Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00121-CV

IN THE INTEREST OF I.N.D., D.M.R., A.M.R., L.F.R., and A.R.R., Children

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-PA-02752
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Beth Watkins, Justice

Delivered and Filed: May 13, 2020

AFFIRMED

Appellant J.D. appeals the trial court's order terminating her parental rights to her children, I.N.D. (born 2003), D.M.R. (born 2008), A.M.R. (born 2012), L.F.R. (born 2016), and A.R.R. (born 2019).[1] On appeal, J.D. argues legally and factually insufficient evidence supports the trial court's findings under Texas Family Code 161.001(b)(1) and that termination is in the best interests of the children. We affirm the trial court's termination order.

BACKGROUND

In December of 2018, the Texas Department of Family and Protective Services ("the Department") received a referral from a hospital about A.M.R., who was six years old with special

[1] To protect the privacy of the minor child, we refer to the child and the parent by their initials. TEX. R. APP. P. 9.8(b)(2).

needs. The hospital reported that J.D. had called 9-1-1 after A.M.R. stopped breathing and was nonresponsive. When A.M.R. arrived at the hospital, she was "stunningly malnourished," covered in ulcers, and "near death." The Department immediately removed D.M.R., A.M.R., and L.F.R. from J.D.'s care. At the time of removal, I.N.D. was reported as a runaway and A.R.R. had not been born.

The Department obtained temporary managing conservatorship over I.N.D., D.M.R., A.M.R., and L.F.R., placed D.M.R. and L.F.R. with a foster family, and placed A.M.R. with a different foster family with experience caring for special needs children. It also created a family service plan requiring J.D. to, inter alia, complete a parenting program, obtain and maintain safe and stable employment and housing, submit to random drug testing, attend scheduled visitations with the children, complete a mental health evaluation, and receive individual counseling as a condition of reunification. During the pendency of the suit, J.D. gave birth to A.R.R., and the Department removed A.R.R. from J.D.'s care and placed her with the foster family caring for D.M.R. By this time, D.M.R. and L.F.R. had been placed with different foster families. As a result of ongoing concerns, the Department pursued termination of J.D.'s parental rights.

On February 14, 2020, the trial court held a one-day bench trial at which J.D. appeared. The trial court heard testimony from: (1) Dr. James Lukefahr, who treated A.M.R. for more than a month after she was admitted to the hospital; (2) Teresa Peaches, A.M.R.'s foster mother; (3) Carlos Castillo, J.D.'s therapist; (4) Ann Marie Hernandez, J.D.'s psychologist; (5) Denise Santos, the Department caseworker; and (6) J.D. The trial court also reviewed J.D.'s service plan as well as photos of A.M.R. in the hospital, J.D.'s home, and the children during a visitation. The court found that termination of J.D.'s parental rights was in the best interests of the children and signed

an order terminating J.D.'s parental rights pursuant to section 161.001(b)(1)(D), (E), and (O). J.D. now appeals, asking to be appointed possessory conservator.[2]

ANALYSIS

Standard of Review

The involuntary termination of a natural parent's rights implicates fundamental constitutional rights and "divests the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit from the parent." *In re S.J.R.-Z.*, 537 S.W.3d 677, 683 (Tex. App.—San Antonio 2017, pet. denied) (internal quotation marks omitted). "As a result, appellate courts must strictly scrutinize involuntary termination proceedings in favor of the parent." *Id.* The Department had the burden to prove, by clear and convincing evidence, both that a statutory ground existed to terminate J.D.'s parental rights and that termination was in the best interests of the children. TEX. FAM. CODE ANN. § 161.206; *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). "'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; *In re S.J.R.-Z.*, 537 S.W.3d at 683.

When reviewing the legal and factual sufficiency of evidence supporting a trial court's order of termination, we apply well-established standards of review. *See* TEX. FAM. CODE §§ 101.007, 161.206(a); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). To determine whether the Department presented clear and convincing evidence, a legal sufficiency review requires us to "look at all the evidence in the light most favorable to the finding to determine whether a

[2] In her brief, J.D. states that the termination order appoints J.D. possessory conservator of the children and "presumes that this is merely an error." After signing its original order, the trial court signed a nunc pro tunc order which terminates J.D.'s parental rights and states J.D. "is not appointed possessory conservator of the children."

