TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00901-CV
NO. 03-19-00927-CV

K. N. K., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
NOS. D-1-FM-19-000126 & D-1-FM-18-000626
THE HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

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

In these related cases that were tried together, K.N.K. ("Mother") appeals from the trial court's final decrees terminating her parental rights to L.K. and N.K.[1] *See* Tex. Fam. Code § 161.001. Following a bench trial, the trial court found by clear and convincing evidence that statutory grounds for terminating her parental rights existed and that termination was in the children's best interest. *See id.* § 161.001(b)(1)(D), (E), (2). For the following reasons, we affirm the trial court's final decrees.

[1] We refer to appellant as "Mother," and her children and other family members by their initials. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8. In this Court's cause number 03-19-00927-CV, Mother appeals from the termination of her parental rights to L.K. In this Court's cause number 03-19-00901-CV, Mother appeals from the termination of her parental rights to N.K. L.K. and N.K. have different fathers, their fathers' parental rights were terminated in the respective final decrees, and the fathers have not appealed.

Background

Mother has four children: L.K., who was born in October 2014; twins, who were born in November 2015; and N.K., who was born in January 2017.[2] S.B. is the father of N.K. and the twins. When the twins were six months old and before N.K. was born, the twins began living with their paternal grandparents with the agreement of Mother and S.B. After N.K. was born, Mother was L.K. and N.K.'s primary caregiver.

The Texas Department of Family and Protective Services received a referral alleging neglectful supervision of L.K. and N.K. on January 26, 2018, by Mother and S.B. Responding to Mother's disturbance call around 10:00 p.m., the police were dispatched to Mother's home. However, when they arrived they found L.K. and N.K. alone at the top of a flight of stairs with no baby gate. Based on its investigation that ensued from this incident, the Department filed two separate petitions in suits affecting the parent-child relationship seeking among its relief to terminate Mother's parental rights to L.K. and N.K. The Department also sought extraordinary relief, and L.K. and N.K. were removed and placed in foster care. According to the affidavit that the Department filed in support of its request for extraordinary relief, Mother returned to her home on January 26, 2018, after the police had arrived. Upon her return, she told an officer that she and S.B. had a verbal altercation; that S.B. "knocked [N.K.] over in his attempt to leave" and "struck [L.K.] with the door when he swung it open"; and that she followed S.B. when he left the home. Based on this incident and observed "bruises" on N.K., a Department investigator asked Mother a few days later to take the children to the hospital

[2] The suit concerning N.K. also concerned the twins, but Mother's parental rights to the twins have not been terminated and are not the subject of these appeals. Based on a mediated settlement agreement dated August 31, 2018, the trial court signed a modified order in December 2018 that appointed the paternal grandparents as the joint managing conservators of the twins and Mother and S.B. as possessory conservators.

for medical assessment. The medical assessment revealed that N.K. had "three separate and distinct" skull injuries and "tested positive for marijuana on a urinalysis which was performed at [the hospital] due to concerns of mother's drug usage and breastfeeding."

After the dismissal dates for the cases were extended, the parties reached a mediated settlement agreement in May 2019 in which the parties agreed to a stair-stepped visitation plan and a monitored return of the children to Mother to begin on July 12, 2019. The Department's plan for L.K. and N.K. changed, however, before the monitored return was to begin when it discovered that Mother continued to have in-person contact with S.B. Although Mother had obtained an emergency protective order in May 2018 that prohibited S.B. from having any contact with her and a two-year protective order in December 2018 that prohibited S.B. from, among other actions, being within 200 yards of her, Mother and S.B. continued to spend time together.

The cases were tried to the bench over several days: July 22, 2019, and September 30 to October 2, 2019. The Department's witnesses included officers who responded to incidents involving Mother and S.B., Department employees assigned to the cases, a doctor who examined N.K. at the hospital, Mother, and S.B.[3] Mother also testified on her own behalf in addition to calling her parent coach, the facilitator of a parenting group in which Mother participated, therapists who provided assistance and services to Mother, and N.K.'s paternal grandfather. The evidence showed that Mother had appropriate visits with her twins, was engaged and in communication with the Department, complied with court-ordered services, improved her parenting abilities, and visited with L.K. and N.K., but it also showed that she

[3] A psychologist who evaluated Mother in February 2019 and a CASA child advocate specialist also testified on the Department's behalf.

continued to have in-person contact with S.B. despite her representations to the Department to the contrary, the Department's stated concerns and warnings to her not to do so, and the history of domestic violence between S.B. and Mother.

