TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00184-CV

K. C., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 261ST JUDICIAL DISTRICT
NO. D-1-FM-16-001629, HONORABLE TIM SULAK, JUDGE PRESIDING

MEMORANDUM OPINION

K.C. appeals from the trial court's final order terminating his parental rights to his child.[1] *See* Tex. Fam. Code § 161.001. In support of its petition to terminate K.C.'s parental rights, the Texas Department of Family and Protective Services (the Department) alleged that K.C. (1) constructively abandoned his child and (2) failed to comply with the terms of a court order that established the specific actions K.C. had to take to achieve reunification with his child. *See id.* § 161.001(b)(1)(N), (O). The Department also alleged that termination of K.C.'s parental rights was in the child's best interest. *See id.* § 161.001(b)(2). Following a bench trial, the trial court found that clear and convincing evidence supported both statutory grounds for terminating K.C.'s parental rights and that termination was in the child's best interest.

[1] The mother of the child voluntarily relinquished her parental rights. The child was about eleven months old at the time of the termination hearing.

On appeal, K.C. asserts that the evidence is legally and factually insufficient to support the trial court's order of termination. He first argues that the evidence did not establish that he constructively abandoned his child because, he contends, the Department did not make reasonable efforts to return the child to him or the child's relatives. *See id.* § 161.001(b)(1)(N). He next argues that his failure to comply with the court-ordered family-service plan cannot support termination because he was incarcerated throughout the duration of proceeding, which he claims prevented him from complying with the plan. *See id.* § 161.001(b)(1)(O). We will affirm.

STANDARD OF REVIEW

In proceedings involving the termination of parental rights, the Department must establish one of the grounds listed under Texas Family Code section 161.001(b)(1) and prove that termination is in the best interest of the child. *Id.* § 161.001(b); *C.B. v. Texas Dep't of Family & Protective Servs.*, 440 S.W.3d 756, 767 (Tex. App.—El Paso 2013, no pet.). A trial court's decision to terminate a parent's rights to his child must be supported by clear and convincing evidence. Tex. Fam. Code § 161.206(a); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). This heightened standard of review is required because termination of parental rights results in severe and permanent changes to the parent-child relationship, implicating due process. *In re E.A.G.*, 373 S.W.3d 129, 140 (Tex. App.—San Antonio 2012, pet. denied).

In conducting a legal-sufficiency review of a trial court's findings, we consider "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (quotations omitted). In conducting a factual-sufficiency review, we review the

entire record and will uphold a finding unless "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" that the Department's allegations are true. *In re A.B.*, 437 S.W.3d 498, 502-03 (Tex. 2014) (quotations omitted).

DISCUSSION

We first review the sufficiency of the evidence supporting the trial court's finding that K.C. "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the subject Child[.]" *See* Tex. Fam. Code § 161.001(b)(1)(O).

Department caseworker Dijon Mitchell testified that K.C. did not comply with any of the requirements of the court-ordered family-service plan. Specifically, she testified that K.C. had not completed a parenting class; had not completed a psychological evaluation; had not submitted to random drug testing; had not participated in individual counseling; and had not submitted to a drug-and-alcohol assessment. Once the Department presented evidence that K.C. had not complied with the service plan, it became K.C.'s burden to rebut that evidence. *See Thompson v. Texas Dep't of Family & Protective Servs*., 176 S.W.3d 121, 127 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), *overruled on other grounds by Cervantes–Peterson v. Texas Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 252 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

K.C. concedes that he did not comply with the service plan. But he argues that his noncompliance cannot support termination because he was incarcerated throughout the duration of the proceedings and thus, he contends, was unable to comply with the plan. His argument, therefore,

does not raise a factual dispute as to his compliance, but is instead in the nature of a defense or excuse for his failure to comply with any of the requirements. *See In re C.M.C.*, 273 S.W.3d 862, 875 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Court-ordered family-service plans are essential "to resolv[ing] barriers to [the] safety" of children who have suffered abuse or neglect. *See* House Comm. on Human Services, Bill Analysis, Tex. S.B. 6, 79th Leg., R.S. (2005). Accordingly, Texas courts generally take a strict approach to application of subsection 161.001(b)(1)(O), which permits termination if a parent fails to comply with any requirement of a court-ordered family-service plan. *In re J.M.T.*, 519 S.W.3d 258, 267 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (quotations omitted). Numerous courts, including this Court, have observed that subsection (O) does not "make a provision for excuses" for the parent's failure to comply with those requirements. *See, e.g., In re S.Y.*, 435 S.W.3d 923, 928 (Tex. App.—Dallas 2014, no pet.); *In re C.M.C.*, 273 S.W.3d at 874-75; *In re T.N.F.*, 205 S.W.3d 625, 631 (Tex. App.—Waco 2006, pet. denied)*, overruled in part on other grounds by In re A.M.*, 385 S.W.3d 74, 79 (Tex. App.—Waco 2012, pet. denied); *G.H. v. Texas Dep't of Family & Protective Servs*., No. 03-16-00157-CV, 2016 WL 4429945, at *4 (Tex. App.—Austin Aug. 17, 2016, pet. denied) (mem. op.). The burden of complying with a court order is on the parent, even if the parent is incarcerated. *Thompson*, 176 S.W.3d at 127 ("To require [the Department] to continually inquire as to a prisoner's efforts and accomplishments in regard to a service plan is not reasonable."); *see also In re B.L.D.-O.*, No. 13-16-00641-CV, 2017 WL 929486, at *4 (Tex. App.—Corpus Christi Mar. 9, 2017, no pet.) (mem. op.); *In re M.R.*, No. 11-13-00029-CV,