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 "assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re R.S.-T.*, 522 S.W.3d 92, 98 (Tex. App.—San Antonio 2017, no pet.). "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.F.C.*, 96 S.W.3d at 266. Nevertheless, "we may not simply disregard undisputed facts that do not support the finding; to do so would not comport with the heightened burden of proof by clear and convincing evidence." *In re S.L.M.*, 513 S.W.3d 746, 748 (Tex. App.—San Antonio 2017, no pet.). If a reasonable factfinder could "form a firm belief or conviction" that the matter is true, then the evidence is legally sufficient. *Id*. at 747.

In contrast, in conducting a factual sufficiency review, we must review and weigh all of the evidence, including evidence contrary to the trial court's findings. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). We consider whether the disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the challenged finding. *In re J.F.C.*, 96 S.W.3d at 266. The evidence is factually insufficient only if "in light of the entire record, 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." *Id.*

In both a legal and a factual sufficiency review, the trial court, as factfinder, is the sole judge of the weight and credibility of the evidence. *In re E.X.G.*, No. 04-18-00659-CV, 2018 WL 6516057, at *1 (Tex. App.—San Antonio Dec. 12, 2018, pet. denied) (mem. op.). We must defer to the factfinder's resolution of disputed evidentiary issues and cannot substitute our judgment for that of the factfinder. *See, e.g., In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam) (factual sufficiency); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency).

Predicate Statutory Grounds

Applicable Law

When, as here, the trial court terminates a parent's rights on multiple predicate grounds, we may affirm on any one ground. *In re A.V.*, 113 S.W.3d at 362; *In re D.J.H.*, 381 S.W.3d 606, 611–12 (Tex. App.—San Antonio 2012, no pet.). However, because termination on an endangerment ground may later be used to terminate parental rights to another child, we must review the sufficiency of the evidence to support a challenged endangerment finding under subsection D or E even if termination is supported by an alternative statutory ground. *In re N.G.*, 577 S.W.3d 230, 235–36 (Tex. 2019) (per curiam). We therefore begin our analysis by considering the trial court's findings under subsections D and E.

Subsection D allows a trial court to terminate parental rights 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 which endanger the physical or emotional well-being of the child." TEX. FAM. CODE § 161.001(b)(1)(D). Under subsection D, the trial court examines "evidence related to the environment of the children to determine if the environment was the source of endangerment to the children's physical or emotional well-being." *In re J.T.G.*, 121 S.W.3d at 125. "Environment" refers to the acceptability of the child's living conditions and a parent's conduct in the home. *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). "A child is endangered when the environment creates a potential for danger that the parent is aware of but consciously disregards." *Id*. A parent does not need to know for certain that the child is in an endangering environment—awareness of a potential for danger is sufficient. *In re R.S.-T.*, 522 S.W.3d at 109. The relevant period for review of environment supporting termination under subsection D is before the Department removes the child. *In re J.R.*, 171 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Subsection E allows termination of a parent's rights if the trial court finds by clear and convincing evidence that the parent "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." TEX. FAM. CODE § 161.001(b)(1)(E). Under subsection E, the trial court determines whether a parent's acts, omissions, or failures to act endangered the child's physical or emotional well-being. *See In re J.T.G.*, 121 S.W.3d at 125. "It is not necessary that the parent's conduct be directed at the child or that the child actually be injured; rather, a child is endangered when the environment or the parent's course of conduct creates a potential for danger which the parent is aware of but disregards." *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Courts may consider parental conduct that did not occur in the child's presence, including conduct before the child's birth or after the child was removed from a parent's care. *In re K.J.G.*, No. 04-19-00102-CV, 2019 WL 3937278, at *4–5 (Tex. App.—San Antonio Aug. 21, 2019, pet. denied) (mem. op.).

