Affirm in part; Reverse and Remand in part; and Opinion Filed February 12, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01322-CV

IN THE INTEREST OF H.H., A CHILD

On Appeal from the 304th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 14-01144-W

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Schenck
Opinion by Justice Schenck

Edward T. ("Father") appeals the trial court's decision to terminate his parental rights with respect to his child H.H. In his sole issue on appeal, Father argues there was legally and factually insufficient evidence to support the termination of his rights pursuant to section 161.001(b)(1)(Q) of the Texas Family Code or to support the finding a termination was in the best interest of the child. TEX. FAM. CODE ANN. §§ 161.001(b)(1)(Q), (2) (West 2016).[1] The Texas Department of Family and Protective Services ("TDFPS") concedes the evidence presented was legally and factually insufficient and acknowledges the case should be reversed. We agree. Accordingly, we reverse the trial court's order and, in the interest of justice, we

[1] We note that in 2015, the Texas Legislature amended section 161.001, which affected the numbering of the provision concerning involuntarily termination of parent–child relationship on the grounds the parent knowingly engaged in criminal conduct, but not the wording. Throughout the opinion, we will refer to the current version, effective September 1, 2015, which was in effect on the date the decree of termination was entered, October 16, 2015.

remand the case to the trial court for further proceedings. Because the dispositive issue in this case is settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

FACTUAL & PROCEDURAL BACKGROUND

TDFPS filed an Original Petition for Protection of Children, for Conservatorship and for Termination, in Suit Affecting the Parent–Child Relationship. The petition named Shanita H. ("Mother") as the mother of H.H. and listed the biological father of H.H. as unknown. Subsequently, Father was identified as a potential biological father for H.H. Father, who was incarcerated in a prison in Milwaukee, Wisconsin, requested the appointment of counsel on his behalf. The trial court ordered parentage testing to determine whether Father was H.H.'s biological father. Before the results of the parentage testing were received, the parties—with the exception of Father who was still incarcerated—participated in a mediation. Neither Father nor his attorney signed the mediated settlement agreement.

After Father's paternity was confirmed, the trial court conducted a hearing. Mother was not present at the hearing, but she was represented by counsel. Also present were Mother's guardian ad litem, the guardian ad litem for H.H., an assistant district attorney representing TDFPS, and a caseworker from the child protective services division of TDFPS. Neither Father nor his attorney was present. The attorney representing TDFPS examined the caseworker. At the conclusion of the hearing, the trial court found that based on the testimony at the hearing, Father committed criminal conduct as defined in section 161.0011(b)(1)(Q) and that termination of the parental rights of Mother was in the best interest of H.H. The trial court also found Mother committed conduct as defined in section 161.0011(b)(1)(O) and that termination of the parental rights of Mother was in the best interest of H.H. The trial court approved the mediated settlement agreement and found that it would be incorporated into the decree of termination. Father filed a motion for new trial in which he stated his attorney mistakenly failed to attend the

hearing and requested a new trial at which father would be allowed to present evidence. The trial court denied Father's motion for new trial and entered a decree of termination that also appointed TDFPS as H.H.'s managing conservator. Father then filed his notice of appeal. Because Mother has not filed a notice of appeal or raised any issues on appeal, we only address the termination of Father's parental rights to H.H.

DISCUSSION

In a single issue on appeal, Father argues the trial court erred in terminating his parental rights because there was not legally and factually sufficient evidence to support the termination pursuant to section 161.001(b)(1)(Q) of the family code or to support the finding the termination was in the best interest of the child. TDFPS concedes the evidence presented was legally and factually insufficient and requests this Court reverse the trial court's order terminating Father's parental rights and remand the case to the trial court for further proceedings.

I. STANDARD OF REVIEW

In a legal-sufficiency review, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal-sufficiency review, looking at the evidence in the light most favorable to the judgment means that we must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* If, after conducting our legal-sufficiency review of the record evidence, we determine that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude that the evidence is legally insufficient. *Id.* Rendition of judgment in favor of the parent would generally be required if the evidence is legally insufficient. *Id.*

In a factual-sufficiency review, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id.* The inquiry must be whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations. *Id.* We consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its 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. *Id.*

II. APPLICABLE LAW

A trial court may order termination of the parent–child relationship if it finds by clear and convincing evidence (1) that the parent knowingly engaged in criminal conduct that has resulted in the parent's conviction of an offense and confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition and (2) that termination is in the best interest of the child. TEX. FAM. CODE ANN. §§ 161.001(b)(1)(Q), (2).

A mediated settlement agreement is binding on the parties if the agreement is, among other things, signed by each party to the agreement and is signed by the party's attorney. *Id.* § 153.0071 (d).

