NO. 12-11-00307-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF	***§***	***APPEAL FROM THE***
A.E.G. AND J.D.G.,	***§***	***COUNTY COURT AT LAW***
CHILDREN	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

D.G. appeals the termination of his parental rights. In seven issues, D.G. contends that service of process was defective and challenges the sufficiency of the evidence. The Department of Family and Protective Services (the Department) did not file a brief. We reverse and render.

BACKGROUND

D.G. and K.G. are the parents of two boys, A.E.G. and J.D.G.[1] On September 9, 2010, the Department filed a petition for protection of a child, for conservatorship, and for termination of K.G.'s and D.G.'s parental rights to A.E.G. and J.D.G. The same day, the trial court signed an emergency order naming the Department as temporary sole managing conservator of the children. The first adversarial hearing was held on September 16, 2010, in which the court ordered the Department to continue as temporary managing conservator of the children. K.G. attended the hearing by telephone, but D.G. was not notified of the hearing and did not attend. A bench trial was held to determine the issue of termination, but neither parent appeared or testified.[2]

[1] K.G. is the mother of both children. K.G.'s parental rights were terminated during this proceeding, but K.G. did not appeal.

[2] The record revealed that one of the Department's witnesses completed her testimony without D.G.'s court-appointed counsel being present. Another attorney appeared on appointed counsel's behalf, but it appears that neither attorney received notice that the "hearing" was a termination trial. Although the trial court appointed counsel one month before the termination trial, appointed counsel did not receive notice of (1) his appointment to the case, or (2) that he was representing D.G. as a respondent in a termination proceeding. Upon notifying the trial court of the deficient notice, the trial court recessed the trial to allow appointed counsel an opportunity to speak with D.G. But this did not prevent the previously admitted evidence from being considered against D.G. at trial.

During trial, the court advised the parties that it would take judicial notice of the "whole file." "After considering the contents of the court's file, the pleadings, the evidence, the exhibits, and the arguments and authorities offered by the parties," the court ruled that D.G.'s parental rights should be terminated.[3] The trial court terminated D.G.'s parental rights on the grounds that (1) D.G. knowingly placed or knowingly allowed his children to remain in conditions or surroundings that endangered the physical or emotional well being of the children; and that (2) D.G. knowingly engaged in criminal conduct that resulted in D.G.'s conviction of an offense and confinement or imprisonment and inability to care for the children for not less than two years from the date of filing the petition. *See* TEX. FAM. CODE ANN. § 161.001(1)(D), (Q) (West Supp. 2012).

TERMINATION OF PARENTAL RIGHTS

Involuntary termination of parental rights embodies fundamental constitutional rights. ***In re C.L.C.***, 119 S.W.3d 382, 390 (Tex. App.—Tyler 2003, no pet.); ***Vela v. Marywood***, 17 S.W.3d 750, 759 (Tex. App.—Austin 2000), *pet. denied per curiam*, 53 S.W.3d 684 (Tex. 2001). When the state seeks to terminate one's parental rights, it seeks not only to infringe one's fundamental liberty interest, but to end it. *See* ***In re J.F.C.***, 96 S.W.3d 256, 273 (Tex. 2002). A termination decree is "complete, final, irrevocable [and] divests for all time the parent and child of all legal rights, privileges, duties, and powers with respect to each other except for the child's right to inherit." ***Wiley v. Spratlan***, 543 S.W.2d 349, 352 (Tex. 1976); ***In re Shaw***, 966 S.W.2d 174, 179 (Tex. App.—El Paso 1998, no pet.). Thus, the breaking of bonds between a parent and child "can never be justified without the most solid and substantial reasons." ***Wiley***, 543 S.W.2d at 352; ***In re Shaw***, 966 S.W.2d at 179. Because a termination action "permanently sunders" the bonds between a parent and child, the proceedings must be strictly scrutinized. ***Wiley***, 543 S.W.2d at 352; ***In re Shaw***, 966 S.W.2d at 179. However, parental rights are not absolute, and it is vital that the emotional and physical interests of the child not be sacrificed at the expense of preserving that right. *See* ***In re C.H.***, 89 S.W.3d 17, 26 (Tex. 2002).