As to evidence of domestic violence, the medical records from N.K.'s medical assessment reflect that Mother reported a "significant history of domestic violence" with S.B., and a conservatorship caseworker testified about a prior Department case in 2017 that concerned domestic violence between Mother and S.B. The caseworker testified that the 2017 case was closed four months before the current cases began; that she did not believe Mother when she said she would no longer continue a relationship with S.B. "based on what has happened in this case and previous cases"; and that she had "multiple" discussions with Mother about the "importance" of her not being in contact with S.B. for the children's safety.[4] The caseworker assigned to the cases at the time of trial testified that Mother's behavior had not changed and that she "continued to put herself in unsafe situations" and "in situations where [the children] would also not be safe." In their testimony, Mother and S.B. did not deny their continued communication and in-person contact while the Department's cases were pending, and S.B. admitted that domestic violence had occurred "a couple of times."

As to the January 2018 incident that initiated the Department's involvement with the family in these cases, a police officer testified that: (i) he responded to a disturbance call around 10:00 p.m. at Mother's home and heard children "yelling and screaming" from inside

[4] The caseworker testified that she "encouraged [Mother] as far as gaining a better understanding of overall domestic violence, and to talk to her therapist, and to use some of [the Department's] resources." She also advised her of studies that show children who experience domestic violence can have "physical" consequences, that "it's not a safe environment if children are constantly witnessing or being present for domestic violence," and that they "can be injured by intervening in the violence."

Mother's home; (ii) he entered the home through the unlocked back door, and no adult was present; (iii) once inside, he saw the two children, who were around one and three years old, "on the top of the stairwell" without a barrier to keep them from coming down the stairs by themselves; (iv) Mother arrived "roughly" ten minutes later; and (v) Mother told him that she left the children to follow S.B. because he had taken her phone and that, before S.B. left, he "kind of pushed" L.K. when his beer was spilled.

Mother's testimony about the January 2018 incident supported a shorter length of time that the children were left alone and that there was a barrier at the top of the stairs, but she did not deny that she and S.B. had an altercation and that she left L.K. and N.K. alone at her home to follow him. Mother testified that: (i) she made the disturbance call "because [she] didn't want [S.B.] in [her] house and around [her] kids"; (ii) she left her home "[a]bout seven minutes" after the call; (iii) she followed S.B. because he took her phone and she was "afraid that he was taking important documents"; and (iv) there was a "bin in front of the top step." Mother, however, acknowledged that leaving her children alone "was a completely dangerous situation for the kids."

The Department investigator testified that she made an unannounced visit to the home a few days after this incident. According to the investigator, Mother, S.B., L.K., and N.K. were at home when she made her visit, she observed bruising on Mother, and she requested that Mother take L.K. and N.K. to the hospital for medical assessments. The investigator further testified that, during the visit, Mother admitted that she smoked marijuana twice a week and had smoked earlier that day; that when she was using marijuana, "she wasn't really monitoring her kids"; and that she left the children alone on the night of the incident to follow S.B. after they had a "verbal altercation." The investigator also interviewed Mother at the hospital following

"another referral about the visit to the hospital" because Mother "appeared to be under the influence" and there was additional concern based on N.K.'s medical assessment.

Medical records from the assessment, which were admitted as an exhibit, document three separate and distinct injuries to N.K.'s skull,[5] as well as "chronic low-level cannabis exposure from breastmilk." The doctor who examined N.K. at the hospital testified that N.K.'s skull injuries "would have taken three blows," that they were caused by "blunt trauma," and that he would expect a parent of a ten-month old with these types of injuries to seek medical treatment or consultation. According to the doctor's testimony and the medical records, Mother stated that she was unaware of known trauma to N.K. when medical personnel initially asked her, but after she was advised of N.K.'s injuries, Mother reported that N.K. had fallen down the stairs in November 2017 and off a table in December 2017. An EMS incident report from December 20, 2017, which was admitted as an exhibit, reflects that Mother called EMS to report N.K. had fallen from a table, that she was advised of the risks of not seeking further treatment, and that she refused EMS's offer of transport to the hospital.

In her testimony, Mother admitted to smoking marijuana while nursing N.K. and provided specifics about the two falls that she reported to medical personnel at the hospital after N.K.'s medical assessment. She testified that she was "literally like two to three feet away from him" when N.K. fell off the table and that he was in a "Bumbo on a flat surface on the table" so she "thought he was safe." When N.K. fell down the stairs, Mother testified that he was "about 11 months old" and she was in her bedroom and "did not see but [she] heard a yell from him"

[5] The doctor testified that they "found evidence of three separate skull injuries, two definite skull fractures, and a third possible fracture versus just calcified—definitely calcified cephalhematomas," which he defined as "an area of bruising under the skin of the scalp specifically" and "blood collected under the scalp from direct injury from a direct blow."

and "ran over from the very top of the stairs and seen [her] son fall down the last steps of the staircase." She agreed that "it was dangerous to leave [her] 11-month old unsupervised near the stairs." In addition to these two falls, Mother testified about another time that N.K. fell off a bed when his maternal grandmother was taking care of him, but Mother did not seek medical attention for him at that time or the time that he fell down the stairs.

