TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00895-CV

J. O., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 146TH DISTRICT COURT OF BELL COUNTY
NO. 296,104-B, THE HONORABLE CHRISTOPHER L. CORNISH, JUDGE PRESIDING

O P I N I O N

J.O. (Father) appeals from a final judgment that terminated his parental rights to four children.[1] Following a bench trial, the district court found by clear and convincing evidence that Father committed three predicate statutory grounds for termination and that termination was in the best interest of the children. *See* Tex. Fam. Code § 161.001(b)(1)(E), (N), (O), (b)(2). Father argues that the judgment is void because the district court never acquired personal jurisdiction over him. In the alternative, Father challenges the legal and factual sufficiency of the evidence supporting the predicate findings. We will modify the district court's judgment and affirm as modified.

BACKGROUND

Father and D.O. (Mother) are the parents of four children, who were between the ages of one and seven at the time of trial. In September 2017, the Texas Department of Family

[1] We refer to the children's parents by aliases. *See* Tex. Fam. Code § 109.002(d).

and Protective Services opened an investigation into Mother after receiving a report that she had tested positive for methamphetamine when giving birth to the youngest child. The Department removed the children the following month. An affidavit filed in support of the Department's request for conservatorship does not mention Father, and the Department supervisor in charge of the 2017 case testified that the Department was unable to locate him. In August 2018, the district court appointed Mother and her sister as joint managing conservators and Father as possessory conservator. The order recites that Father had not made an appearance in the case.

Mother tested positive for methamphetamine again in October 2018. Department caseworkers visited the home the following month and learned that her sister had moved out following an argument. They observed the youngest child wearing nothing but a "heavily soiled" diaper and the other children wearing dirty clothes, and found unsanitary conditions in the house. The district court appointed the Department temporary managing conservator of the children, and the Department filed a petition to terminate the rights of both parents. There is no indication that Father was served with the Department's petition, but the district court appointed him counsel in January 2019. Father's counsel stated at the final hearing that she spoke with Father around that time using a phone number supplied by Mother.

Department caseworker Navita Elwell called Father in February 2019 using the same number. According to an affidavit Elwell filed with the district court, she told Father about the pending case and the reasons for the removal of the children. Father denied knowledge of Mother's drug use and said that he wanted the children to live with him in Mexico. He told her that he could not return to the United States and asked if his parents could bring the children to him if they could obtain a visa. On the same day as the phone call, the Department sent Father a copy of his service plan—the steps the Department asked him to take to prove his fitness as a

parent—by certified mail. No return receipt appears in the record. Two days later, the district court rendered an order requiring Father to complete the service plan.

Father filed a motion to postpone the final hearing, then scheduled for April 4, to afford him more time to complete the service plan. The motion was apparently granted because the district court did not convene the final hearing until late October. In the interim, Father filed an answer and counterpetition. When the final hearing convened, Father's counsel announced ready and cross-examined the Department's witnesses. The district court subsequently found by clear and convincing evidence that Father had committed three statutory grounds for termination and that termination was in the best interest of the children. *See id.* § 161.001(b)(1)(E), (N), (O), (b)(2). This appeal ensued.[2]

PERSONAL JURISDICTION

Father argues in his fourth issue that the district court never acquired personal jurisdiction over him.[3] Whether personal jurisdiction exists is a question of law that we review de novo. *See Old Republic Nat'l Title Ins. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018).

Establishing personal jurisdiction over a party requires valid service of process. *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012). "If service is invalid, it is 'of no effect' and cannot establish the trial court's jurisdiction over a party." *Id.* (quoting *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam)). Thus, a "complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time." *Id.* at 566. In a direct attack on a

[2] The district court also terminated Mother's rights, but only Father appealed.

[3] We address this issue first because it implicates the trial court's jurisdiction.

judgment, as here, "[t]here are no presumptions in favor of valid issuance, service, and return of citation." *See Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994). The record must affirmatively show "strict compliance with the rules for service of citation." *Insurance Co. of State of Penn. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009) (per curiam) (quoting *Primate Const.*, 884 S.W.2d at 152).