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[3] A court may take judicial notice of its own records in a case, but may not take judicial notice of the truth of the factual contents of the records. *See* ***In re C.L.***, 304 S.W.3d 512, 514-15 (Tex. App.—Waco 2009, no pet.); ***Barnard v. Barnard***, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied). Once a court takes judicial notice of its file, the contents, but not the truth of its contents, are subject to review in a legal sufficiency challenge. *See, e.g.*, ***In re S.S.A.***, No. 02-11-00180-CV, 2012 WL 2923285, at *8 (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.); ***In re A.W.B.***, No. 14-11-00926-CV, 2012 WL 1048640, at *3-4 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012, no pet.) (mem. op.); ***In re H.M.P.***, No. 13-08-00643-CV, 2010 WL 40124, at *12 (Tex. App.—Corpus Christi Jan. 7, 2010, no pet.) (mem. op.).

Section 161.001 of the Texas Family Code permits the termination of parental rights if two elements are met. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2012). First, the parent must have engaged in any one of the acts or omissions itemized in the first subsection of the statute. ***Id.*** § 161.001(1) (West Supp. 2012); ***In re C.L.C.***, 119 S.W.3d at 390. Second, termination must be in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(2); ***In re C.L.C.***, 119 S.W.3d at 390. Both elements must be proved by "clear and convincing evidence," and proof of one element does not alleviate the petitioner's burden of proving the other. ***Id.*** "Clear and convincing evidence" means the measure or degree of proof that 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 2008). Because there is a strong presumption that the best interest of the child is served by preserving the parent-child relationship, the burden of proof rests upon the party seeking to deprive the parent of his parental rights. *See* ***Wiley***, 543 S.W.2d at 352; ***In re C.L.C.***, 119 S.W.3d at 390-91.

STANDARD OF REVIEW

When the burden of proof is clear and convincing evidence, we conduct a legal sufficiency review by looking at all of 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.F.C.***, 96 S.W.3d at 266. We must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. ***Id.*** Thus, it follows that the reviewing court should disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible, but this does not mean that the reviewing court must disregard all evidence that does not support the finding. ***Id.*** Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. ***Id.*** If, after conducting our legal sufficiency review, we determine that no reasonable fact finder could form a firm belief or conviction that the matter that must be proven is true, then we will conclude that the evidence is legally insufficient. ***Id.***

When we conduct a factual sufficiency review, we must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. ***Id.*** Our inquiry is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the Department's allegations. ***Id.*** We consider whether the disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its

finding. ***Id***. If, when viewed in light of the entire record, the disputed evidence is so significant that a fact finder could not have reasonably formed a firm belief or conviction, then the evidence is factually insufficient. ***Id***. In finding evidence factually insufficient, the appellate court should detail why it has concluded that a reasonable fact finder could not have credited disputed evidence in favor of its finding. ***Id***. at 267.

The standard of review for legal and factual sufficiency challenges maintains a deferential standard for the fact finder's role, which means the trier of fact is the exclusive judge of the credibility of the witnesses and weight to be given their testimony. ***In re C.H.***, 89 S.W.3d at 26-27; ***Nordstrom v. Nordstrom***, 965 S.W.2d 575, 580 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). Thus, our review must not be so rigorous that the only fact findings that could withstand review are those established beyond a reasonable doubt. ***In re C.H.***, 89 S.W.3d at 26.

SERVICE OF PROCESS

We first address D.G.'s seventh issue in which he contends that the service of process was defective because it did not contain the return receipt with D.G.'s signature. We agree that service was defective, but conclude that the defect was waived.

The Texas Rules of Civil Procedure permit the service of a citation by registered or certified mail, return receipt requested. TEX. R. CIV. P. 106 (a)(2). For service by registered or certified mail to be effective, the return of the officer or authorized person executing the citation may be endorsed on or attached to the citation, and must state when the process was served, the manner in which it was served, and the name of the person who served the process. *See* TEX. R. CIV. P. 107(a), (b). When citation is served by certified or registered mail, the return by the officer or authorized person must also contain the return receipt with the addressee's signature. TEX. R. CIV. P. 107(c).