The Department also presented evidence about other incidents involving Mother and S.B. that happened in April 2018 and January, May, and July 2019. Mother, S.B., and the responding police officer testified about the incident in April 2018 that involved domestic violence and resulted in S.B.'s conviction for assault causing bodily injury family violence. *See* Tex. Penal Code § 22.01(a)(1). S.B. pleaded guilty to the offense, and the exhibits included S.B.'s judgment of conviction and the assault victim statement that Mother signed with a strangulation supplement. In the portion of the assault victim statement that the officer filled out, the officer noted that Mother was crying; had bruising, pain, lacerations, redness, and swelling; and reported that S.B. had hurt her in the past "once a year." In the portion of the statement that Mother filled out, she stated that she "knocked [S.B.'s] phone out of his hand" and then S.B. "continuously grabbed at [her] body pulling and throwing [her] around, attempting to pry [her] phone from [her] hands." S.B. testified that he was incarcerated for about eight months for this offense and a separate offense, possession of a controlled substance, and that he was released from confinement on December 20, 2018.

The incident in January 2019, which was a few weeks after S.B.'s release from confinement, concerned a traffic stop, and Mother, S.B., and the officer who initiated the traffic stop testified about the incident. The officer testified that he pulled Mother over, that S.B. was in the car with her, that S.B. gave two inaccurate names before giving his actual name, that Mother

did not correct S.B. when he gave the inaccurate names, and that Mother told the officer that S.B. was a "family friend." Mother admitted that she was pulled over with S.B. in the car but she "believed" it was safe to be around S.B. because they were "both sober." S.B. also did not dispute that he was in the car with Mother when she was pulled over, testifying that they were on their way to a restaurant, and confirmed that she had a protective order against him at the time that prevented him from being within 200 yards of her. As a result of this incident, S.B. was arrested for failure to identify.

The incident in May 2019 occurred a few days after the mediation in which the parties had agreed to Mother's stair-stepped visitation and monitored return of L.K. and N.K. to her. A police officer testified that he responded to a call about a noise disturbance around 2:00 a.m. and found Mother in the stairwell outside S.B.'s apartment. According to the officer, Mother "appeared heavily intoxicated, slurring her words" and told him that she was "banging on [her] boyfriend's door, because she left her glasses inside his apartment." The officer further testified that Mother told him that she had been hanging out with S.B. in his apartment and that she "wasn't supposed to be over there because CPS was going to take her kids because there was a protective order in place against the boyfriend." Mother admitted that she was at S.B.'s apartment but denied she was intoxicated. S.B. asserted his constitutional right not to answer questions about this incident pursuant to the Fifth Amendment. *See* U.S. Const. amend. V.

The July 2019 incident involved Mother, S.B., and the twins at a "musical gathering" or "community get together" a few days before the monitored return of L.K. and N.K. to Mother was scheduled to begin. Mother admitted that she, the twins, and S.B. attended the event together and that S.B. had been drinking. Mother also answered that she did not know

when she was asked how many times she had been around S.B. after May 9, 2019. S.B. again asserted his Fifth Amendment right not to answer questions about the July 2019 incident.

In the final decrees of termination, the trial court found by clear and convincing evidence that Mother knowingly placed or knowingly allowed L.K. and N.K. to be placed or to remain in conditions or surroundings which endangered their physical or emotional well-being; Mother engaged in conduct or knowingly placed L.K. and N.K. with persons who engaged in conduct that endangered their physical or emotional well-being; and termination of Mother's parental rights was in her children's best interest. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (2). These appeals followed.

Analysis

In her issue on appeal, Mother contends that the evidence was legally and factually insufficient to support the predicate grounds that the trial court found.

