TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00116-CV

K. D., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 35TH DISTRICT COURT OF MILLS COUNTY
NO. 18-08-6993, THE HONORABLE STEPHEN ELLIS, JUDGE PRESIDING

MEMORANDUM OPINION

"Katie"[1] appeals from the trial court's order terminating her parental rights to three-year-old "Lilly," arguing that the evidence is neither legally nor factually sufficient to support that court's statutory-predicate and best-interest findings. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (b)(2). We will affirm.

BACKGROUND

In August of 2018, the Department of Family and Protective Services filed a petition seeking emergency temporary conservatorship of Lilly. Its supporting affidavit indicated that a medical facility had contacted the Department and requested an intake assessment for Lilly, whose mother was receiving care at the facility. The Department averred

[1] We use pseudonyms to refer to the mother, her roommate, and her daughters. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

that Katie was in acute psychological distress, was "suicidal," and "need[ed] to address her mental health needs prior to being the sole caregiver to [Lilly]." The Department allegedly found Lilly at the facility with "dried blood in and around her nose and on her face" and found that "it was difficult to gather additional information" from Katie due to her mental state. According to the affidavit, the Department "immediately had concerns" for Lilly and her well-being. The trial court ordered that the Department exercise temporary conservatorship over Lilly while Katie worked toward restoring her mental health.

During the pendency of the case, Katie remained employed and financially solvent and completed the services required by the Department. By April of 2019, Katie had progressed in her services to the point that the Department granted her a monitored return of Lilly, but that return was revoked in June when the Department learned of allegations of domestic violence. The Department ultimately placed Lilly with "Mandy," one of Katie's older daughters. Mandy was still caring for Lilly at the time of the final hearing on the matter.

The trial court held the final hearing on January 31, 2020. Witnesses included three peace officers, multiple service providers, a teacher at Lilly's pre-school, the adoptive mother of Katie's older children, Katie's counselor, and Katie.

Johnny Brown, a deputy with the Mills County Sheriff's Office, testified about the incident that led to Lilly's removal in August of 2018. He recalled that he was dispatched "at like 4:00 a.m." to respond to an "incident" at a convenience store. He arrived to find Katie "having some mental health issues." He recalled that Katie "was getting angry, starting to throw things around, and she was having thoughts of hurting herself." Brown testified that he did not "remember anything real significant about [Lilly], other than . . . [her] being in a diaper" and standing unrestrained in the back seat of Katie's vehicle. He described it as "unusual" to "see

kids standing in a diaper in a car at four o'clock in the morning." He concluded that Katie was "severely impaired and needed help." He remained with Katie for around 90 minutes before calling an ambulance to transport Katie and Lilly to the medical facility where the Department conducted the intake assessment.

Colby Adams is an officer with the Brownwood Police Department. He testified that in June[2] of 2019, while Katie had monitored possession of Lilly, dispatchers called him to respond to a report of a domestic incident at Katie's home, where she resided with roommate "Daniel." Adams arrived to find Daniel complaining that Katie was "intoxicated" and that she had "started punching [him]" during an argument over Katie's consumption of alcohol. Adams testified that he had interviewed Katie and "could smell [alcohol] coming off of her breath whenever she was talking." He remembered seeing Lilly sitting outside and advised Katie to take Lilly and find a place to stay overnight. Adams filed a report but did not make an arrest. He recalled that he had been dispatched to the same house "maybe two or three [other] times" to respond to similar reports of what he described as "a domestic in progress."

Jesse Mares, a sergeant with the Brownwood Police Department, testified that he and another officer responded to a report of disorderly conduct at an apartment complex in July of 2019. He arrived to find Katie "barefoot," "disheveled," and "unsteady on her feet." He described her speech as slurred and noticed that she had been crying. Katie reported that someone was "trying to kill her" and that Lilly, who was not present due to the revocation of the monitored return, had been sexually assaulted. He observed that she "didn't make very much sense" and that she was apparently under the impression that she was at home when she in fact

[2] The witnesses were not certain whether the incident occurred on June 30th or July 1st. For clarity, we will refer to it as the June incident.

lived around three miles away. He testified that Katie was uncooperative and kicked each of the responding officers, and that she was in no condition to care for Lilly. Believing that Katie "was a danger to either herself or somebody else," the officers took her into custody and transported her to the county jail. He recalled that Katie never mentioned any health issues or any medication she was taking. He also remembered that he had previously responded to a reported domestic incident at Katie's house.