2013 WL 3878584, at *6 (Tex. App.—Eastland July 25, 2013, no pet.) (mem. op.). Incarceration, therefore, is not a legal excuse or defense to a parent's failure to comply with a service-plan order.[2]

Even assuming that impossibility is a defense to compliance, K.C. did not present evidence, at the termination hearing, that incarceration rendered his compliance with all of the provisions of the service plan impossible. Rather, the record supports the trial court's finding that "there were services available to [K.C.] during his incarceration." Specifically, Mitchell testified that applicable services were available at the correctional facility where K.C. was incarcerated. She confirmed that the Department routinely recognizes certificates of completion of services completed during incarceration. In fact, K.C. testified that he had previously participated in one such program (a substance-abuse program), but did not complete the program because it "is not for me." K.C. presented no evidence of good-faith but unsuccessful attempts to comply with the requirements of the court-ordered service plan.[3] Therefore, this is not a case of "a parent's imperfect compliance with the plan." *Cf. In re S.M.R.*, 434 S.W.3d 576, 584 (Tex. 2014). K.C. did not merely "fall short

[2] We note, however, that a parent's incarceration is a fact that the factfinder may consider in determining compliance under subsection (O). *See In re S.M.R.*, 434 S.W.3d 576, 584 (Tex. 2014) ("[W]hether a parent has done enough under the family-service plan to defeat termination under subpart (O) is ordinarily a fact question."); *In re A.J.L.*, No. 04-14-00013-CV, 2014 WL 4723129, at *5 (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (mem. op.) (holding that record did not support termination where evidence showed that, "up until the time Mother was incarcerated for a violation of her probation, she was in compliance with her service plan" and no evidence was presented that services were available to mother while incarcerated).

[3] The record does contain some evidence that K.C. could not have complied with certain requirements of the plan while incarcerated. But to the extent that the record contains conflicting testimony about whether compliance was possible, the trial court was free to resolve that conflict in favor of the Department. *See In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). Further, the record does not contain evidence establishing that compliance with all of the plan's requirements was impossible, and termination may be supported by failure to comply with any requirement. *See In re J.M.T.*, 519 S.W.3d 258, 267 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

of strict compliance with a family-service plan's requirements"; he failed to comply with any of the plan's requirements. *Cf. id*. The record further shows that K.C. did not seek modification of or relief from the court-ordered service plan on the basis of impossibility at any time prior to the termination hearing when modifications or relief, if necessary, could have been ordered.

Based on our review of the entire record, we conclude that the evidence is legally and factually sufficient to support termination of K.C.'s parental rights under subsection 161.001(b)(1)(O) for his failure to comply with any of the requirements of the court-ordered family-service plan.[4] *See* Tex. Fam. Code § 161.001(b)(1)(O). Because the evidence is legally and factually sufficient under subsection (O), we need not address the other statutory ground for termination that K.C. challenges on appeal. *See id*. § 161.001(b)(1)(N); *see also In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (holding that sufficient proof of one statutory termination ground, with finding that termination is in child's best interests, is sufficient to support termination order); Tex. R. App. P. 47.1 (requiring court of appeals to hand down written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of appeal). Accordingly, we will not summarize the evidence supporting the trial court's constructive-abandonment findings under subsection (N), although we note that our review of the entire record shows that those findings are supported as well. *See* Tex. Fam. Code § 161.001(b)(1)(N); *G.H.*, 2016 WL 4429945, at *4.

[4] K.C. does not dispute that the child had been in the temporary managing conservatorship of the Department for not less than nine months as a result of the child's removal for abuse or neglect, and the record supports that finding. *See* Tex. Fam. Code § 161.001(b)(1)(O). K.C. also does not challenge the trial court's best-interest finding. *See id*. § 161.001(b)(2).

CONCLUSION

We affirm the judgment of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: August 17, 2017