III. APPLICATION OF LAW TO FACTS

Here, the entirety of the evidence presented at the hearing in support of the grounds for termination of Father's parental rights consists of the following testimony at the hearing elicited by the TDFPS attorney from the caseworker.

> TDFPS Attorney: . . . And the father is Edward [T.]; is that correct?
>
> Caseworker: Correct.
>
> TDFPS Attorney: And the parties entered into a binding mediated settlement agreement back on July 28th, 2015; is that correct?

Caseworker: Correct.

TDFPS Attorney: Is that MSA in the best interest of this child and do you ask the Court to accept it?

Caseworker: Yes.

. . . .

TDFPS Attorney: And the father is currently incarcerated; is that correct?

Caseworker: Correct.

TDFPS Attorney: We did a DNA test. He was indeed the father of this child; is that correct?

Caseworker: Correct.

TDFPS Attorney: And are we asking that his rights be terminated on (q) grounds and that he knowingly engaged in criminal conduct that has resulted in his conviction of an offense and confinement and imprisonment and the ability to care for the child for more than two years from the date of the filing of this petition?

Caseworker: Correct.

. . .

TDFPS Attorney: And it is in the child's best interests for both of the parent's rights to be terminated?

Caseworker: Correct.

The mediated settlement agreement contained in the clerk's record was not signed by Father or his attorney, and there is no evidence of his assent to it. Accordingly, the mediated settlement agreement is not binding on Father. *Id.* § 153.0071(d).

While Father admits he was incarcerated at the time of the hearing, the foregoing testimony from the caseworker is the only evidence as to the length of his sentence or whether he has the ability to care for H.H. *Id.* § 161.001(b)(1)(Q). We conclude the record contains legally and factually insufficient evidence to support the trial court's termination of the parent–child relationship between Father and H.H. on the grounds that Father knowingly engaged in criminal conduct that has resulted in the parent's conviction of an offense and confinement or

imprisonment and inability to care for the child for not less than two years from the date of filing the petition. *In re J.R.*, 319 S.W.3d 773, 777 (Tex. App.—El Paso 2010, no pet.) (holding that because the record contained no evidence as to the length of the father's sentence or the likely date of parole or release, the evidence was legally insufficient to support termination of the father's parental rights).

Finally, even if we were to conclude the only evidence as to best interest, the above testimony of the caseworker, was sufficient to support the trial court's finding that termination of the parent–child relationship between Father and H.H. was in the best interests of the child, we note such evidence alone could not support the trial court's termination of Father's parental rights. TEX. FAM. CODE ANN. § 161.001(b) (permitting a trial court to order termination of the parent–child relationship if the trial court finds by clear and convincing evidence that termination is in the best interest of the child *and* that the parent has engaged in some other conduct provided by subsection (b)(1)). We sustain Father's sole issue.

Father requests rendition of judgment in his favor, but TDFPS requests remand for further proceedings. We recognize that rendition of judgment in favor of Father would generally be required where, as here, there is legally insufficient evidence. *In re J.F.C.*, 96 at 266. Appellate courts have broad discretion to remand a case for a new trial in the interest of justice. *See* TEX. R. APP. P. 43.3(b); *Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 176 (Tex. App.—Dallas 2009, no pet.). Remand is appropriate when, for any reason, a case has not been fully developed below. *See In re S.E.W.*, 168 S.W.3d 875, 886 (Tex. App.—Dallas 2005, no pet.) (although the mother failed to preserve error on issue of expert testimony, case remanded in interest of justice).

Here, the record reflects that H.H. was barely a year old when the trial court entered the decree of termination and had been in the custody of TDFPS for almost her entire life, never at

any time living with Father. Father's paternity was confirmed approximately one month before the trial court entered the decree of termination. Father has been incarcerated since before learning he was potentially the biological father of H.H. and admits in his appellate brief that he remains incarcerated. However, there is no evidence in the record regarding when Father will be released or his ability to care for H.H. in a manner consistent with her interests. Additionally, neither Father nor his attorney appeared at the hearing, but there was some evidence TDFPS had agreed to use its best efforts to identify a paternal relative with whom to place H.H. We conclude a remand of the case against Father is appropriate to further develop the record and is in the interest of justice.

CONCLUSION

We reverse the trial court's order terminating Father's parental rights, affirm the trial court's order terminating Mother's parental rights, and remand this case for further proceedings.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF H.H., A CHILD

No. 05-15-01322-CV

On Appeal from the 304th Judicial District Court, Dallas County, Texas
Trial Court Cause No. 14-01144-W.
Opinion delivered by Justice Schenck, Justices Lang-Miers and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment terminating the parental rights of Edward Townsend and **AFFIRM** that portion of the trial court's judgment terminating the parental rights of Shanita Humphrey. We **REMAND** this cause to the trial court for further proceedings.

Judgment entered this 12th day of February, 2016.