April Walker was the first Department investigator assigned to Lilly's case. Walker described the intake interview with Katie at the medical facility following the August incident. She recalled that Katie "began to get very agitated" during the interview, explaining that Katie "threw a chair and then she stormed out and said she wasn't talking to [the Department] anymore." Walker found Katie so uncooperative that she had to abort the interview. Walker then prepared the affidavit recommending emergency removal. When asked whether Lilly should return to her mother's care, Walker testified that she would have concerns about "any child left in [Katie's] care" because of "her mental health state [that's] not been properly treated, along with ongoing alcohol abuse, patterns of instability," and Katie's angry "outbursts."

Kandi Pendleton also investigated the allegations against Katie on behalf of the Department. She described what she learned following the June incident when she arrived to inspect the home. Pendleton explained that "in the kitchen there were several shot glasses and beer bottles" and "a case of Dos Equis beer on the floor." She noticed that "all of them were empty" and accepted Daniel's explanation that Katie had consumed all the alcohol herself. Pendleton was most concerned about the alleged assault on Daniel. Domestic violence, she testified, "was an ongoing issue" in the home, with Daniel alleging that Katie had assaulted him

multiple times in the past. Pendleton explained that although Lilly appeared happy and healthy, remaining in the home would present "a definite danger to [her]."

Jamie Woodward served as the Department's case worker beginning in February of 2019. She testified that from February through June "everything seemed to be going fine," that Katie was completing her services, and that she "had not had any negative experiences with [Katie]." She described herself as "blindsided" by the news of the June incident and recalled that she discovered multiple circumstances that concerned her when she arrived at the home in response to the allegations of domestic violence. Upon her arrival, she "notice[d] several glasses that look like they had—like wineglasses on the counter next to the sink, as well as the empty beer case on the floor and an open beer bottle open top of the dining table." Prescription medication was sitting unattended on a coffee table, notwithstanding Woodward's previous instructions to keep medications out of Lilly's reach. She recalled observing that Daniel "was actually scared to be in the home" with Katie. Daniel also alleged that Katie had been stealing his prescription painkillers. With respect to Lilly, her "hair was not brushed out and she didn't look like she had been taken care [of and] looked unkempt at the time." Woodward was immediately "concerned for [Lilly's] safety, continuing to be in the home where there was possible drinking and fighting," and where "even . . . an adult didn't feel safe in the home."

Candace Mills adopted and raised Katie's older children, including Mandy, after Katie's rights were terminated in Colorado due to "violence and drugs." She testified that there were "similarities" between the Colorado and Texas termination proceedings and that Lilly should not return to Katie's care. She explained that Mandy is 22 years of age, employed, married, and has a "good support system" to help her care for Lilly. She summarized the placement by observing that Lilly is "in a good place now being placed with [Mandy]" and that

she could not imagine "anybody else or any other placement that . . . would be a better place for [Lilly]."

Sarah Deskins, Lilly's teacher and child-care provider when Lilly was enrolled in Head Start from April to July of 2019, testified that Lilly was always clean and "dressed appropriately" for school. She described Katie as an "active parent" and recalled that she had never seen Katie "appear intoxicated." She testified that Lilly's eight absences in four months as unusually high but not so frequent as to lead the employees to consider dropping Lilly from the program.

Katie's psychotherapist, Deborah Marlin, testified that Katie suffers from "an aggressive form of bipolar disorder" but had consistently attended her counseling appointments. She explained that some of Katie's erratic behavior might have been caused by changes to her prescription medication. She lamented, however, that Katie had not been honest with her about her alcohol dependency or her violent tendencies. As a consequence, Marlin could not work through those issues with Katie. Marlin testified that Katie's omission of some of her issues "made [her] wonder what else did [she] not know." Marlin ultimately recommended that Lilly not return to Katie's care because "the most important thing for a child" is "to feel like everything is stable and safe," and Marlin believed Katie had "demonstrated a lot of instability."

