Opinion filed July 15, 2020

In The

Eleventh Court of Appeals

No. 11-20-00001-CV

IN THE INTEREST OF K.P. AND K.P., CHILDREN

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause No. CV 18-10-428

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

After a de novo hearing, the trial court entered an order in which it terminated the parental rights of the mother of K.P. and K.P. The mother filed an appeal. On appeal, she presents four issues in which she challenges the sufficiency of the evidence to support the trial court's findings, asserts that she received ineffective assistance of counsel, and complains of the admission and exclusion of certain evidence.[1] We affirm the trial court's order.

[1]We note that Brown County Attorney Shane Britton failed to file an appellee's brief on behalf of the Department of Family and Protective Services.

Termination Findings and Standards

Appellant first argues that the evidence is legally and factually insufficient to support the trial court's findings. Termination of parental rights must be supported by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2019). To terminate parental rights, it must be shown by clear and convincing evidence that the parent has committed one of the acts listed in Section 161.001(b)(1)(A)–(U) and that termination is in the best interest of the child. FAM. § 161.001(b). In this case, the trial court found that Appellant had committed two of the acts listed in Section 161.001(b)(1)—those found in subsections (N) and (O). Specifically, the trial court found that Appellant had constructively abandoned the children and that Appellant had failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children, who had been in the managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the children's removal from the parents for abuse or neglect. The trial court also found that termination of the mother's parental rights would be in the children's best interest. *See id.* § 161.001(b)(2).

To determine on appeal if the evidence is legally sufficient in a parental termination case, we review all of the evidence in the light most favorable to the finding and determine whether a rational trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). To determine if the evidence is factually sufficient, we give due deference to the finding and determine whether, on the entire record, a factfinder could reasonably form a firm belief or conviction about the truth of the allegations against the parent. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002).

With respect to the best interest of a child, no unique set of factors need be proved. *In re C.J.O.*, 325 S.W.3d 261, 266 (Tex. App.—Eastland 2010, pet. denied). But courts may use the non-exhaustive *Holley* factors to shape their analysis. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These include, but are not limited to, (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 these individuals to promote the best interest of the child, (6) the plans for the child by these 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. *Id.* Additionally, evidence that proves one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *C.J.O.*, 325 S.W.3d at 266.

Background Facts

The Department originally became involved with the children in this case after Appellant "attack[ed]" her older daughter (KP1). During this incident, Appellant was driving, and KP1 was in the vehicle with Appellant. Appellant pulled KP1's hair and caused bruising on KP1's face and neck. Police and an ambulance were called to the scene. After an investigation, the children were removed from Appellant's care.

Although Appellant's assault of KP1 was the incident that resulted in the Department's involvement, other reasons for removal included Appellant's drug use and her leaving the children alone at home to fend for themselves for days at a time. Appellant's drug of choice was methamphetamine. Appellant tested positive while

the termination proceedings were pending below, refused to submit to testing, and also admitted that she had used methamphetamine. Appellant also associated with people who had a history of abusing drugs, including Appellant's mother, who had "significant CPS history," and a man with whom Appellant lived after her children were removed.

The trial court ordered Appellant to complete various services in order for her children to be returned to her care. She initially participated—although inconsistently—in her services. And after her arrest for assaulting a man in Eastland County, Appellant "started no showing for all of the rest of her services and no longer maintained contact with the Department." Appellant did not complete her court-ordered services.

Appellant testified at the de novo hearing that she had recently been to Austin Recovery for inpatient treatment and that she had successfully completed the program there. Appellant had been diagnosed as being bipolar and as suffering from some depression and anxiety. Appellant received prescribed medications, which she said helped her mental health issues. She also testified that "being sober also helps [her] a lot." Appellant admitted that she had not seen her daughters in almost a year, but she testified that she loved them and wanted to be in their lives.

The children, who were ages fifteen and thirteen at the time of trial, had been placed with their paternal aunt and uncle. The children are happy and doing well in that placement. The children love their mother but know that she has a substance abuse problem. The children would like to be adopted by their aunt and uncle, and the aunt and uncle wish to adopt the children. The Department's plan for the children is to be adopted by their aunt and uncle. Both the Department and the children's guardian ad litem believe that termination of Appellant's parental rights would be in the children's best interest.

Analysis

Sufficiency of the Evidence

In her first issue, Appellant challenges the legal and factual sufficiency of the evidence in support of the findings made by the trial court pursuant to Section 161.001. *See* FAM. § 161.001(b)(1)(N), (O), (b)(2), (d).

