TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00229-CV

C. S., Appellant

v.

Texas Department of Family & Protective Services, Appellee

FROM THE DISTRICT COURT OF BURNET COUNTY, 424TH JUDICIAL DISTRICT
NO. 45276, HONORABLE CHERYLL MABRAY, JUDGE PRESIDING

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

Appellant C.S. ("Charles") appeals the trial court's order terminating his parental rights to his child, N.S. ("Nicole").[1] In six issues, Charles challenges the trial court's taking judicial notice of the file and the legal and factual sufficiency of the evidence supporting the trial court's termination of his parental rights. *See* Tex. Fam. Code § 161.001(b)(1), (2). We will affirm the judgment of the trial court.

BACKGROUND

Charles and K.P. ("Kelly") are the parents of Nicole, born in May 2015.[2] On February 20, 2016, Charles and Kelly were involved in a domestic disturbance while at a hotel in

[1] To preserve the parties' privacy and for convenience, we refer to the child, her parents, and her foster family by fictitious names. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

[2] Kelly's parental rights were also terminated in the underlying suit, but she is not a party to this appeal.

Marble Falls. Local police were called to the scene, and Charles reported that Kelly was suffering from mental-health issues and that she had physically attacked him while he was holding Nicole, who was approximately eight months old at the time. Kelly was arrested, and Charles's aunt, S.R. ("Sandra"), picked up Nicole from the hotel the night of the incident. Nicole remained with Sandra after the incident at the hotel. The Texas Department of Family and Protective Services ("TDFPS") was notified of the disturbance after Kelly's arrest. While Sandra was caring for the child, she asked Charles and Kelly for the child's medical-insurance information. Although they told Sandra that Nicole had Medicaid coverage, the coverage had lapsed several months earlier in December 2015.

During TDFPS's initial investigation, Kelly and Charles submitted to drug testing. Kelly tested positive for methamphetamine, while Charles had a negative result. The investigator indicated that there was some time prior to the test that Charles was "not under supervision," and "there was some intimation he had perhaps done something that might have caused the drug test to be negative." That same day, TDFPS took possession of Nicole under Chapter 262 of the Texas Family Code, though the child remained in Sandra's care. *See* Tex. Fam. Code § 262.104 (taking possession of child without court order). On May 4, 2016, TDFPS filed its original petition and a sworn affidavit from a TDFPS employee, Ann Sharp, which detailed the factual allegations against Kelly and Charles and their history with the Department. After a hearing,[3] the trial court entered temporary orders on May 11, 2016 placing the child in the custody of TDFPS. Kelly and Charles were not served and did not receive notice of the hearing prior to the temporary orders.

[3] No record of this hearing is included as part of the appellate record before us. However, the order states that the court made its findings based on "the facts contained [in the affidavit] and the evidence presented to this Court at the hearing."

In the temporary orders, the trial court found that "there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession," "that it is contrary to the welfare of [Nicole] to remain in the home," and that "there was a substantial risk of continuing danger if [Nicole] is returned home." The court also ordered that, in order to obtain the return of Nicole, Charles had to submit to a psychological or psychiatric evaluation, attend counseling sessions and parenting classes, submit to a drug-and-alcohol dependency assessment, comply with TDFPS's service plan, and provide TDFPS with other relevant information. The order also denied Charles visitation rights until he had shown proof of three clean drug tests.

The trial court conducted an additional status hearing on June 21, 2016, at which both parents appeared, and again the trial court ordered Charles to show proof of three clean drug tests in order to regain visitation rights. The trial court subsequently conducted permanency hearings on September 6, 2016, November 1, 2016, and December 6, 2016. After the September hearing, Charles and Kelly were ordered to pay child support in the amount of $120 each, which was to be paid to the attorney ad litem to be forwarded to Sandra. TDFPS filed Charles's signed service plan with the court on December 6, 2016, though it had been signed by Charles on October 6, 2016.

On February 21, 2017, the trial court held a bench trial at which neither Charles nor Kelly appeared in person.[4] The trial court asked where the parents were, and Court Appointed Special Advocate (CASA) Kim Singleton stated that Charles was in Travis County Jail. During the trial, the court heard testimony from Charles's TDFPS caseworker, Tanner Rice, who testified that

[4] Both parents were represented by appointed attorneys during the trial.