Application

J.D. argues the evidence is legally and factually insufficient to support the trial court's predicate findings under subsections D and E because the Department only produced evidence regarding A.M.R.'s malnourishment and failed to produce any evidence she endangered her other children. J.D. further argues she had difficulty feeding A.M.R. and that difficulty—and not any knowing endangerment—caused the malnourishment.

The Department produced evidence that A.M.R. was born with cerebral palsy, was wheelchair bound, and needed to be fed through a gastrostomy tube. When six-year-old A.M.R. was admitted to the hospital, her temperature was 84 degrees, she weighed nineteen pounds, was "stunningly malnourished," was covered in ulcers, and needed intravenous fluids and glucose to stabilize her blood sugar level. The ulcers on her body indicated A.M.R. had been left in one

position for such a long period of time that her skin started decaying. She also emitted a "peculiar odor" Dr. Lukefahr described as "kind of musty, sort of [like the] smell of decay." A.M.R. exhibited signs of prolonged starvation: she had lanugo—hair growing in areas where hair does not normally grow—and refeeding syndrome—the inability to handle normal amounts of glucose and nutrients immediately. Her medical records indicated A.M.R. had been steadily losing weight for the past three years. It also appeared that A.M.R. had never been to a dentist.

When Department Caseworker Santos arrived at the hospital to interview J.D., A.M.R. "had a very strong body odor," protruding bones, no body fat, and "seemed to have been, basically, starved." After the Department removed the children from J.D.'s care, Santos visited J.D.'s home and saw that J.D. "had plenty of formula to be feeding [A.M.R.]," exclaiming "there was absolutely no reason for this child to have been starved." J.D., however, testified she did not receive any training regarding how to feed A.M.R., yet she also testified she was taught how to feed A.M.R. through the gastrostomy tube at the hospital when A.M.R. received the tube.

According to Santos, by neglecting A.M.R., J.D. exposed her two children who lived with her—D.M.R. and L.F.R—to watching A.M.R. slowly die, hearing A.M.R. cry in pain, and smelling A.M.R.'s "like death" odor. Santos testified such trauma "was very emotionally damaging" to these children. Santos further testified that J.D. did not know where I.N.D. was, but did not appear to be concerned.

The trial court also heard testimony that I.N.D. had run away and J.D. did not know where her daughter was, but she did not appear to be concerned. The evidence showed that I.N.D. had been missing for at least two years and that A.M.R. had been malnourished for at least three years. The trial court, therefore, could have concluded that I.N.D. had witnessed J.D.'s treatment of A.M.R. as D.M.R. and L.F.R. did.

Finally, with respect to A.R.R., who was born during the pendency of the proceeding, the Department presented evidence that when A.R.R. was born, she was suspected to have fetal alcohol syndrome. As a result, A.R.R. is being followed by a developmental pediatrician and receives physical, occupational, and speech therapy. Santos testified she was concerned that J.D. would not follow through with the therapies A.R.R. required, since she did not follow through with the therapies A.M.R. required.

The Department also produced evidence the children witnessed domestic violence. *See In re R.S.-T.*, 522 S.W.3d at 110 ("Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment.") (internal quotation marks omitted). The trial court heard testimony from Castillo, J.D.'s therapist, and Hernandez, J.D.'s psychologist, that J.D. remained in an abusive relationship with the father of D.M.R., A.M.R., and L.F.R. while caring for them. According to Castillo, J.D. blamed her situation and A.M.R.'s malnourished condition on the abuse she endured. Castillo testified that J.D.'s decision to remain in this relationship made her depressed and impacted her parenting. For example, she would isolate herself and act "in a very hostile, very angry mood" toward her children.