Katie disputed nearly all the testimony offered by the other witnesses. She testified that she was diagnosed with a bipolar disorder seventeen years ago, that she regularly sees her treating physician and takes her medicine as prescribed, and that her erratic behavior in the August, June, and July incidents was caused by changes to her prescription medication—not by consumption of alcohol. She denied drinking excessively prior to the June incident: she testified that she had only consumed "one shot." She insisted that Daniel was the instigator of

that confrontation and that the argument was not about alcohol but was about Daniel's objections to one of Katie's friends. With respect to the July incident, she testified that the medication she was taking at the time prevented her from remembering what she had said and what had transpired. With respect to the August incident, Katie similarly testified that she did not dispute that something unusual had occurred but explained that she had no recollection of what had transpired. She denied that Lilly appeared unkempt or unclean during any of the incidents because, as she put it, her child would not "look like that, ever." Katie conceded that a child should not be exposed to so much instability.

After closing arguments, the trial court terminated Katie's rights after finding that she had "knowingly placed or knowingly allowed [Lilly] to remain in conditions or surroundings which endanger the physical or emotion well-being of [Lilly]," had "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of [Lilly]," and that "termination of the parent-child relationship . . . is in [Lilly's] best interest." *See id.* § 161.001(b)(1)(D), (E), (b)(2). The trial court then appointed the Department as permanent managing conservator of Lilly. Katie timely filed this appeal.

DISCUSSION

In three issues on appeal, Katie challenges the legal and factual sufficiency of the evidence to support the trial court's judgment. A court may render judgment terminating a parent's rights only upon finding by clear and convincing evidence that the parent's acts or omissions satisfy at least one statutory predicate for termination and that termination is in the child's best interest. *See id.* § 161.001(b)(1), (2). The Department, as the petitioner in this instance, had the burden to prove statutory predicates and best interest 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 review that reflects this heightened burden of proof. *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

The distinction between legal and factual sufficiency when the burden 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 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, the appellate court concludes that "a reasonable factfinder could form a firm belief or conviction that the finding was true." *Id.* at 631.

Factual-sufficiency review requires the appellate court to weigh evidence contrary to the disputed finding against all the evidence supporting the finding. *Id.* The appellate court must then 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. Evidence that is factually sufficient to support a trial court's finding necessarily satisfies the legal-sufficiency standard. *See In re M.V.G.*, 440 S.W.3d 54, 60 (Tex. App.—Waco 2010, no pet.) ("[B]ecause the evidence is factually sufficient, it is necessarily legally sufficient.").

Statutory Predicates

Katie first contends the evidence is legally and factually insufficient to support the trial court's statutory-predicate findings under subsections (D) and (E). Subsection (D) allows the termination of the rights of a parent that "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." *See* Tex. Fam. Code § 161.001(b)(1)(D). Subsection (E) allows the termination of the parental rights of a parent that "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 id*. § 161.001(b)(1)(E). "Both subsections D and E of 161.001(1) use the term 'endanger.'" *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). "'To endanger' means to expose a child to loss or injury or to jeopardize a child's emotional or physical health." *See id.* (citing *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996); *Walker v. Texas Dep't of Family & Protective Servs*., 312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). "Endangerment under subsection D may be established by evidence related to the child's environment." *Id.* "Under subsection E, the evidence must show the endangerment was the result of the parent's conduct, including acts, omissions, or failure to act." *Id.*

This record includes sufficient evidence to support the court's findings under subsections (D) and (E). With respect to (D), the record reflects evidence that Katie knowingly placed Lilly in an unsafe environment. Multiple witnesses testified to Katie's long history of instability and substance abuse. *See In re A.B.*, 125 S.W.3d 769, 777 (Tex. App.—Texarkana 2003, pet. denied) (holding instability driven by substance abuse to create endangering environment). And while Katie testified that any instability or erratic behavior was the result of

medication changes and not a result of substance abuse, the district court—as the "sole arbiter" of the evidence—was free to disregard that testimony and credit the testimony of other witnesses. *See In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014). Evidence of Katie's history of committing acts of domestic violence was undisputed. *See L.B. v. Texas Dep't of Family & Protective Servs.*, No. 03-09-00429-CV, 2010 WL 1404608, at *5 (Tex. App.—Austin Apr. 9, 2010, no pet.) (mem. op.) (holding "pattern of" domestic violence to be an endangering circumstance). On this record, a factfinder could form a reasonably firm conviction that Katie had knowingly placed and allowed Lilly to remain in conditions that endanger her physical and emotional well-being.