he had prepared a service plan and reviewed it with Charles in October 2016. The service plan included requirements that Charles abide by court orders, provide proof of appropriate housing, attend all court hearings, participate in individual therapy, complete a drug assessment, participate in parenting classes, submit to a psychological evaluation, and submit to weekly random drug testing. Rice further testified that he had not spoken to Charles since approximately October or November 2016 and that Charles had not completed any of the requirements ordered by the trial court or those laid out in the service plan. He admitted that Charles had sent "a few responses via text," but stated that Charles never responded to Rice's requests to tell him when he was available to meet. Rice further stated that he was unaware of Charles's current address, job, or housing situation. In addition to his testimony about Charles's actions, Rice testified about Nicole and about Sandra's care of her. He stated that Nicole was very comfortable in her placement and was adapting well. Rice also stated that Sandra wanted to adopt Nicole and that adoption would be in her best interest. As for Charles's support of Nicole during the pendency of the case, Rice testified that Charles had not provided any child support to Sandra nor did he provide any other items to assist with the care of the child. Rice stated that he had spoken with Sandra the week before trial, who told him that Charles was in jail "because there was some kind of domestic" with Kelly and that "there's just too much drama going on there and there's just—there's no stability . . . ." In response to a question from the court, Rice further stated that Sandra did not communicate with Charles during the case.

The trial court then heard testimony from CASA representative Melanie Huff. Huff echoed Rice's testimony that Nicole was doing well in Sandra's care and stated that Nicole was attached to Sandra as well as the wider family, including Charles's mother, who regularly visited.

Huff also testified briefly about the incident at the hotel between the parents, stating that her understanding from Sharp's affidavit was that Kelly attacked Charles and that Charles "was trying to get [Nicole] away from her and lifting her away." She further stated that Charles contacted Sandra, who came to pick up Nicole from the scene. On cross-examination, Huff testified that Charles was trying to protect Nicole from Kelly at the time, that Charles's only drug test result had been negative, and that "other than that Charles hasn't done all of the things in his service plan," she did not know of anything that he had done to put Nicole in danger. She later testified that Charles and Kelly had allowed Nicole's Medicaid coverage to lapse but that Sandra had gotten it reinstated at some point later. She further opined that it would endanger Nicole if "she didn't have the appropriate way to get medical care at the time as needed." Huff stated that Nicole had "some breathing issues" for which she used a breathing device and that she would be a good candidate for Early Childhood Intervention (ECI) services due to some behavioral issues. Huff also testified that Charles's mother regularly visited Nicole, that Nicole had a wide family to whom she had become attached, and that she believed it would be in Nicole's best interest to have her parents' parental rights terminated so that Sandra could adopt her and "move forward."

After hearing testimony and taking judicial notice of the court's file, the trial court terminated Charles's parental rights to Nicole, finding that Charles had committed violations of Texas Family Code subsections 161.001(b)(1)(D), (E), (N), and (O) and that termination of his parental rights was in Nicole's best interest. This appeal followed.

DISCUSSION

The trial court found that termination was appropriate based on four statutory grounds in section 161.001 of the Texas Family Code and that termination was in the best interest of the child. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (N), (O). On appeal, Charles first asserts that the court improperly took judicial notice of the file, including an affidavit attached to TDFPS's petition. In his remaining five issues, Charles further contends that the evidence was legally and factually insufficient to support the trial court's findings on any of the four grounds and its finding that terminating his parental rights was in the child's best interest.

Standard of Review

To terminate the parent–child relationship, there must be clear and convincing evidence that the parent committed one or more of the acts specifically set forth in Texas Family Code section 161.001(b)(1) and that termination is in the child's best interest. *See* Tex. Fam. Code § 161.001(b)(1), (2); *see also Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987) (both elements must be established). Evidence is clear and convincing if it "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 § 101.007. Due process demands this heightened standard because of the fundamental interests at issue. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

On appeal, we apply a standard of review that reflects this clear-and-convincing burden of proof. *Id.* at 264–66. When reviewing the legal sufficiency of the evidence supporting termination, we consider all of the evidence in the light most favorable to the termination finding and determine whether a reasonable factfinder could have formed a firm conviction that the finding

was true. *Id.* at 266. In reviewing the factual sufficiency of the evidence, we must give due consideration to evidence that a factfinder could reasonably have found to be clear and convincing. *Id.* (citing *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). We must also consider the disputed evidence and determine whether a factfinder could have reasonably resolved that evidence in favor of the finding. *Id.* We must give due deference to the fact finder's findings and not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Judicial Notice

In his first issue, Charles asserts that the trial court erred when it took judicial notice of the court's file. Specifically, Charles contends that the trial court improperly took judicial notice of the facts included in the affidavit of Ann Sharp, which was attached to TDFPS's petition, and "the reasons for removal."