With respect to Appellant's challenge to the trial court's finding that Appellant constructively abandoned her children, *see id.* § 161.001(b)(1)(N), Appellant specifically argues that the evidence was insufficient to show that she failed to regularly visit or maintain significant contact with the children because she "did not reject visits" but was instead "denied visitation." Appellant argues that the Department kept her from visiting and maintaining significant contact with the children. The trial court had ordered Appellant to comply with her family service plan, which provided in part: "Once visitation begins, if a positive drug test is received, visitation will be suspended until 3, consecutive, negative drug screens are obtained." Appellant tested positive for methamphetamine and subsequently refused to submit to drug tests during an eight-month period. Appellant's visits were suspended because she refused to submit to drug testing and failed to make progress on her services.

Although Appellant argues that the trial court and the Department thwarted her ability to visit the children, the evidence shows that, to the contrary, submitting to drug testing and obtaining three consecutive negative test results were tasks within Appellant's control. *See In re X.A.S.*, No. 05-19-01082-CV, 2020 WL 1042520, at *5–6 (Tex. App.—Dallas Mar. 3, 2020, no pet.) (mem. op.) (upholding finding under subsection (N) and holding that mother was not prevented from regularly visiting or maintaining significant contact with her child where mother's failure to submit to drug testing in order to regain visits was within mother's control); *Nuyen v. Tex.*

Dep't of Family & Protective Servs., No. 03-12-00147-CV, 2012 WL 3629427, at *6 (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.) (upholding finding under subsection (N) and holding that mother was not prevented from regularly visiting or maintaining significant contact with her child even though trial court had abated mother's visitation rights after mother failed to appear at two court hearings concerning her visitation rights); *Quiroz v. Dep't of Family & Protective Servs.*, No. 01-08-00548-CV, 2009 WL 961935, at *7 (Tex. App.—Houston [1st Dist.] April 9, 2009, no pet.) (mem. op.) (upholding finding under subsection (N) and holding that mother was not prevented from regularly visiting or maintaining significant contact with her child where mother merely had to come to court to have an order denying contact lifted).

The record before us does not reflect that the trial court or the Department prevented Appellant from obtaining negative drug test results. Rather, Appellant's actions controlled her ability to visit her children. As did the courts in *X.A.S.*, *Nuyen*, and *Quiroz*, we conclude that the trial court's finding, pursuant to subsection (N), that Appellant failed to regularly visit or maintain significant contact with the children was supported by clear and convincing evidence. Appellant does not contend on appeal that the evidence is insufficient to support the remaining elements of subsection (N); therefore, we need not address those elements here. *See* TEX. R. APP. P. 47.1. Accordingly, we overrule Appellant's first issue to the extent that Appellant challenges the sufficiency of the evidence to support the trial court's finding under Section 161.001(b)(1)(N).

Because we have upheld the trial court's finding under subsection (N), we need not address Appellant's challenge to the legal and factual sufficiency of the evidence to support the trial court's finding under subsection (O) or the trial

court's failure to find that Appellant met an exception to subsection (O). *See* FAM. § 161.001(b)(1), (d); *see also* TEX. R. APP. P. 47.1.

We must, however, still address Appellant's challenge to the legal and factual sufficiency of the evidence to support the trial court's best interest finding. *See id.* § 161.001(b)(2). Based upon the *Holley* factors and the evidence in the record, we cannot hold that the trial court's best interest finding is not supported by clear and convincing evidence. *See Holley*, 544 S.W.2d at 371–72. Considering the desires of the children, the emotional and physical needs of the children, the danger to the children, the parental abilities of those involved, the Department's plans for the children, the stability of the placement, the instability of Appellant, Appellant's inability to provide a safe home for the children, Appellant's drug use, and Appellant's assault of KP1, the trial court could reasonably have formed a firm belief or conviction that it would be in each child's best interest for Appellant's parental rights to be terminated. We hold that the evidence is both legally and factually sufficient to support the trial court's best interest finding. We overrule Appellant's first issue to the extent that Appellant challenges the sufficiency of the evidence to support the trial court's best interest finding.

Assistance of Counsel

In her second issue, Appellant contends that she received ineffective assistance of counsel because her first attorney did not appear at the adversary hearing or the subsequent status hearing. The record reflects that attorney Aaron C. Seymour filed an answer on behalf of Appellant and a notice of representation stating that he had been retained to represent Appellant in this matter. Nothing in the record before us contains any information as to why retained counsel did not appear or whether he was permitted to withdraw as counsel for Appellant; however, on the date of the status hearing, the trial court appointed a different attorney to represent

Appellant. Appellant's newly appointed counsel appeared and acknowledged the scheduling order that the trial court signed on the same day that it conducted the status hearing and appointed counsel. Court-appointed counsel represented Appellant for an entire year prior to the final hearing on termination and continues to represent Appellant in this appeal.