A party residing in a foreign country may be served "pursuant to the terms and provisions of any applicable treaty or convention." Tex. R. Civ. P. 108a(d). The applicable treaty here is the Hague Service Convention. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter, Convention]; *see also In re J.P.L.*, 359 S.W.3d 695, 705 (Tex. App.—San Antonio 2011, pet. denied) ("Service of process on a defendant in Mexico is governed by . . . the Hague Service Convention."). The Convention applies in all civil or commercial matters where it is necessary "to transmit a judicial or extrajudicial document for service abroad." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (citing Convention, 20 U.S.T. at 362). It requires each state party "to establish a central authority to receive requests for service of documents from other countries." *Water Splash, Inc. v. Menon*, ___ U.S. ___, ___, 137 S. Ct. 1504, 1508 (2017) (quoting *Schlunk*, 486 U.S. at 698). "When a central authority receives an appropriate request, it must serve the documents or arrange for their service, and then provide a certificate of service." *Id.* (internal citations omitted).

Father argues that the record contains no evidence the Department served him pursuant to the Convention. We agree, but a party can waive defects in service by entering a general appearance. *See* Tex. R. Civ. P. 120 (providing that general appearance has "the same

force and effect as if the citation had been duly issued and served as provided by law"); *Baker v. Monsanto Co.*, 111 S.W.3d 158, 161 (Tex. 2003) (noting that entering "general appearance in action waives any defect in the manner of service"). Filing an answer, as Father's counsel did here, constitutes a general appearance. *See* Tex. R. Civ. P. 121 ("An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him."). Father does not dispute this general rule but argues that it does not apply when the Convention governs. He cites us to two decisions of our sister courts that he claims reached the same conclusion. *See In re T.M.E.*, 565 S.W.3d 383, 387 (Tex. App.—Texarkana 2018, no pet.); *Velasco v. Ayala*, 312 S.W.3d 783, 787 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

In re T.M.E. arose from a suit by the Department to terminate the parental rights of a person living in Mexico. 565 S.W.3d at 387. The Department failed to serve the parent pursuant to the Convention but argued that he waived any defects in service by appearing through his court-appointed counsel. *Id.* at 394. The court of appeals disagreed and held that due process—but not the Convention—required reversal because the parent did not know that his parental rights were in jeopardy, much less that he had counsel to represent his interests in the proceeding. *See id.* at 387–90 (summarizing procedural history). As the court explained at the outset of its opinion, a fundamental requirement of due process "in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action." *Id.* at 390 (quoting *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex. 2012)). This concern is heightened in cases seeking termination of parental rights. *See id.* (explaining that courts "carefully scrutinize termination proceedings" because "[p]arental rights are far more precious than any property right" (quoting *In re E.R.*,

385 S.W.3d at 563)). Holding that "a parent—who never received service of process—entered a general appearance through his court-appointed counsel—whom he never talked to—" would not satisfy these heightened standards. *See id.* at 395. Father argues that his case is "strikingly similar" to *T.M.E.*, but the record reflects that Father knew of the Department's suit and that he needed to complete his service plan to avoid termination of his parental rights. Unlike the parent in *T.M.E.*, Father spoke with his counsel early in the case and had more contact with the Department. Elwell, the Department caseworker, called Father and read him "the reason for the removal of the children" and mailed a copy of the service plan to the address Father provided. There is no return receipt in the record, but the motion to reset the final hearing—filed the month following his initial phone call with Elwell—states that Father has "been in contact with his attorney" and wanted more time "to work services" so that he could "prove to [the trial court] that he is a safe and stable caregiver" for the children. The Department's amended final report to the court states that Father and Elwell spoke "a few" more times and that Father informed her in one of those conversations that he did not have the financial means to complete the service plan. The record before us does not raise the same due process concerns that required reversal in *T.M.E.*

*Velasc*o arose from a private termination suit against a parent, Velasco, who lived in Mexico. 312 S.W.3d at 787. The plaintiff failed to serve Velasco pursuant to the Convention, but her court-appointed attorney filed an answer. *Id.* at 789. The court of appeals acknowledged that filing an answer ordinarily waives defects in service but held that this rule does not apply when "the Hague Service Convention governs." *Id.* at 799. And with the trial court never having acquired jurisdiction over Velasco because of the defective service, "the subsequent actions of the trial court in authorizing the ad litem to represent her interests at trial, and

everything that flowed therefrom, [were] likewise a nullity." *Id.* We agree with the court of appeals that the trial court did not acquire personal jurisdiction over Velasco through service of citation because the plaintiff did not serve her pursuant to the Convention. *See id.* at 797–98 (concluding defects in service precluded court from acquiring personal jurisdiction); *see also Lejeune*, 297 S.W.3d at 255 (noting generally that record must show "strict compliance with the rules for service of citation"). However, defective service of citation does not preclude courts from exercising personal jurisdiction over a party that makes a general appearance. *See Baker*, 111 S.W.3d at 161 (noting that general appearance dispenses with need for service of citation); *In re J.P.L.*, 359 S.W.3d at 707 (explaining that due process requires that parties "be served, waive service, or voluntarily appear before judgment was rendered"). The court's holding that filing an answer does not waive defects in service when the Convention "governs" implies that the Convention preempts all the rules of civil procedure concerning general appearances in court. To the extent the court of appeals intended this holding, we respectfully disagree.