Standard of Review

To terminate parental rights, the Department has the burden to prove one of the predicate grounds in section 161.001(b)(1) of the Texas Family Code and that termination is in the best interest of the child. *See id.* § 161.001(b)(1), (2); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). The applicable standard of proof is the clear and convincing evidence standard. Tex. Fam. Code § 161.206(a); *see In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002) (explaining that due process requires clear and convincing evidence standard of proof in parental termination cases). The clear and convincing evidence standard is "that measure or degree of proof which 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." *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002) (quoting *State v. Addington*,

588 S.W.2d 569, 570 (Tex. 1979)); *see* Tex. Fam. Code § 101.007 (defining "clear and convincing evidence"). Although "parental rights are of constitutional magnitude," "it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *In re C.H.*, 89 S.W.3d at 26.

Legal sufficiency review of the evidence to support a termination finding requires a court to look at all the evidence in the light most favorable to the finding and consider undisputed contrary evidence to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re A.C.*, 560 S.W.3d 624, 630–31 (Tex. 2018); *In re J.F.C.*, 96 S.W.3d at 266. "Factual sufficiency, in comparison, requires weighing disputed evidence contrary to the finding against all the evidence favoring the finding." *In re A.C.*, 560 S.W.3d at 631. "Evidence is factually insufficient if, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of a finding is so significant that the factfinder could not have formed a firm belief or conviction that the finding was true." *Id.*; *see In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (explaining that, in factual sufficiency review, court of appeals "should not supplant [fact-finder]'s judgment with its own"); *In re C.H.*, 89 S.W.3d at 25 (describing factual sufficiency review).

Predicate Grounds

The trial court found that the Department met its burden as to two predicate grounds. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E). Because termination of a parent's rights can stand on one statutory ground plus a best interest finding, we limit our review to Mother's challenge to the sufficiency of the evidence to support the ground set out in subsection (E) of section 161.001(b)(1)—that the parent "engaged in conduct or knowingly placed the child with

persons who engaged in conduct which endangered the physical or emotional well-being of the child." *See id.* § 161.001(b)(1)(E); *In re N.G.*, 577 S.W.3d 230, 232–33 (Tex. 2019) (explaining that only one predicate ground is necessary to support termination of parental rights when there is also best interest finding); *In re A.V.*, 113 S.W.3d at 362 (same).

"'Endanger' means 'to expose to loss or injury; to jeopardize.'" *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (quoting *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)). "Although 'endanger' means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *Id.* Evidence of endangerment may include conduct that does not occur in the presence of the child and may include parental conduct occurring "both before and after the child has been removed by the Department." *Pruitt v. Texas Dep't of Family & Protective Servs.*, No. 03-10-00089-CV, 2010 Tex. App. LEXIS 10272, at *13–14 (Tex. App.—Austin Dec. 23, 2010, no pet.) (mem. op.). The relevant inquiry under subsection (E) is whether evidence exists that the endangerment of the child's well-being was "the direct result of Appellant's conduct, including acts, omissions, or failures to act." *In re M.E.-M.N.*, 342 S.W.3d 254, 262 (Tex. App.—Fort Worth 2011, pet. denied) (citation omitted). "Additionally, termination under subsection (E) must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent." *Id.*

Mother argues that the evidence does not establish a course of conduct and that the trial court's finding of such a course of conduct is based on speculation or assumption about "the children being unattended," her response to S.B.'s violence, her "alleged inability to follow court orders," N.K.'s injuries, and N.K.'s "presumptively" positive urine test for "cannabis" from

Mother breastfeeding him. Mother relies on: (i) the police officer's testimony that the children "looked good in health and spirits" when he observed them at Mother's home during the January 2018 incident, (ii) Mother's testimony that there was a barrier at the top of the stairs at that time, (iii) an alleged lack of evidence that N.K.'s injuries were the result of abuse or neglect or that N.K.'s "'cannabis' ingestion" had "adverse effects," "much less an endangering effect," and (iv) the evidence that the protective order does not apply to her.

The trial court, however, could have resolved the credibility issues against Mother and credited other evidence, including the testimony of the police officers, Department employees, the doctor, and the medical records, to find that Mother had engaged in an endangering course of conduct. *See In re J.J.O.*, 131 S.W.3d 618, 632 (Tex. App.—Fort Worth 2004, no pet.) (explaining that, in bench trial, trial court determines credibility of witnesses and weight to be accorded to their testimony); *see also In re S.B.*, No. 07-19-00146-CV, 2019 Tex. App. LEXIS 9695, at *29 (Tex. App.—Amarillo Nov. 5, 2019, pet. denied) (mem. op.) (observing that "as the trier of fact, the trial court resolved credibility issues and conflicts in the evidence against [parent]" and concluding that evidence was sufficient to support predicate ground for termination).