"A trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed." *In re J.E.H.*, 384 S.W.3d 864, 870 (Tex. App.—San Antonio 2012, no pet.). As such, a court may take judicial notice that a pleading has been filed in the case, that it has signed an order, or of the law of another jurisdiction. *Id.*; *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.—Austin 1994, no writ). A court may not take judicial notice of the truth of allegations in its records. *See In re J.E.H.*, 384 S.W.3d at 870 (holding trial court could not take judicial notice of allegations caseworker made in family service plan or in affidavit attached to TDFPS's petition); *Tschirhart*, 876 S.W.2d at 508 (same); *see also Jackson v. State*, 139 S.W.3d 7, 21 (Tex. App.—Fort Worth 2004, pet. ref'd) (holding trial court may judicially notice existence of affidavit in its file but may not take judicial notice of truth of facts recited in

affidavit without affidavit being admitted as evidence during trial); *Wilson v. Wilson*, 132 S.W.3d 533, 538 n.3 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (court may not take judicial notice of testimony given during prior temporary hearing in same cause without admitting the prior testimony into evidence during subsequent hearing). Although a trial court may not judicially notice the factual allegations made in an affidavit or prior evidence, "a trial court *may* take judicial notice of its previous orders and findings of fact from the same case." *In re E.W.*, 494 S.W.3d 287, 300 n.12 (Tex. App.—Texarkana 2015, no pet.) (quoting *In re A.O.*, No. 04-12-00390-CV, 2012 WL 5507107, at *3 (Tex. App.—San Antonio Nov. 14, 2012, no pet.) (mem. op.)) (emphasis added).

Charles concedes that the trial court could have properly taken judicial notice of the file. In support of his argument that the trial court improperly took judicial notice of the affidavit, Charles refers only to the attorney ad litem's closing statement, during which she stated "the Court['s] taking judicial notice of the case file, including the affidavit and the reasons for removal, substantiate[s] the D and E grounds on both parties, as well as the N and O grounds." Although Charles is correct that the facts alleged in Sharp's affidavit are not subject to judicial notice, there is no indication from the trial court that it took notice of or otherwise relied on the facts contained in the affidavit or the "reasons for removal" when it made its termination ruling. Based solely on the attorney ad litem's closing statement, we cannot assume that the trial court made such an error.[5] We overrule Charles's first issue. We note, however, that our review of the sufficiency of the

[5] We further note that Charles did not object to the court's taking judicial notice of the file nor did he object to the attorney ad litem's statements about taking notice of the affidavit.

evidence is limited only to the evidence adduced at trial and the properly noticed contents of the trial court's file, which does not include Sharp's affidavit or the reasons for removal contained in TDFPS's petition and service plan.

Statutory Grounds for Termination

In his second, third, fourth, and fifth issues, Charles contends that the evidence was legally and factually insufficient to support the trial court's findings on any of the four statutory grounds under which the trial court terminated his parental rights. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (N), (O). Only one ground under section 161.001(b)(1) is necessary to support the trial court's judgment in a parental-rights-termination case. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *Spurck v. Texas Dep't of Family & Protective Servs.*, 396 S.W.3d 205, 221 (Tex. App.—Austin 2013, no pet.). Accordingly, we will begin our analysis with Subsection (N).

To prove constructive abandonment under Subsection (N), there must be clear and convincing evidence that the child has been in the custody of TDFPS for at least six months and: (1) TDFPS made reasonable efforts to return the child to the parent; (2) the parent has not regularly visited or maintained significant contact with the child; and (3) the parent has demonstrated an inability to provide the child with a safe environment. *See* Tex. Fam. Code § 161.001(1)(N). If the evidence is legally insufficient on any one of these elements, the termination finding cannot be sustained. *In re D.T.*, 34 S.W.3d 625, 633 (Tex. App.—Fort Worth 2000, pet. denied). The party seeking the termination of parental rights bears the burden of proof on each of these elements. *In re A.S.*, 261 S.W.3d 76, 90 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Charles does not

challenge the sufficiency of the evidence to support the finding that Nicole was in the care of TDFPS for more than six months.