In deciding this issue, we look to decisions of the Supreme Court of the United States interpreting the Convention. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006) (explaining that "[i]f treaties are to be given effect as federal law . . . determining their meaning as a matter of federal law" is role of federal judiciary). The Supreme Court has held that "the scope of the Convention is limited to service of documents." *Water Splash*, 137 S. Ct. at 1509. "Service" here refers to service of process—"a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *Schlunk*, 486 U.S. at 700; *accord In re J.P.L.*, 359 S.W.3d at 704. The Convention "specifies certain approved methods of service and 'pre-empts inconsistent methods of service' wherever it applies." *Water Splash*, 137 S. Ct. at 1507 (quoting *Schlunk*, 486 U.S. at 699); *see In re T.M.E.*, 565 S.W.3d at

391–92. A general appearance, however, is not a method of service. "[A] party enters a general appearance when it invokes the judgment of the court on any question other than the court's jurisdiction, recognizes by its acts that an action is properly pending, or seeks affirmative action from the court." *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304 (Tex. 2004) (per curiam) (citing *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998)). Put more generally, a party enters an appearance by taking an action that "indicates a submission to the court's jurisdiction." *In re D.M.B.*, 467 S.W.3d 100, 103 (Tex. App.—San Antonio 2015, pet. denied). And by consenting to the trial court's personal jurisdiction, the party dispenses with the need for service of citation. *See* Tex. R. Civ. P. 120 (providing that entering general appearance has "the same force and effect as if the citation had been duly issued and served as provided by law"). Father does not explain how the Convention preempts these rules when it is limited in scope "to service of documents," *see Water Splash*, 137 S. Ct. at 1509, and we decline to extend the Convention's reach without support in the text. Absent further guidance from a higher court, we conclude that the Convention does not preempt the rules of civil procedure concerning general appearances. Applying those rules, we hold that Father waived any defects in service by filing an answer. *See* Tex. R. Civ. P. 121; *Wuxi Taihu Tractor Co., v. York Grp.*, No. 01-13-00016-CV, 2014 WL 6792019, at *10 (Tex. App.—Houston [1st Dist.] Dec. 2, 2014, pet. denied) (mem. op.) (concluding filing answer waived defects in service under Convention). We overrule Father's fourth issue.

SUFFICIENCY CHALLENGES

Having concluded the district court possessed personal jurisdiction, we turn to Father's sufficiency challenges. A court may render judgment terminating a parent's rights upon

finding by clear and convincing evidence that the parent's acts or omissions satisfy at least one statutory ground for termination and that termination is in the child's best interest. *See* Tex. Fam. Code § 161.001(b)(1), (2). The Department had the burden to prove these matters by "clear and convincing evidence." *See id.* Clear and convincing evidence is "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." *Id.* § 101.007.

We apply a standard of appellate review that reflects the heightened standard of proof. *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). The distinction between legal and factual sufficiency when the standard of proof is clear and convincing "lies in the extent to which disputed evidence contrary to a finding may be considered." *In re A.C.*, 560 S.W.3d 624, 630 (Tex. 2018). In a legal sufficiency review, the court "cannot ignore undisputed evidence contrary to the finding, but must otherwise assume the factfinder resolved disputed facts in favor of the finding." *Id*. at 630–31. The evidence is legally sufficient if, after viewing the disputed and undisputed evidence in this manner, "a reasonable factfinder could form a firm belief or conviction that the finding was true." *Id*. at 631.

Factual sufficiency review, on the other hand, requires weighing disputed evidence contrary to the finding against all the evidence supporting the finding. *Id*. The reviewing court must consider whether the "disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding." *Id*. "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, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d at 267.

Father argues that there is legally and factually insufficient evidence to support the district court's findings that he committed three statutory-predicate grounds for termination. *See* Tex. Fam. Code § 161.001(b)(1)(E), (N), (O).[4] We begin our analysis with the subsection (E) finding because the Supreme Court of Texas has held that "[a]llowing section 161.001(b)(1)(D) or (E) findings to go unreviewed on appeal when the parent has presented the issue to the court [] violates the parent's due process and due course of law rights." *In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019) (per curiam).