Appellant has not met her burden to show that she received ineffective assistance of counsel; she has not shown that she was prejudiced by retained counsel's failure to appear at the adversary hearing or the subsequent status hearing. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to meet the second prong of the test for ineffective assistance of counsel, an appellant must show that the result of the proceeding would have been different but for counsel's errors). Furthermore, we will not presume prejudice in this case because Appellant was not denied counsel at a critical stage of her trial. *See* FAM. § 262.201 (permitting, but not requiring, trial court to postpone adversary hearing for up to seven days from the date counsel is appointed); *In re E.R.W.*, 528 S.W.3d 251, 262 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also United States v. Cronic*, 466 U.S. 648, 658–59 & n.25 (1984) (prejudice need not be shown if the appellant was denied counsel, or if counsel was absent, during a critical stage of the proceeding). The trial court appointed counsel for Appellant on the same day that the trial court received Appellant's request for appointment of counsel and notification of indigence. Appellant continued to be represented by appointed counsel throughout the remainder of the proceedings. Because Appellant was not denied counsel at a critical stage of her trial and because she has not shown that she received ineffective assistance of counsel, we overrule her second issue on appeal.

Evidentiary Rulings

In her third and fourth issues, Appellant complains of evidentiary rulings made by the trial court. We review a trial court's evidentiary rulings, including its decisions to admit or exclude evidence, for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d at 575; *In re D.O.*, 338 S.W.3d 29 (Tex. App.—Eastland 2011, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Appellant specifically complains in her third issue that the trial court erred when it permitted the conservatorship worker to testify about an incident in which Appellant was arrested for assault. Appellant asserts that the testimony was based on hearsay and did not meet the business records exception to the hearsay rule. *See* TEX. R. EVID. 803(6). At the de novo hearing, the trial court initially sustained Appellant's hearsay objections, but it overruled a subsequent hearsay objection after one of the attorneys pointed out that the information was "contained within the Department's records" and also within previous testimony. The record reflects that the conservatorship worker had already testified at the de novo hearing about a conversation that she had had with Appellant regarding Appellant's arrest for assault. According to that testimony, Appellant had told the conservatorship worker that Appellant had been arrested for the offense of assault; that the alleged victim was J.H., a man with whom Appellant lived at the time; and that the alleged assault took place in a vehicle while J.H. was driving. This testimony did not constitute hearsay because the out-of-court statements regarding the assault were made by Appellant to the conservatorship worker and were offered against Appellant at trial. *See* TEX. R. EVID. 801(e)(2) (an opposing party's statement is not hearsay). Thus,

the trial court did not abuse its discretion when it permitted the conservatorship worker to testify about the incident for which Appellant had been arrested.

Appellant complains in her fourth issue that the trial court abused its discretion when it sustained an objection to a video exhibit that Appellant offered at trial. Appellant had recorded a discussion that she had had with KP1's principal and some "lady who was from CPS." During that discussion, the principal informed Appellant that KP1 did not want to leave with Appellant, and the principal refused to "give [Appellant] her daughter." After determining that the children were not in the custody of the Department at the time that the video was recorded, the trial court ruled that the exhibit was "not relevant to the issues at hand." Appellant asserted that the video was relevant to the issue of "abandonment." We disagree.

The abandonment ground that was at issue in this case provides for the termination of parental rights when a parent has "constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months." FAM. § 161.001(b)(1)(N); *see In re K.A.S.*, 399 S.W.3d 259, 264 (Tex. App.—San Antonio 2012, no pet.) (ruling that relevant time period for purposes of subsection (N) is time during which child was in Department's custody). Because the video depicted an event that occurred prior to the children being placed in the managing conservatorship of the Department, it was within the trial court's discretion to exclude the video as not relevant to the issues at trial.

Moreover, even if Appellant is correct in her contentions that the trial court abused its discretion with respect to the complained-of evidentiary rulings, any error in the admission or exclusion of evidence in this case was harmless. *See* TEX. R. APP. P. 44.1(a)(1) (judgment may not be reversed unless the error probably caused the rendition of an improper judgment). In this regard, we note that other evidence

at trial indicated that Appellant had been arrested for assault and that Appellant testified without objection as to the content of the excluded video exhibit. We overrule Appellant's third and fourth issues.

This Court's Ruling

We affirm the trial court's order of termination.

JOHN M. BAILEY
CHIEF JUSTICE

July 15, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.