NUMBER 13-17-00187-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN THE INTEREST OF R.G.B., A CHILD

On appeal from the 156th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras

This is an accelerated appeal of an order terminating parental rights. *See* TEX. R. APP. P. 28.4. Appellant D.B.,[1] biological mother of the child R.G.B., contends by one issue that her due process rights were violated when the trial court rendered judgment reciting four specific grounds for termination, despite the jury having returned a broad-form verdict. We affirm the judgment as modified.

---

[1] We refer to appellant and child by their initials in accordance with the rules of appellate procedure. *See* TEX. R. APP. P. 9.8(b)(2).

I. BACKGROUND

The Department of Family and Protective Services (the Department) filed its petition to terminate the parental rights of D.B. on November 5, 2015.[2] At trial, D.B. testified that she moved with her three children aged eleven, eleven, and five, from Arkansas to Texas in January of 2015 to live with her sister and brother-in-law. At the time, D.B. was on probation in Arkansas after pleading to the felony offenses of breaking and entering and forgery, and she conceded that one of her probation conditions was that she was not supposed to leave Arkansas.

D.B., who was 31 years of age at the time of trial, acknowledged that she has been addicted to methamphetamine since the age of 15 or 16. She stated she came to Texas after her husband died "[b]ecause I was trying to get clean because I was doing drugs during my probation." D.B. stated that she became aware she was pregnant with R.G.B. a few months after she arrived in Texas, but she admitted that she continued to use methamphetamine during the course of her pregnancy, though she denied using it around the children. D.B. agreed that her sister and brother-in-law, whom she lived with, were also addicted to drugs and had been involved in domestic violence. Around September of 2015, D.B. had her mother-in-law take the other three children back to Arkansas.

A Department investigator testified that D.B. tested positive for methamphetamine on October 21, 2015 and again on October 28, 2015. When R.G.B. was born on November 1, 2015, his meconium tested positive for methamphetamine. The Department determined that, because D.B.'s sister had recently been arrested and jailed, there was

[2] The Department also sought the termination of parental rights of L.S., R.B.G.'s biological father. L.S. is not a party to this appeal.

no suitable caregiver for R.G.B., and the Department sought and obtained removal of the child from D.B. The investigator later determined that D.B. had several prior arrests in Arkansas and had three outstanding warrants from that state. D.B. was arrested on November 11, 2015 for other outstanding warrants in Bee County and jailed briefly. Later, in August of 2016, D.B. was arrested and jailed in Karnes County.

The Department set up a family service plan which was signed by D.B. and approved by the trial court at a status hearing. The service plan required D.B. to refrain from drug use and to provide a stable home for R.G.B. The Department caseworker testified that D.B. was offered fifteen drug tests and that she appeared for seven of them—three of the tests were positive, three were negative, and one was pending. The caseworker stated that, on March 21, 2016, D.B. showed up for a visit with R.G.B. while under the influence of methamphetamine. The caseworker also stated that D.B. has been difficult to locate, would not allow Department workers in her home, and had been generally uncooperative.

In the charge of the court, the jury was instructed that, for the parent-child relationship between D.B. and R.G.B. to be terminated, "it must be proven by clear and convincing evidence that at least one of the following events has occurred":

> 1. [D.B.] has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
>
> 2. [D.B.] has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
>
> 3. [D.B.] has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of [the Department] or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the child to the mother; (2) the mother has not

regularly visited or maintained significant contact with the child; and (3) the mother has demonstrated an inability to provide the child with a safe environment;

4. [D.B.] has failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under the Texas Family Code, Chapter 262, entitled "Procedures in Suit by Governmental Entity to Protect Health and Safety of Child," for the abuse or neglect of the child[.]

The charge also contained the following instruction:

> In addition, it must also be proven by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child. The same evidence may be probative of both the acts or omissions stated and the best interest of the child. Some factors to consider in determining the best interest of the child are:
>
> 1. the desires of the child;
>
> 2. the emotional or physical needs of the child now and in the future;
>
> 3. any emotional and physical danger to the child now and in the future;
>
> 4. the parenting abilities of the individuals seeking custody;
>
> 5. the programs available to assist those individuals or by the agency seeking custody;
>
> 6. the plans by those individuals 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.

Question number one of the charge asked: "Should the parent-child relationship between [D.B.] and the child, [R.G.B.], be terminated?" The jury answered "Yes" and, in accordance with its instructions, did not answer any other questions in the charge.

The final judgment terminating D.B.'s parental rights states in relevant part as follows:

> 6. Termination of Respondent Mother [D.B.]'s Parental Rights
>
> 6.1. The Jury finds by clear and convincing evidence that termination of the parent-child relationship between [D.B.] and the child, [R.G.B.] the subject of this suit is in the child's best interest.
>
> 6.2. Further, the Jury finds by clear and convincing evidence that [D.B.] has:
>
> 6.2.1. knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, pursuant to § 161.001(1)(D), Texas Family Code;
>
> 6.2.2. engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child, pursuant to § 161.001(1)(E), Texas Family Code;
>
> 6.2.3. constructively abandoned the child who has been in the permanent or temporary managing conservatorship of [the Department] or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the child to the mother; (2) the mother has not regularly visited or maintained significant contact with the child; and (3) the mother has demonstrated an inability to provide the child with a safe environment, pursuant to § 161.001(1)(N), Texas Family Code;
>
> 6.2.4. failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the child who has been in the permanent or temporary managing conservatorship of [the Department] for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child, pursuant to § 161.001(1)(O), Texas Family Code;
>
> 6.3. IT IS THEREFORE ORDERED that the parent-child

> relationship between [D.B.] and the child, [R.G.B.] the subject of this suit is terminated.