The evidence established that Mother left L.K. and N.K. alone to follow S.B. away from her home during the January 2018 incident and, contrary to Mother's testimony about a barrier at the top of the stairs, the responding officer testified that the children, who were approximately one and three years old, were alone, yelling, and screaming when he arrived and that they were at the top of the stairs without a barrier. *See In re M.C.*, 917 S.W.2d at 269 (explaining that endanger means to expose to loss or injury and that it was not necessary that child "actually suffers injury"). Mother admitted that leaving the children at home alone "was a

completely dangerous situation for the kids" and that it was dangerous to leave her 11-month old unsupervised by the stairs. The doctor also testified that he would have expected Mother to have taken N.K. to the doctor or a hospital for the types of skull injuries that N.K. had sustained,[6] but Mother only sought medical assistance when N.K. fell off a table in December 2017 and, in that case, she refused EMS's offer of transport to the hospital. *See In re T.M.T.*, No. 14-18-00442-CV, 2018 Tex. App. LEXIS 9459, at *30 (Tex. App.—Houston [14th Dist.] Nov. 20, 2018, no pet.) (mem. op.) (explaining that "[n]eglect of a child's medical needs endangers the child" and that "parent's failure to provide appropriate medical care may constitute endangering conduct for purposes of subsection (E)").

Mother also admitted to smoking marijuana twice a week before her children were removed and while she was breastfeeding N.K. and agreed that marijuana use impacted her ability to parent. *See Walker v. Texas Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (stating that illegal drug use may support termination under Subsection (E) because "it exposes the child to the possibility that the parent may be impaired or imprisoned"); *see also In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) ("[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct."); *Pruitt*, 2010 Tex. App. LEXIS 10272, at *15 (noting that evidence of drug use was relevant to issue of endangerment). The medical records further support the trial court's finding of a course of conduct because they reflect that N.K.'s "low-level cannabis exposure from breastmilk" was "chronic."

[6] The doctor testified that it is important with these types of injuries to seek medical attention "[b]ecause injuries are some times not visible externally," that "[g]reater injuries might be present internally than are present externally," and that he "believe[d] most reasonable caregivers" would seek medical attention.

The evidence further showed a history of domestic violence involving Mother and S.B. including during the pendency of the Department's cases. *See In re J.J.S.*, 272 S.W.3d 74, 79–80 (Tex. App.—Waco 2008, pet. struck) (relying on trial court's finding that mother "conducted herself in a manner, namely her abusive relationships, which exposed her children to a home where physical violence was present" as support for upholding endangerment ground); *In re M.R.*, 243 S.W.3d 807, 819 (Tex. App.—Fort Worth 2007, no pet.) (considering evidence that showed that mother "exposed her children to domestic violence" as evidence of endangerment under subsection (E)); *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (stating that "the trial court could have considered the domestic violence . . . as evidence of endangerment to [the child]").

In addition to the evidence of domestic violence, the evidence showed that S.B. and Mother continued to spend time together during the pendency of these cases and while there was a protective order in place. Mother admitted that it was unsafe to be around S.B. when he was drinking, and the evidence showed that she did not keep the Department informed that she continued to spend time with him, including while they were drinking and despite the Department's expressed concerns to her about doing so. *See Pruitt*, 2010 Tex. App. LEXIS 10272, at *13–14 (noting that evidence relevant to endangerment determination may include conduct that does not occur in presence of child and "may include conduct . . . both before and after the child has been removed by the Department"); *In re R.W.*, 129 S.W.3d 732, 738–39 (Tex. App.—Fort Worth 2004, pet. denied) (explaining that "it is not necessary that the parent's conduct be directed at the child or that the child actually suffer injury," "specific danger to the child's well-being may be inferred from parent's misconduct standing alone," and generally "conduct that

subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child").

After carefully reviewing the record, we conclude that the evidence was legally and factually sufficient to support the trial court's finding that Mother engaged in conduct which endangered the physical or emotional well-being of L.K. and N.K. *See* Tex. Fam. Code § 161.001(b)(1)(E); *In re A.C.*, 560 S.W.3d at 630–31; *In re M.E.-M.N.*, 342 S.W.3d at 262. Having found the evidence legally and factually sufficient to support the predicate ground set out in subsection (E), we overrule Mother's issue and do not address the sufficiency of the evidence to support the trial court's predicate ground finding under subsection (D). *See* Tex. Fam. Code § 161.001(b)(1)(D); *In re N.G.*, 577 S.W.3d at 232–33; *In re A.V.*, 113 S.W.3d at 362.

Conclusion

Having overruled her issue, we affirm the trial court's final decrees terminating Mother's parental rights to her children L.K. and N.K.

Melissa Goodwin, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: May 21, 2020