i. Reasonable Efforts to Return the Child to the Parent

Charles first asserts that TDFPS did not make reasonable efforts to return the child. In reviewing the evidence supporting this element, we focus on TDFPS's efforts, not Charles's efforts. *See* Tex. Fam. Code § 161.001(1)(N)(i). Generally, implementation of a family service plan by TDFPS is considered a reasonable effort to return the child to the parent. *In re S.A.C.*, No. 04-13-00058-CV, 2013 WL 2247471, at *2 (Tex. App.—San Antonio May 22, 2013, no pet.) (mem. op.). Charles's caseworker, Tanner Rice, testified at trial that TDFPS created a service plan, which he reviewed with Charles in October 2016, but Charles failed to begin services. Charles concedes that there was a service plan and that he did not complete services but argues that TDFPS failed to sufficiently follow up with him about those services. In support of this argument, Charles cites to *In re E.A.W.S.*, No. 01-06-00031-CV, 2006 WL 3525367 (Tex. App.—Fort Worth Dec. 7, 2006, pet. denied) (mem. op.). In *In re E.A.W.S.*, the court held that the evidence was insufficient to support the lower court's finding of reasonable efforts to return the child to the father because the evidence presented by the Department at trial focused only on the mother. Only the mother's name appeared on the service plan, and there was "a complete lack of testimony in the record . . . about any efforts, reasonable or otherwise, to return E.A.W.S. to [the father]." *Id.* at *17 However, unlike in *In re E.A.W.S.*, TDFPS created a service plan for Charles, with which he failed to comply, and Rice testified that he attempted to contact Charles repeatedly through text messages, phone calls, and mailed correspondence. Rice further stated that he received "a few responses via

text," but that when he requested that Charles send him times he was available to meet, Charles failed to respond to set up a meeting time.

Viewing the evidence in favor of the trial court's finding, we conclude that the trial court could have reasonably formed a firm conviction that TDFPS made reasonable efforts to return the child. Further, although Charles argues that TDFPS should have made further efforts to communicate with him, the fact that TDFPS was unsuccessful in its attempts to contact him does not indicate that TDFPS did not engage in reasonable efforts to return the child. Based on the existence of a service plan and Rice's testimony that he made repeated attempts to communicate with Charles by phone, mail, and text, the trial court could have resolved any dispute about the evidence in favor of its finding that TDFPS made reasonable efforts to return the child.

ii. Parent's Failure to Maintain Contact

Charles also (briefly) challenges the trial court's finding that he failed to maintain contact or regularly visit Nicole while she was in the custody of TDFPS. Charles concedes that he did not regularly visit Nicole but asserts that he only failed to do so because the trial court's orders denied him visitation. However, the court's temporary orders did not prevent him from having visitation. Rather, the orders stated that Charles was entitled to visitation after three clean drug tests. Charles seems to suggest that this prerequisite was inappropriate because he had passed the initial drug test during TDFPS's investigation. However, Charles has not challenged the temporary orders or other status orders that contain the same condition or otherwise preserved such an appellate challenge to those orders. *See* Tex. R. App. P. 33.1(a)(1). Furthermore, Rice testified that Charles was not in communication with the child or her caregiver during the pendency of the case. Based

on Charles's concession that he did not visit Nicole, as well as the evidence that Charles failed to comply with the trial court's orders for reestablishing visitation and failed to communicate with the child or her caregiver, the trial court could have reasonably formed a firm conviction that Charles failed to regularly visit or maintain significant contact with the child.

iii. Inability to Provide a Safe Environment

Charles next challenges the finding that TDFPS sufficiently proved that Charles had demonstrated an inability to provide the child with a safe environment. The trial court heard evidence that Charles did not complete any of the services on his service plan, including drug testing, which was necessary in order for him to have visits with Nicole. Rice also testified that he did not have any knowledge of Charles's employment or housing circumstances and that Charles had failed to maintain regular communication with him or respond to his requests to set up an appointment time. Charles did not make child-support payments or any other contributions to Nicole's care. Sandra stated to Rice that there was "too much drama" between Charles and Kelly, that "there's no stability" in their lives, and that she had concerns about Nicole being returned to their care without that needed stability.[6]

[6] Although Rice's testimony about Sandra's statements may be inadmissible hearsay, it was admitted without objection by Charles. Therefore, it has probative value and can be considered by this Court when reviewing the sufficiency of the evidence. Tex. R. Evid. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay."); *see Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, No. 03-04-00284-CV, 2005 WL 548218, at *1 (Tex. App.—Austin Mar. 10, 2005, pet. denied) (mem. op.); *In re C.M.W.*, No. 01-02-00474-CV, 2003 WL 579794, at *2 (Tex. App.—Houston [1st Dist.] Feb. 27, 2003, no pet.) (mem. op.).