Defective service of process may be waived upon a party's general appearance in open court. *See* TEX. R. CIV. P. 120. A general appearance is entered whenever a party "invokes the judgment of the court in any way on any question other than that of the court's jurisdiction." ***Toler v. Travis Cnty. Child Welfare Unit***, 520 S.W.2d 834, 836 (Tex. App.—Austin 1975, writ ref'd n.r.e.). The emphasis is on affirmative action that impliedly recognizes the court's jurisdiction over the parties. *See* ***Beistel v. Allen***, Nos. 01-06-00246-CV, 01-06-00276-CV, 2007 WL 1559840, at *3 (Tex. App.—Houston [1st Dist.] May 31, 2007, no pet.) (mem. op.). Appearing in court and requesting a continuance constitutes a general appearance. *See* ***Gough v. Gough***, No. 05-99-00459-CV, 2000 WL 371034, at *2 (Tex. App.—Dallas April 12, 2000, pet. denied).

Here, counsel appeared on D.G.'s behalf at the initiation of the termination trial. Counsel cross-examined witnesses and requested a continuance on the first day of trial. This affirmative conduct impliedly recognized the court's jurisdiction over D.G. and constituted a general appearance. *See* ***Beistel***, 2007 WL 1559840, at *3. Accordingly, we overrule D.G.'s seventh issue.

TERMINATION UNDER SECTION 161.001(1)(D)

In his first and second issues, respectively, D.G. argues that the evidence is legally and factually insufficient to support a finding that he knowingly placed or allowed his children to remain in conditions or surroundings that endangered their physical or emotional well being. D.G. contends that all the evidence at trial pertained to the children's living environment subsequent to their move from California to Texas when D.G. was incarcerated in California. D.G. argues that his incarceration in California does not translate into the voluntary act of knowingly placing his children in a dangerous condition or surrounding that justifies the termination of his parental rights. We agree.

Applicable Law

The court may order termination of the parent-child relationship if it finds by clear and convincing evidence that the parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child. TEX. FAM. CODE ANN. § 161.001(1)(D) (West Supp. 2012). This provision of the family code addresses the child's surroundings and environment, rather than parental conduct. ***In re C.L.C.***, 119 S.W.3d at 392. When seeking termination, the Department must show that the child's living conditions pose a real threat of injury or harm. ***In re N.R.***, 101 S.W.3d 771, 776 (Tex. App.—Texarkana 2003, no pet.). There must be a connection between the environment and the resulting danger to the child's emotional or physical well being when seeking termination of parental rights under Section 161.001(1)(D). ***Id.*** It is sufficient that the parent was aware of the potential for danger to the child in such environment and disregarded that risk, but if the parent is unaware of a potential risk of endangerment, termination under subsection (D) is not appropriate. *See* ***Rios v. Tex. Dep't of Family & Protective Servs.***, No. 03-11-00565-CV, 2012 WL 2989237, at *5 (Tex. App.—Austin July 11, 2012, no pet.) (mem. op.); *see also* ***In re D.C.***, 128 S.W.3d 707, 715 (Tex. App.—Fort Worth 2004, no pet.) (holding that subsection (D) requires knowledge on the part of the parent). The relevant time frame to consider in determining whether there is clear and convincing evidence

of endangerment is before the child was removed. ***Ybarra v. Tex. Dep't of Human Servs.***, 869 S.W.2d 574, 577 (Tex. App.—Corpus Christi 1993, no pet.).

The specific danger to the child's well being need not be established as an independent proposition, but may instead be inferred from parental misconduct. ***In re N.R.***, 101 S.W.3d at 776. 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). ***Rios***, 2012 WL 2989237, at *5. An environment that routinely subjects a child to the probability that he will be left alone because his parents are once again jailed endangers both the physical and emotional well being of a child. ***In re S.D.***, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied). But a parent's voluntary, willful, and conscious engagement in conduct that he knows may result in imprisonment is insufficient to support termination of parental rights. *See* ***In re D.T.***, 34 S.W.3d 625, 636 (Tex. App.—Fort Worth 2000, pet. denied).