This appeal followed.

II. DISCUSSION

"Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the 'death penalty' of civil cases." *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring). Accordingly, termination proceedings must be strictly scrutinized. *Id.* at 112. Termination of the parent-child relationship may be ordered if the trier of fact finds clear and convincing evidence that: (1) the parent committed an act or omission described in family code subsection 161.001(b)(1); and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West, Westlaw through 2017 R.S.); *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

By a single issue on appeal, D.B. argues that her due process rights were violated because, although the jury's verdict was based on a single broad-form question, the judgment recited four specific grounds for termination under the family code. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O).

No party objected to the broad-form question at the charge conference. *See* TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1. Assuming but not deciding that the issue of charge error is not waived, we find that it lacks merit. In 1990, the Texas Supreme Court held that the submission of a single broad-form question listing multiple potential grounds for termination did not violate the parent's due process rights. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (op. on reh'g). The Court noted that "[u]nless extraordinary circumstances exist, a court must submit such broad-form questions" under the rules of civil procedure, and it held that "[t]he charge in parental rights cases should

be the same as in other civil cases." *Id*. (citing TEX. R. CIV. P. 277 ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.")). The Court reasoned as follows:

> The controlling question in this case was whether the parent-child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under [the predecessor statute to family code section 161.001(b)(1)] the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in [the statute]. Petitioner argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission. The standard for review of the charge is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle. Here the trial court tracked the statutory language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.
>
> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.

Id. As an intermediate appellate court, we are bound to follow the supreme court's precedent. *See Lubbock Cnty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002). Therefore, we conclude that D.B.'s due process rights were not violated by the submission of a broad-form question listing multiple potential grounds for termination. *See E.B.*, 802 S.W.2d at 649.

D.B. suggests, however, that her complaint is not with the jury charge but rather with the judgment. She notes that Texas Rule of Civil Procedure 306 has been amended to require judgments in parental termination cases to "state the specific grounds for termination." *See* TEX. R. CIV. P. 306.[3] D.B. asserts that the use of a broad-form question

[3] The rule states in its entirety as follows:

"creates a conflict" such that the judgment cannot possibly comply with both Rule 306 and Rule 301. *See* TEX. R. CIV. P. 301 (stating that the trial court's judgment must conform to the verdict). Specifically, she contends that it was improper for the judgment to recite all four grounds for termination when the charge allowed the jury to find in favor of termination on any one ground.

D.B. further argues that the judgment violates her due process rights because she "could face future terminations based on" its findings. She notes that, although not pleaded in this case, one of the grounds for termination listed in subsection 161.001(b)(1) is that the parent "had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) . . . ." TEX. FAM. CODE ANN. § 161.001(b)(1)(M). D.B. contends that, because the order in this case listed paragraphs (D) and (E) along with paragraphs (N) and (O) as grounds for termination, she may be subject to future termination proceedings under paragraph (M) even though the jury may or may not have actually found grounds for termination as to R.G.B. under paragraphs (D) or (E).

We agree with D.B. that, because the jury was asked only to answer a broad-form question and did not make any specific findings as to any particular ground for termination under subsection 161.001(b)(1), the order of termination should not state that the jury

---

> RULE 306. RECITATION OF JUDGMENT
>
> The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. *In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.*

TEX. R. CIV. P. 306 (emphasis added). The emphasized portion was promulgated by an order of the Texas Supreme Court in 2012. *See* 75 TEX. B.J. 228 (Tex. 2012).

necessarily found any one particular ground for termination. *See* TEX. R. CIV. P. 301 (requiring the judgment to conform to the verdict). Here, the jury was instructed to find that D.B.'s parental rights should be terminated if it found "at least one" of the grounds has occurred and that termination was in R.G.B.'s best interests. The judgment, on the other hand, states that the jury found the four alleged grounds for termination by clear and convincing evidence, but the list of four grounds does not contain any grammatical conjunction such as "and" or "or." The judgment is therefore ambiguous as to whether the jury found (1) at least one of the grounds, or (2) all four grounds.

To remove any ambiguity, and to ensure that the judgment conforms both to the jury's verdict and to Rule 306, we modify the judgment to add the disjunctive "or" immediately preceding the final listed ground. To the extent D.B. argues that a judgment listing the four grounds in the disjunctive would violate her due process rights, we disagree. The amendment to Rule 306 does not alter the constitutional analysis set forth in *E.B*. *See* 802 S.W.2d at 649.

We overrule D.B.'s issue in part and sustain it in part.

III. CONCLUSION

The trial court's judgment is affirmed as modified herein. *See* TEX. R. APP. P. 43.2(b).

DORI CONTRERAS
Justice

Delivered and filed the
31st day of August, 2017.