell/possession of a controlled substance"
- September 2007: conviction for "man del sell/possession of a controlled substance" and evading arrest
- September 2009: conviction for assault causing bodily injury to a family member
- June 2011: conviction for criminal mischief
- June 2012: conviction for driving while intoxicated

- September 2013: conviction for harassment of a public servant and resisting arrest
- July 2015: arrest for possession of a controlled substance and aggravated assault with a deadly weapon
- July 2016: conviction for evading arrest or detention with a vehicle, enhanced to a second-degree felony

This evidence shows that D.M. has persistently engaged in criminal activity since he was a juvenile.[4] In addition to numerous drug offenses, D.M. has been convicted of evading and resisting arrest, criminal mischief, family violence, and "abandonment/endangering a child with criminal negligence." He also has additional arrests for family violence.

From this evidence of D.M.'s history of extensive drug use and violence, the trial court could have reasonably inferred that D.M.'s course of dangerous and illegal conduct will continue in the future. *See In re T.G.R.-M.*, 404 S.W.3d at 14; *In re S.M.*, 389 S.W.3d at 492. The trial court could have further concluded that this course of conduct endangered J.N. because, among other things, D.M.'s frequent criminal activity would constantly expose him to the risk of being incarcerated and therefore unable to provide for J.N. and be present in her life. *See In re M.C.*, 482 S.W.3d at 685. Indeed, D.M. was imprisoned a few months after learning that he is J.N.'s biological father and remained incarcerated at the time of the final termination hearing. Although the Department presented no evidence that D.M. has committed any crimes since learning of J.N.'s existence, it did present evidence that D.M. failed to submit to required drug testing, and

[4] The record indicates that D.M. was born in 1982.

the trial court could have inferred from this that D.M. would have tested positive for controlled substances. *See In re C.A.B.*, 289 S.W.3d at 885 ("A factfinder reasonably could infer that Aja's failure to submit to the court-ordered drug screening indicated she was avoiding testing because she was using drugs.").

In light of the entire record before us, we conclude that the trial court could have reasonably formed a firm belief that D.M. "engaged in conduct . . . which endanger[ed] the physical or emotional well-being" of J.N. *See* Tex. Fam. Code § 161.001(b)(1)(E); *see also In re A.A.*, 2014 WL 5421027, at *4 ("Here, the evidence paints a picture of a long history of irresponsible choices which were ultimately detrimental to the emotional and physical well-being of Scott's children."); *In re V.V.*, 349 S.W.3d 548, 555 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)[5] ("A life of crime—based on the number of crimes, the frequency of their commission, and repeated incarcerations over a decade—is evidence from which a reasonable fact finder could infer endangerment to a child committed to the offender's care."). We also conclude, viewing all of the evidence in a neutral light, that the trial court could have reasonably formed a firm belief or conviction that D.M. had endangered J.N. We further determine that there was no disputed evidence so significant that the trial court could not reasonably have formed a firm belief or conviction that

[5] In its appellate brief, the Department notes that *In re V.V.* "was 'petition denied' by the [Texas] Supreme Court" and states that the opinion "has precedential value from the Texas Supreme Court." The Department is mistaken. A case in which the Texas Supreme Court denies the petition for review does *not* have the force of Texas Supreme Court precedent. *See The Greenbook: Texas Rules of Form* Appendix D (Texas Law Review Ass'n ed., 12th ed. 2010) (noting that "Petition denied" indicates that "[t]he Texas Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects" while "Petition refused" indicates that "[t]he opinion of the court of appeals has the same precedential value as an opinion of the Texas Supreme Court").

its finding was true. Therefore, we conclude that the evidence is legally and factually sufficient to support the termination of D.M.'s parental rights under subsection (E). Accordingly, we overrule D.M.'s first issue.

Best Interest of the Child

In his second issue, D.M. challenges the sufficiency of the evidence supporting the trial court's best-interest finding. In a parental-rights-termination case, the best interest of the child is assessed using a non-exhaustive list of factors. *See In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). These factors include (1) the child's wishes, (2) the child's emotional and physical needs now and in the future, (3) emotional or physical danger to the child now and in the future, (4) the parenting abilities of the parties seeking custody, (5) programs available to help those parties, (6) plans for the child by the parties seeking custody, (7) the stability of the proposed placement, (8) the acts or omissions of the parent which indicate that the existing parent-child relationship is not proper, and (9) any excuses for the acts or omissions of the parent. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The Department need not prove all nine *Holley* factors as a "condition precedent" to termination, and the absence of some factors does not bar the fact-finder from determining that termination is in the child's best interest. *In re C.H.*, 89 S.W.3d at 27. While no one factor is controlling, the presence of a single factor may be adequate in a particular situation to support a finding that termination is in the child's best interest. *In re J.O.C.*, 47 S.W.3d 108, 115 (Tex. App.—Waco 2001, no pet.), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d at 267 n.39.

We conclude that the *Holley* factors weigh in favor of a determination that the termination of D.M.'s parental rights is in J.N.'s best interest. As discussed above, the trial court could have inferred from D.M.'s extensive criminal history, which includes family violence, that D.M. would be unable to provide a safe home for J.N. in the future. We also note that the most recent status report in the record indicates that D.M. did not attend all court hearings pertaining to his case, he was incarcerated, he had not yet made any of the court-ordered child-support payments, he had "not drug tested since the inception of this case," he had not submitted to a drug and alcohol assessment, he did not complete a psychological evaluation or counseling, and he had not contacted the caseworker since being incarcerated. In addition, the Department presented evidence that J.N. is now in a stable placement with a caretaker who is willing to adopt J.N. and who has no criminal history.

In light of the entire record before us, we conclude that the trial court could have reasonably formed a firm belief or conviction that it is in J.N.'s best interest for D.M.'s parental rights to be terminated, that the court could have reasonably resolved disputed evidence in favor of its finding, and that any disputed evidence is not so significant that the court could not reasonably have formed a firm belief or conviction that its finding was true. Therefore, we conclude that the evidence is legally and factually sufficient to support the trial court's finding that the termination of D.M.'s parental rights is in J.N.'s best interest. Accordingly, we overrule D.M.'s second issue.

CONCLUSION

We affirm the trial court's order terminating D.M.'s parent-child relationship with J.N.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: June 13, 2017