The commission of an intentional act that results in imprisonment, including violation of community supervision, is not sufficient grounds, standing alone, for termination. ***Mayfield v. Smith***, 608 S.W.2d 767, 771 (Tex. App.—Tyler 1980, no writ). Imprisonment can be used only as a factor to consider on the issue of endangerment; otherwise, the termination of parental rights could become an additional punishment automatically imposed along with imprisonment for almost any crime. ***In re C.L.C.***, 119 S.W.3d at 397; ***In re D.T.***, 34 S.W.3d at 636.

Analysis

In its findings of fact and conclusions of law, the trial court found that on September 9, 2010, D.G. was an inmate in the California penal system. The trial court also found that

> [D.G.] has left the children in the possession of their mother, [K.G.], a person who engaged in conduct over a course of years that endangered the physical and emotional well[]being of the children. [D.G.] made no effort, either before or after his incarceration, to learn the status of his children or to make arrangements for their care.

1. Evidence Most Favorable to the Finding

The Department called two witnesses at trial, investigator Kristi Kusch and caseworker Alexa Silva. Kusch testified that the Department obtained temporary managing conservatorship of A.E.G. and J.D.G. because one of the children brought Xanax pills to school and admitted ingesting one of the pills. During her investigation, Kusch learned from the children that their mother, K.G.,

was in Houston for the week. Brandon Nelms, a wheelchair-bound man known by law enforcement to have an extensive criminal history and instances of suicide attempts, was their roommate and was to take care of the children during K.G.'s absence. J.D.G. told Kusch that he had taken approximately twenty-five Xanax pills from Nelms's dresser.

Kusch contacted K.G. that day to advise her that the boys could not be returned to Nelms's care because such a placement was "inappropriate." While trying to find alternative placements for the children, Kusch learned from K.G. that the children's father, D.G., was incarcerated in California and would be "serving a few more years." K.G. told Kusch that D.G. went to prison on drug charges, and was abusive and controlling during their marriage. She also told Kusch that she had "CPS history" in California due to D.G.'s criminal activity. Kusch testified that K.G. told her that she and the boys moved to Texas after D.G. was incarcerated in 2007, and have basically lived as "vagrant[s]" moving from one location to the next while in Texas.[4]

The boys were placed with the parents of K.G.'s boyfriend while K.G. was in Houston. Upon K.G.'s arrival in Palestine, Kusch transported K.G. and the two boys to a shelter. But because K.G. was unable to find a place for all three of them to live, K.G. agreed to have the boys placed in a foster home. Shortly after the boys were placed in a foster home, K.G. went to Houston and did not return.

Caseworker Silva testified that she had no personal knowledge regarding the facts or circumstances surrounding D.G.'s incarceration, but agreed with the trial judge when he stated,

> [N]obody knows whether [the children] were personally present or not [when D.G. was engaging in criminal activity], and that's not—as I understand it, that's not the issue. The issue is whether by engaging in conduct that got him imprisoned, he has placed the children in—he exposed them to the possibility of emotional and physical harm.

2. <u>Evidence Contrary to the Finding</u>

It is undisputed that D.G. was incarcerated at the time of the children's removal. It is also undisputed that the children were under K.G.'s care when she left them with Brandon Nelms while she went to Houston. Investigator Kusch testified that K.G. had no prior criminal history, no prior history of drug use, and no history of any other "conditions." It is undisputed that Kusch failed to obtain any records from California's Child Welfare Services to verify K.G.'s allegations that she

[4] Caseworker Silva testified that she believed K.G. and the boys moved to Texas "somewhere near the end of 2009 maybe."

had "CPS history" in California as a result of D.G.'s conduct as a "drug dealer." Furthermore, the Department failed to call any other witnesses or introduce any documentation to verify what, if any, "CPS history" D.G. and K.G. had in California.[5]

Finally, the Department offered no evidence to show that D.G. was aware that leaving his children with K.G. would place his children in conditions or surroundings that could potentially endanger their emotional or physical well being. The Department's justification for termination pursuant to subsection (D) is based on the inference that D.G.'s incarceration posed a specific danger to the children's well being because they were left in K.G.'s care—an individual the Department admitted had no prior criminal or drug use history, and no confirmed prior CPS history. The Department presented no evidence at trial to show that D.G. was aware that K.G.'s care of the children would result in his children living in a home where the secondary caretaker was a wheelchair-bound man with a history of criminal activity and suicide attempts. Furthermore, Caseworker Silva testified that she did not believe D.G. was aware of the children's living conditions in Texas. *Compare* ***In re A.L.W.***, No. 12-04-00263-CV, 2005 WL 2404115, at *6 (Tex. App.—Tyler Sept. 30, 2005, no pet.) (mem. op.) (evidence sufficient to show father placed children in dangerous conditions when he knew mother was drug addict and only removed himself, not children, from dangerous situation).