With respect to (E), the record reflects evidence of acts and omissions that endangered Lilly's well-being. The trial court heard testimony that Katie instigated instances of domestic violence on multiple occasions. *See id*. The record reflects evidence that Katie engaged in conduct—specifically, substance abuse—that increased her instability and that she failed to cooperate with health-care providers in a manner that might have allowed her to mitigate that conduct. *See In re E.F.*, No. 11-18-00199-CV, 2019 WL 614251, at *3 (Tex. App.—Eastland Feb. 14, 2019, no pet.) (mem. op.). (holding evidence sufficient to support termination under (E) in part because parent abused alcohol). The trial court heard testimony that Katie could not keep a home safe enough for a toddler, including testimony that the living room and kitchen contained alcoholic beverages and containers, as well as prescription medications, within Lilly's reach. *See id.* at *2 (describing alcohol left within children's reach). Sergeant Mares testified that he had to arrest Katie for public intoxication because she was so inebriated as to pose a danger to herself and others. *See In re T.G.R.-M.*, 404 S.W.3d 7, 15 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding activity leading to arrests to be endangering).

And Deputy Brown testified that Katie was threatening suicide and that she had left Lilly undressed and unrestrained in the back seat of a vehicle. *See In re K.S.*, No. 09-14-00222-CV, 2014 WL 4755500, at *3 (Tex. App.—Beaumont Sept. 25, 2014, pet. denied) (mem. op.) (holding failure to properly use car seat to constitute endangering course of conduct); *In re J.T.G.*, 121 S.W.3d at 126; *In re A.M.C.*, 2 S.W.3d 707, 716 (Tex. App.—Waco 1999, no pet.) (holding suicidal ideation to constitute evidence of endangering conduct). On this record, a factfinder could reasonably form a firm conviction that Katie had knowingly engaged in conduct that endangered Lilly's physical and emotional well-being. The evidence is therefore both legally and factually sufficient to support the district court's statutory-predicate findings.

Best Interest

Katie next argues that the evidence is legally and factually insufficient to support the trial court's best-interest finding. Texas law recognizes a strong presumption that a child's best interest is served by remaining with his or her natural parent, *see In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), but this record includes sufficient evidence that the Department satisfied its burden to prove termination is in Lilly's best interest. Relevant factors in assessing the best interest of a child include: (i) the desires of the child, (ii) the stability of the home or proposed placement, (iii) parental abilities, (iv) the emotional and physical needs of the child now and in the future, (v) the emotional and physical danger to the child now and in the future, (vi) the plans for the child by the individual or agency seeking custody, (vii) the programs available to assist the individuals seeking custody to promote the best interest of the child, (viii) acts or omissions by the parent showing that the parent-child relationship was not proper, and (ix) any excuses for the parent's conduct. *See Holley v. Adams*,

544 S.W.2d 367, 371–72 (Tex. 1976); *accord* Tex. Fam. Code § 263.307 (stating that "prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest" and listing factors that court should consider "in determining whether the child's parents are willing and able to provide the child with a safe environment"). No one factor is controlling, and evidence presented to satisfy the predicate ground finding may also be probative of the child's best interest. *See In re C.H.*, 89 S.W.3d 17, 27–28 (Tex. 2002).

Although no one testified as to Lilly's desires, other *Holley* factors suggest that termination is in Lilly's best interest. Marlin testified that children need a stable home and that Katie could not provide a stable environment for Lilly. She also testified that by withholding important information about her mental health, Katie did not receive the treatment she needs to mitigate the behavior that poses physical and emotional risks to Lilly. Walker and Mills each testified that Katie could not provide adequate care for any child and that Lilly was no exception. As already described, the record reflects multiple acts and omissions by Katie that compromised Lilly's well-being and suggest that the parent-child relationship is not proper. And with respect to the Department's plans for Lilly as her managing conservator, Mills testified that the placement with Mandy was in Lilly's best interest and that she could not imagine any better placement for the child. On this record, a factfinder could reasonably form a firm conviction that termination of Katie's parental rights to Lilly is in Lilly's best interest. The evidence is therefore both legally and factually sufficient to support the district court's best-interest finding.

Conservatorship

In her final argument on appeal, Katie argues that, to the extent the "termination order is reversed on appeal," this Court should "reconsider[]" the trial court's conservatorship

determination. As we have already explained, the record includes sufficient evidence to support termination. We therefore do not reach Katie's argument regarding conservatorship.

CONCLUSION

For the reasons stated herein, we overrule Katie's issues on appeal and affirm the trial court's order terminating Katie's parental rights to Lilly.

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Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: July 15, 2020