Section 161.001(b)(1)(E) authorizes termination of parental rights if 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." *See* Tex. Fam. Code § 161.001(b)(1)(E). Termination under this subsection "must be based on 'a voluntary, deliberate, and conscious course of conduct.'" *J.G. v. Texas Dep't of Family & Protective Servs.*, 592 S.W.3d 515, 524 (Tex. App.—Austin 2019, no pet.) (quoting *In re M.D.M.*, 579 S.W.3d 744, 764 (Tex. App.—Houston [1st Dist.] 2019, no pet.)). In this context, "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)). Endangerment requires "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment," but it is not necessary that the conduct be directed at the child or that the child suffer injury. *Id.*

The Department's main argument is that the Father endangered the children because his deportation deprived them of support and resulted in their exposure to Mother's

[4] Father does not challenge the finding that termination is in the best interest of the children.

renewed drug use. Deportation of a parent is relevant but insufficient "in and of itself to establish endangerment." *In re E.N.C.*, 384 S.W.3d 796, 805 (Tex. 2012). Its "relevance to endangerment depends on the circumstances." *Id.* The record is silent on the surrounding circumstances—neither the Department supervisor nor the caseworker was aware of the reason for the deportation. The Department admits in its brief that Father kept "in frequent contact" with Mother after he returned to Mexico, and the Department provided no evidence that he was aware of her drug use. Nevertheless, the Department asks us to consider the deportation together with Father's alleged abandonment of the children after their removal. According to the Department, Father failed to avail himself of opportunities to participate in court hearings by telephone and he made no effort to contact the children after the second removal. We do not disagree with the Department that deliberate parental disinterest can constitute a course of endangering conduct. *See, e.g., In re V.V.*, 349 S.W.3d 548, 553–54 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (en banc) (considering parent's "lack of all contact with a child without any proffered excuse" in analyzing termination under subsection (E)). Even assuming that the omissions alleged here amount to a dangerous course of conduct, the Department must also show that it was voluntary. *See In re E.N.C.*, 384 S.W.3d at 804; *J.G.*, 592 S.W.3d at 524. The record contains no information concerning Father's life in Mexico following the deportation except for a permanency report from the Department to the district court. The report, which was admitted into evidence, states that Father told Elwell that he could not afford to complete any part of the service plan and that he attempted to return to the United States to see the children but turned back because it was "too dangerous." Without more information concerning Father's situation, we cannot conclude that his absence from the later stages of the case was voluntary. Applying the appropriate standard of review, we conclude there is legally insufficient evidence to support

termination under subsection (E). Because we have sustained Father's legal sufficiency point, we do not address his factual sufficiency argument. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."). We sustain Father's first issue.

Next, Father challenges the finding under section 161.001(b)(1)(O). Termination under this subsection requires proof that the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child," and the child must have been in the conservatorship of the Department for at least nine months "as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." *See* Tex. Fam. Code § 161.001(b)(1)(O). Father affirmatively acknowledges that the Department proved these elements but asserts that it failed to meet its additional burden of showing that nine months had elapsed since the district court ordered him to complete the service plan. We disagree because the statute clearly requires that the Department serve as managing conservator of the children for nine months prior to termination, not that the parent have nine months to complete services. *See id.*

Father also contends under this issue that there is no evidence that he was aware of the service plan or that failure to complete it would result in termination of his rights. Assuming that providing proof of his knowledge was part of the Department's evidentiary burden, the evidence is sufficient. Approximately eight months before the final hearing, Father's counsel filed a motion to reset the final hearing stating that Father "had been in contact with his attorney" and wanted "to work services" to "prove to this Court that he is a safe and stable caregiver." Moreover, Father informed the Department's caseworker that financial barriers prevented him from completing the service plan. These statements support a reasonable

inference that Father was aware of the service plan and its significance. *See In re E.N.C.*, 384 S.W.3d at 804 (noting that trier of fact in proceeding to terminate parental rights may draw "reasonable and logical" inferences from evidence). We overrule Father's third issue.

We do not reach Father's second issue, in which he challenges the finding under subsection N, because only one predicate finding is necessary to support the judgment. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *see also* Tex. R. App. P. 47.1.

CONCLUSION

We modify the district court's judgment to delete the finding under subsection 161.001(b)(1)(E), and we affirm the judgment as modified. *See* Tex. R. App. P. 43.2(b).

Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith

Modified and, as Modified, Affirmed

Filed: June 1, 2020