Conclusion

Although D.G. engaged in criminal activity that led to his incarceration, this evidence alone is not sufficient to support the termination of his parental rights under subsection (D). *See* ***Mayfield***, 608 S.W.2d at 771. Moreover, there is no evidence that D.G. was aware of the dangerousness of the children's living conditions and disregarded the risk. *See* ***Rios***, 2012 WL 2989237, at *5. Therefore, no reasonable fact finder could have formed a firm belief or conviction that the Department's allegation was true—that D.G. knowingly placed or allowed his children to remain in conditions or surroundings that endangered their physical or emotional well being. *See generally* ***In re K.W.***, 138 S.W.3d 420, 431-32 (Tex. App.—Fort Worth 2004, pet. denied). Accordingly, we conclude that the evidence is legally insufficient to support a finding of termination of D.G.'s parental rights under Section 161.001(1)(D) of the Texas Family Code. D.G.'s first issue is sustained. Because we have held that the evidence is legally insufficient to

[5] Caseworker Silva confirmed that she "received records to confirm [the children] were in California," but no records were introduced and admitted at trial.

support termination under Section 161.001(1)(D), we need not address D.G.'s second issue pertaining to factual sufficiency. *See* TEX. R. APP. P. 47.1.

TERMINATION UNDER SECTION 161.001(1)(Q)

In his third and fourth issues, respectively, D.G. argues that the evidence is legally and factually insufficient to support a finding that he knowingly engaged in criminal conduct that resulted in his conviction of an offense and confinement or imprisonment and inability to care for his children for not less than two years from the date of filing the petition.

Applicable Law

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly engaged in criminal conduct that has resulted in the parent's (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition. TEX. FAM. CODE ANN. § 161.001(1)(Q). Subsection (Q) applies prospectively. ***In re A.V.***, 113 S.W.3d 355, 360 (Tex. 2003). Thus, if a parent is convicted and sentenced to serve at least two years and will be unable to provide for his child during that time, the state may use subsection (Q) to ensure that the child will not be neglected. ***Id.*** However, a two year sentence does not automatically meet subsection (Q)'s two year imprisonment requirement because neither the length of the sentence nor the projected release date are dispositive of when the parent will in fact be released from prison. *See* ***In re H.R.M.***, 209 S.W.3d 105, 108 (Tex. 2006). Accordingly, evidence of the availability of parole is relevant to determine whether the parent will be released within two years. ***Id.*** at 109. But the mere introduction of parole-related evidence does not prevent a fact finder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years. ***Id.***

To support termination of D.G.'s parental rights under subsection (Q), the Department was required to prove by clear and convincing evidence that D.G.'s criminal conviction would result in confinement for at least two years from the date the Department filed its petition. *See* TEX. FAM. CODE ANN. § 161.001(1)(Q); *see also* ***In re K.B.C.***, No. 10-09-00007-CV, 2009 WL 3131441, at *2 (Tex. App.—Waco Sept. 30, 2009, no pet.) (mem. op.).

Analysis

The Department filed its original petition seeking termination on September 9, 2010. Thus, the Department was required to prove by clear and convincing evidence that D.G.'s confinement or

imprisonment would cease no sooner than September 9, 2012. In its findings of fact and conclusions of law, the trial court found that

> [D.G.] provided no direct evidence concerning his incarceration, but sought at trial to rely on what he himself had communicated to Department workers. It appears that [D.G.] was incarcerated sometime in 2007. In his Family Service Plan dated November 10, 2010, [D.G.] writes that he expects to be released in July 2012. In the Permanency Progress Report dated May 23, 2011, his worker states that he told her he had seventeen months on his sentence, which would put the release date sometime in October of 2012. Then in a letter dated July 7, 2011, he again states the July 2012 date. There is no evidence of when, if ever, [D.G.] would have the ability to provide for the children after his release from prison, whenever that might be.