The trial court reasonably could have concluded that J.D. endangered A.M.R. by failing to properly feed or care for her and endangered her other children by exposing them to domestic violence and the trauma of watching their sister deteriorate over the course of years. *See In re R.S.-T.*, 522 S.W.3d at 110; *In re S.M.L.*, 171 S.W.3d at 477. And the trial court could have reasonably inferred that J.D.'s conduct before A.R.R. was born constituted endangerment. *See In re K.J.G.*, 2019 WL 3937278, at *4–5 (stating courts may consider parental conduct that occurred before child's birth). When viewing this evidence in the light most favorable to the findings under subsections D and E, the trial court could have reasonably formed a firm belief or conviction that J.D. endangered her children by knowingly subjecting them to an endangering environment. *See*

In re J.F.C., 96 S.W.3d at 266; *In re S.R.*, 452 S.W.3d at 360. Accordingly, we conclude the evidence is legally and factually sufficient to support the trial court's findings under subsections D and E.

Best Interests

J.D. also challenges the sufficiency of the evidence to support the trial court's determination that termination of her parental rights was in the best interests of her children. J.D. argues that because she successfully completed her service plan and accepted responsibility for her past behavior with the help of therapy, the trial court should have reunited her with her children, or at minimum, named her possessory conservator.

Applicable Law

There is a strong presumption that a child's best interest is served by maintaining the relationship between a child and the natural parent, and the Department has the burden to rebut that presumption. *See, e.g.*, *In re R.S.-T.*, 522 S.W.3d at 97. In determining whether the Department satisfied this burden, the legislature has provided several factors for courts to consider regarding a parent's willingness and ability to provide a child with a safe environment.[3] TEX. FAM.

[3] These factors include, inter alia: "(1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of the harm to the child; (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department or other agency; (5) whether the child is fearful of living in or returning to the child's home; (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home; (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (9) whether the perpetrator of the harm to the child is identified; (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the child's family demonstrates adequate parenting skills [. . .]; and (13) whether an adequate social support system consisting of an extended family and friends is available to the child." TEX. FAM. CODE ANN. § 263.307(b).

CODE ANN. § 263.307(b). Courts may also apply the list of factors promulgated by the Texas Supreme Court in *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).[4]

A best interest finding, however, does not require proof of any particular factors. *See In re G.C.D.*, No. 04-14-00769-CV, 2015 WL 1938435, at *5 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.). Neither the statutory factors nor the *Holley* factors are exhaustive, and "[e]vidence of a single factor may be sufficient for a factfinder to form a reasonable belief or conviction that termination is in the child's best interest." *In re J.B.-F.*, No. 04-18-00181-CV, 2018 WL 3551208, at *3 (Tex. App.—San Antonio July 25, 2018, pet. denied) (mem. op.). Additionally, evidence that proves a statutory ground for termination is probative on the issue of best interest. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). Finally, "[a] trier of fact may measure a parent's future conduct by his past conduct [in] determin[ing] whether termination of parental rights is in the child's best interest." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

Application

In addition to the evidence described above, the Department produced evidence that J.D. was depressed and overwhelmed with her parenting responsibilities. *See In re A.V.*, 113 S.W.3d at 361 (pointing out parental rights are not absolute and Department may seek termination of parental rights of those who are not fit to accept parental responsibilities). Both Castillo and Hernandez testified that prior to the children's removal, J.D. did not work and had been highly dependent on D.M.R., A.M.R., and L.F.R.'s father for support until their separation. They testified

[4] Those factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist those individuals to promote the best interest of the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.*

J.D. was a domestic violence victim who had very low self-esteem and refused to accept responsibility for the children and A.M.R.'s condition. Castillo testified that J.D. did not feel like she did anything wrong and blamed D.M.R., A.M.R., and L.F.R.'s father for what happened to A.M.R. Only after months of counseling did J.D. acknowledge that her past relationship impacted her parenting abilities.