Viewing the evidence in the light most favorable to the trial court's judgment, we conclude that the trial court could have reasonably formed a firm conviction that Charles had demonstrated an inability to provide Nicole with a safe environment based on the evidence presented that Charles failed to provide TDFPS with any information about his living or employment circumstances, failed to make child support payments, failed to seek out and accept counseling services, failed to take required drug tests, failed to maintain contact with his caseworkers during this case, and was in jail at the time of trial for a domestic disturbance with Kelly. *See J.M. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00161-CV, 2012 WL 2476790, at *6 (Tex. App.—Austin June 26, 2012, no pet.) (mem. op.) (holding J.M. demonstrated inability to provide child with safe environment by failing to maintain contact with TDFPS, failing to attend counseling or parenting classes, failing to take required drug tests, even though J.M. had obtained housing and employment several months before trial). Furthermore, viewing the evidence in a neutral light, we conclude that the trial court could have resolved the disputed evidence and formed a firm belief that Charles demonstrated an inability to provide a stable situation based on his failures to maintain any meaningful contact with his caseworker, to provide any information regarding his housing or employment status, and to complete any of the services offered to assist him in providing a stable environment for Nicole. *See id.*

Having determined that the evidence is sufficient to support each element of the trial court's finding that Charles constructively abandoned Nicole, we overrule Charles's fourth issue. Because a finding of only one ground for termination alleged under Section 161.001(b)(1) is sufficient to support a judgment of termination, it is not necessary to address Charles's remaining

issues regarding the other predicate grounds contained in the judgment. *See In re A.V.*, 113 S.W.3d at 362. Accordingly, we overrule Charles's second, third, and fifth issues.

Best Interests of the Child

In his sixth issue, Charles challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of his parental rights was in the child's best interest. There is a strong presumption that the best interest of a child will be served by preserving the parent-child relationship. *See In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). In determining a child's best interest, the factfinder may consider a number of factors, including the desires of the child, the present and future physical and emotional needs of the child, the present and future emotional and physical danger to the child, the parental abilities of the person seeking custody, programs available to assist those persons in promoting the child's best interest, plans for the child by those individuals, the acts or omissions of the parent that may indicate that the existing parent-child relationship is not appropriate, and any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). TDFPS need not prove all nine *Holley* factors, and the absence of some factors does not bar the factfinder from finding by clear and convincing evidence that termination is in a child's best interest. *In re C.H.*, 89 S.W.3d at 27. While no one factor is controlling, analysis of a single factor may be adequate in a particular factual situation to support a finding that termination is in the child's best interest. *Spurck*, 396 S.W.3d at 222. The focus of the inquiry is on the best interest of the child, not the best interest of the parent. *See A.L. v. Texas Dep't of Family & Protective Servs.*, No. 03-13-00610-CV, 2014 WL 641456, at

*3 (Tex. App.—Austin Feb. 13, 2014, no pet.) (mem. op.). However, parental rights may not be terminated merely because a child might be better off living elsewhere. *Id.*

When a child is too young to express his or her desires, a court may consider the quality and extent of the child's relationship with the prospective placements. *See L.Z. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00113-CV, 2012 WL 3629435, at *10 (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.) (considering quality and extent of young children's relationship with prospective placements); *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (considering evidence that child was well cared for by foster family, had bonded with them, and spent minimal time with parent in assessing toddler's desires). Here, Nicole was placed with Charles's aunt, Sandra. There was evidence that Nicole was doing well in Sandra's care, that they had bonded well, and that Sandra wanted to adopt Nicole in the future. As for Nicole's physical and emotional needs, there was evidence that Nicole required breathing treatments and possibly ECI services for behavioral issues. There was also evidence that Charles had allowed Nicole's Medicaid coverage to lapse while in his care, which the trial court could have felt was a potential barrier to Nicole receiving the ongoing medical treatment she needed. With respect to Charles's parenting abilities and acts or omissions indicating the parent–child relationship is not appropriate, testimony at trial showed that Charles had not paid any child support required under the temporary orders and that he had not had any visitation with Nicole for almost a year since first leaving her in the care of Sandra in February 2016, when she was just eight months old. Additionally, he had not submitted to required drug testing, had not attended required parenting classes and counseling, and had otherwise failed to avail himself of any services offered by TDFPS.

He had not communicated with his caseworker or other family members to seek out information about the child, and testimony suggested that he was in jail during the trial after another domestic disturbance with Kelly. Additionally, both Charles's caseworker as well as a CASA representative testified that they felt it was in Nicole's best interest to terminate Charles's parental rights.

Viewing the evidence in favor of the judgment, we conclude that the trial court could have formed a firm belief or conviction that termination of Charles's parental rights was in Nicole's best interest. Further, viewing the evidence in a neutral light, we conclude that the trial court could have reasonably resolved any disputed evidence in favor of its finding that termination was in the best interest of the child. We hold that the evidence is legally and factually sufficient to support the trial court's finding that termination of Charles's parental rights was in Nicole's best interest. We overrule Charles's sixth issue.

CONCLUSION

Having overruled all of the issues presented on appeal, we affirm the judgment of the trial court.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: August 9, 2017