1. Evidence Most Favorable to the Finding

At trial, Investigator Kusch testified that K.G. told her that D.G. was in prison in California and would be serving "a few more years." It is undisputed that at the time of removal, D.G. was incarcerated in California. Kusch testified that the children knew D.G. "was not around" and that she "believe[d]" that the children "stated that they knew he was in prison in California."

Caseworker Silva testified that she corresponded with D.G. by mail. The last communication Silva initiated with D.G. was in June 2011, when she mailed him a court report and D.G. responded by letter. Silva's second permanency plan and progress report, which was filed on May 24, 2011, stated, "[D.G.] has been incarcerated in California since 2007. He informed me that he still has 17 months left in his sentence. D.G. has provided me with reqested [sic] paperwork, and contact through mail." Seventeen months from the date of Silva's report would have been October 23, 2012. According to this information, D.G. would have been released no sooner than the September 10, 2012 date.

2. Evidence Contrary to the Finding

It is undisputed that two years from the date the Department filed its petition would be September 9, 2012, and that the Department offered no documentation regarding D.G.'s incarceration, sentence, or other information concerning his release. Investigator Kusch admitted that she never obtained any documentation or records showing D.G.'s incarceration in California. Kusch testified that she had no personal knowledge as to whether D.G. had been released from prison at the time of trial. Caseworker Silva also confirmed that she did not obtain any documentation or court records from California to determine what D.G. was convicted of or the length of his sentence, and had no personal knowledge concerning these matters. Silva testified that

D.G. was still incarcerated at the time of trial, and that she "believe[d]" D.G. told her that he was scheduled to be released in August 2012. Silva then said she was unsure of whether August 2012 was a parole date or release date.

In D.G.'s service plan that was filed in November 2011, D.G. wrote the following statement in the comments portion: "As soon as I'm released out of prison on 7/11/2012 or sooner, then I will make every effort possible to provide a stable place for both [children] . . . ." Silva confirmed on cross-examination that she received a letter from D.G. dated July 7, 2011. In the letter, D.G. informed Silva, "My release date is on 07/11/2012, which allows me to see to the future in response to the boys . . . ." Prior to the letter's admission, the following exchange took place between the Court, the Department, D.G.'s attorney, and Caseworker Silva:

> The Court: Can I clarify something? I haven't seen the exhibits, so I don't know what the letter says. Is that his first consideration for parole?
>
> Department's Attorney: That's our understanding, Judge, and the attempts to get records from California, it has been difficult.
>
> D.G.'s Attorney: Your Honor, I don't think the letter specifies that if you---
>
> Caseworker Silva: It's just what he says—that's just when he says he's getting out. I don't know if that's true or not.
>
> D.G.'s Attorney: Judge, it's in the exhibit that has the—there's a letter in the Family Progress Report.
>
> The Court: What was he convicted of?
>
> . . . .
>
> Department's Attorney: Judge, if you—just to clarify, my information comes from—in the State of California, they have a computerized system whereby you can check on an inmate's status. I have requested the official records and have yet to receive them, and in checking the computer, the California computer system, I was able to locate this inmate, I was able to locate the facility which he is incarcerated and what it lists is his expected parole date of 7 of 2012 and that he is incarcerated for a drug charge.
>
> D.G.'s Attorney: Judge, if the Court is considering this as evidence, I would object to it.
>
> The Court: Well, considering—
>
> D.G.'s Attorney: I would—
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> The Court: What he says is not very strong evidence.
>
> D.G.'s Attorney: I understand.

> The Court: And that issue is significant in terms of, you know, if they have promised him he's going to be released on that date, then that's one thing, it's within two years. If it's just his first consideration, then I'm not going to accept that as a release date, and so my knowledge of the prison system is—is they—after they have been there a while, they get several opportunities to petition, and that's what I would take his statement to refer to. They all, in my experience, speak hopefully about that first consideration, but without knowing for certain that that is an absolute release date, and having only his word on it, I'm not going to find him credible. I don't even get to talk to him or see him.
>
> . . . .
>
> The Court: So we have got a lot of—it's all speculation on all sides, it seems to me at this point.