The Department also produced evidence that outside of J.D.'s care, A.M.R's health improved significantly. *In re T.T.*, 228 S.W.3d 312, 321 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (considering evidence that children had improved significantly after removed from parent's care in best interest determination). A.M.R. remained in the hospital for more than one month under Dr. Lukefahr's care. During that time, her ulcers "completely healed," and she was able to sit for short periods of time and make eye contact and facial expressions. Her body odor disappeared, her skin improved, and she gained weight. In addition, Peaches—A.M.R.'s foster mother—testified A.M.R. was initially very fragile and weak, but by the time of trial, she was able to roll, tumble, and pull herself up. A.M.R. weighed forty-four pounds at trial, which was within a normal weight range for her age. Peaches also testified that she feeds A.M.R. through a gastrostomy tube, takes A.M.R. to a cycle of medical appointments, and has learned to interpret A.M.R.'s screams. Peaches testified she could only act as the foster placement because she is seventy-two years old and feels she is too old to adopt A.M.R.

With respect to D.M.R., L.M.R., and A.R.R., the evidence shows they are currently doing well in their foster placements. *See id.*; *see also In re C.H.*, 89 S.W.3d at 28 ("Evidence about placement plans and adoption are, of course, relevant to best interest."). Department Caseworker Santos testified that D.M.R. and L.M.R. were initially placed together in a foster home, but two-year old L.M.R. threw "excessive tantrums," and as a result, the foster mother was unable to continue to care for her. In her current foster placement, L.M.R. is doing well and receiving speech

therapy. Santos also testified D.M.R. and A.R.R. are fostered together. D.M.R. is receiving counseling and A.R.R. is being monitored by a developmental specialist and receiving treatment for fetal alcohol syndrome. All these children are in homes with families who plan to adopt them. Santos further testified the foster parents plan to keep in touch with each other and A.M.R. so that the children can remain close. As to I.N.D., the evidence shows she remains missing and has not contacted J.D. or any of her half-siblings.

Finally, the trial court heard testimony from J.D., who was currently facing criminal charges for injury to a child with respect to A.M.R. When asked about A.M.R.'s condition, J.D. invoked the Fifth Amendment, allowing the trial court to draw adverse inferences against her. *See Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360, 367 (Tex. App.—Houston 2009, no pet.) (stating trial court may "draw reasonable inferences from a party's assertion of the privilege against self-incrimination" and "[t]hat does not change merely because there are pending criminal charges arising out of the same conduct"). J.D., however, told the court that she cared for A.M.R. by feeding her, bathing her, moving her around in her wheelchair, and putting ointment on her ulcers. J.D. also testified that for a short time, A.M.R. received in-home healthcare services, and a nurse would feed her, change her, and bathe her. However, by 2014, Medicaid stopped providing the nurse, and J.D became the full-time caregiver for A.M.R. In addition, J.D. testified that she did not know where I.N.D. was but added that she made attempts to find her by texting I.N.D.'s friends and checking I.N.D.'s Facebook account.

J.D. points out she completed her service plan and recognized the problems with her past behavior with the help of therapy. J.D. is correct in that Santos testified that J.D. completed her service plan, and Castillo testified that after several months, J.D. recognized how staying in a violent relationship caused her to neglect her children. However, Santos also testified J.D. did not fully comply with her service plan because she has not accepted full responsibility for severely

neglecting A.M.R. Santos further explained that they cannot address this concern until J.D. explains why A.M.R. was neglected. Her therapist also testified J.D. is still "very overwhelmed, stressed out, not making good decisions, [and is] very angry."

Accordingly, after reviewing all the evidence—including the evidence on which J.D. relies—we conclude this disputed evidence is not so significant that a reasonable factfinder could not have formed a firm belief or conviction that termination of J.D.'s parental rights was in the best interests of her children. *See In re S.L.M.*, 513 S.W.3d at 750. We therefore overrule J.D.'s arguments to the contrary and hold that legally and factually sufficient evidence supports the trial court's findings, by clear and convincing evidence, under subsections D and E and that termination of J.D.'s parental rights was in the best interests of her children. Having determined legally and factually sufficient evidence supports the termination order, we need not consider J.D.'s request to be reunited with her children or at minimum, be appointed possessory conservator. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We affirm the trial court's order of termination.

Beth Watkins, Justice