Conclusion

As previously stated, we are required to disregard all evidence that a reasonable fact finder could have disbelieved. ***In re J.F.C.***, 96 S.W.3d at 266. The trial court stated it would not find credible any of D.G.'s statements relating to a July 2012 release date. Whether it was reasonable for the trial court to disregard all of D.G.'s consistent statements regarding his release date does not affect our conclusion regarding the sufficiency of the evidence to support termination under Section 161.001(1)(Q).

In its findings of fact and conclusions of law, the trial court stated that D.G. "provided no direct evidence concerning his incarceration," and that the Department, "made a diligent effort to obtain specific, confirmed information concerning [D.G.'s] incarceration from the appropriate authorities of the California penal system, with very little success." Notwithstanding these findings, the Department, and not D.G., had the burden to show by clear and convincing evidence that D.G. would not be released within two years from the date the Department filed its petition. *See* TEX. FAM. CODE ANN. § 161.001; ***In re C.L.C.***, 119 S.W.3d at 391. The Department's attorney told the court that she obtained information regarding D.G.'s incarceration from a computer database. However, the Department offered no evidence from any authoritative source in the California penal system to establish that D.G. would be released after September 9, 2012.[6]

The trial court used Silva's May 23, 2011 progress report to support its conclusion that D.G. would be incarcerated more than two years after the Department filed its original petition. But Silva's report relating to D.G.'s release date admittedly came from D.G. Specifically, she stated in

[6] "Evidence" is defined as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." BLACK'S LAW DICTIONARY 595 (8th ed. 2007). Unsworn statements by counsel are not evidence. ***Daugherty v. Jacobs***, 187 S.W.3d 607, 619 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

her report that "[D.G.] informed me that he still has 17 months left in his sentence," but did not specify when she received this information from D.G.

Finally, the deficiency of the Department's proof is illuminated in the trial court's findings of fact, which state in part that "[t]here is no evidence of when, if ever, [D.G.] would have the ability to provide for the children after his release from prison, *whenever that may be*." (emphasis added).

We agree with the trial court's pronouncement that there was nothing more than "speculation" regarding D.G.'s release date, and its acknowledgement that the record does not show a specific release date for D.G. Therefore, we conclude that no reasonable fact finder could form a firm belief or conviction that D.G. would be confined or imprisoned for a period of not less than two years from the date of the Department's filing of its termination petition. Consequently, the evidence is legally insufficient to support termination under Section 161.001(1)(Q). *See, e.g.*, ***In re J.R.***, 319 S.W.3d 773, 777 (Tex. App.—El Paso 2010, no pet.); ***In re K.B.C.***, 2009 WL 3131441, at *3; ***In re D.J.J.***, 178 S.W.3d 424, 429 (Tex. App.—Fort Worth 2005, no pet.); ***In re R.F.***, 89 S.W.3d 258, 260 (Tex. App.—Corpus Christi 2002, no pet.). D.G.'s third issue is sustained. Because we have held that the evidence is legally insufficient to support termination under Section 161.001(1)(Q), we need not address D.G.'s fourth issue pertaining to factual sufficiency. *See* TEX. R. APP. P. 47.1. We also do not address D.G.'s fifth and sixth issues pertaining to the sufficiency of the evidence to support the jury's finding that termination is in the best interest of the child. *See* ***id***.

CONCLUSION

We have overruled D.G.'s seventh issue. However, we have sustained D.G.'s first and third issues. Accordingly, we ***reverse*** the judgment of the trial court and ***render*** judgment that the Department's request for termination of the parent-child relationship between D.G., A.E.G. and J.D.G. is ***denied***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 28, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 28, 2012

NO. 12-11-00307-CV

IN THE INTEREST OF A.E.G. AND J.D.G., CHILDREN

Appeal from the County Court at Law
of Anderson County, Texas. (Tr.Ct.No. CCL-10-12920)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment of the trial court be **reversed** and judgment **rendered** that the request of the Department of Family and Protective Services for termination of the parent-child relationship between D.G., A.E.G. and J.D.G. is **denied**; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.