

COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

M.P.G. v. Department of Family and Protective Services; In the
Interest of R.R., a Child

No. 01-10-01069-CV · No. 01-10-01069-CV · Decided October 20, 2011

SUMMARY

The First Court of Appeals of Texas affirmed the termination of a mother's parental rights to R.R. The court rejected challenges concerning a continuance, admission of family-service-plan and medical records, caseworker testimony, trial procedure, appointment of counsel, and the legal and factual sufficiency of the evidence supporting the child's best interest. The court concluded that the mother's failure to protect the child from abuse, delay in obtaining medical care, and lack of safe and stable caregiving supported termination.

CASE DETAILS

COURT	Court of Appeals for the First District of Texas
WRITING FOR THE COURT	Jane Bland; Chief Justice Radack; Justice Bland; Justice Huddle
JURISDICTION	Texas
DECIDED	October 20, 2011
DOCKET	01-10-01069-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	In an accelerated appeal from a judgment terminating the mother's parental rights to R.R., the mother challenged the denial of a continuance, evidentiary rulings, trial-management decisions, the failure to appoint counsel, and the legal and factual sufficiency of the evidence supporting the child's best-interest finding.
STANDARD OF REVIEW	Denial of a motion for continuance and admission or exclusion of evidence are reviewed for abuse of discretion. Legal sufficiency is reviewed by considering evidence supporting the finding, while factual sufficiency is reviewed in light of the entire record to determine whether disputed evidence is so significant that a reasonable factfinder could not form a firm belief or conviction. The Department bore the burden of proving termination was in the child's best interest by clear and convincing evidence.
PRECEDENTIAL VALUE	published

TOPICS

termination of parental rights

parental rights

writ of certiorari

evidence

PRACTICE AREAS

family law

appellate procedure

evidence

civil procedure

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying the mother's motion for continuance.
2. Whether the mother's challenges to the admission of Department exhibits were preserved and, for preserved objections, whether the family service plan and medical records were admissible.
3. Whether the trial court abused its discretion by allowing the caseworker to testify about facts reflected in R.R.'s medical records.
4. Whether the trial court improperly deviated from the traditional order of witnesses and trial procedure.
5. Whether the trial court was required to appoint an attorney ad litem or other counsel for the mother before trial.
6. Whether the evidence was legally and factually sufficient to support the finding that termination of the mother's parental rights was in R.R.'s best interest.

HOLDINGS

1. The mother preserved her challenge to the denial of the continuance because counsel presented specific grounds and secured an express or implicit ruling in the record.
2. The trial court did not abuse its discretion in denying the mother's motion for continuance based on counsel's late retention, the mother's alleged confusion, and the asserted need for additional preparation.
3. The mother's challenges to exhibits 1, 2, 6, and 7 were waived because she failed to make timely and specific objections at trial.
4. The trial court acted within its discretion in admitting the family service plan because it qualified as a public record and was required by statute to be filed with the court.
5. The trial court did not abuse its discretion in admitting R.R.'s medical records as business records.
6. The trial court did not err in allowing McCartney to testify about facts reflected in R.R.'s medical records because she did not offer independent medical opinions, and the mother also waived the objection by allowing the same or similar evidence without objection.
7. The mother presented no preserved appellate issue concerning the trial court's management of the order of witnesses.
8. The trial court was not required to appoint counsel for the mother because she did not seek appointment, did not file an affidavit of indigence, and appeared with counsel at trial.

9. The evidence was legally and factually sufficient to support the trial court's finding by clear and convincing evidence that termination of the mother's parental rights was in R.R.'s best interest.

KEY QUOTATIONS

“a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it.” (Discussion I.A)

“We find that the evidence in this case is legally and factually sufficient for the trial court to have formed a firm belief or conviction that termination was justified.” (Discussion V.B)

FACTUAL BACKGROUND

When R.R. was five months old, the mother left him with his father, whom she knew to be abusive, while she worked. After discovering that R.R.'s leg was swollen, the mother waited nine days before obtaining medical treatment; doctors diagnosed a broken femur, multiple skull fractures, and a subdural hematoma, with injuries consistent with abuse or neglect. After R.R. was placed with another caregiver selected by the mother, he sustained another leg fracture. R.R. was placed in foster care, where evidence showed that he bonded with the foster family, received extensive medical and developmental treatment, and improved.

PROCEDURAL HISTORY

The trial court granted the Department temporary conservatorship after R.R. suffered serious injuries while in the mother's care and later sustained another injury while placed with a caregiver chosen by the mother. The Department filed a petition to terminate the parents' rights, and the trial court ultimately terminated both parents' parental rights. The mother appeared with counsel at trial, moved for a continuance, and appealed after the trial court proceeded with trial and entered judgment against her.

DISPOSITION

affirmed

CASES CITED

- In re R.R., 209 S.W.3d 112, 114 (Tex. 2006)
- Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986)
- Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985)
- Holley v. Holley, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied)
- Whitworth v. Whitworth, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.)
- O'Connor v. O'Connor, 245 S.W.3d 511, 516 (Tex. App.—Houston [1st Dist.] 2007, no pet.)
- Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992)
- In re L.M.I., 119 S.W.3d 707, 711 (Tex. 2003)
- Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 638 (Tex. 2009)
- Jelinek v. Casas, 328 S.W.3d 526, 539 (Tex. 2010)

- *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51–52 (Tex. 2002) (per curiam)
- *Owens-Corning Fiberglas v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)
- *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004)
- *Sylvia M. v. Dallas Cnty. Child Welfare Unit of Tex. Dep't of Human Servs.*, 771 S.W.2d 198, 205 (Tex. App.—Dallas 1989, no writ)
- *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.)
- *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980)
- *In re C.H.*, 89 S.W.3d 17, 27–28 (Tex. 2002)
- *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.)
- *Clark v. Dearen*, 715 S.W.2d 364, 367 (Tex. App.—Houston [1st Dist.] 1986, no writ)
- *Yonko v. Dep't of Family & Protective Servs.*, 196 S.W.3d 236, 243 (Tex. App.—Houston [1st Dist.] 2006, no pet.)
- *In re C.T.E.*, 95 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)
- *In re J.F.C.*, 96 S.W.3d 256, 266–67 (Tex. 2002)
- *Jordan v. Dossey*, 325 S.W.3d 700, 730 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)
- *In re T.M.J.*, 315 S.W.3d 271, 278–79 (Tex. App.—Beaumont 2010, no pet.)
- *In re J.H.G.*, 313 S.W.3d 894, 895–96 (Tex. App.—Dallas 2010, no pet.)
- *M.C. v. Texas Dep't of Family and Protective Servs.*, 300 S.W.3d 305, 311 (Tex. App.—El Paso 2009, pet. denied)

OPINION

PER CURIAM.

Opinion issued October 20, 2011. In The Court of Appeals For The First District of Texas NO. 01-10-01069-CV IN THE INTEREST OF R.R., a child On Appeal from the 313th District Court Of Harris County, Texas Trial Court Cause No. 2010–02684J MEMORANDUM OPINION In this accelerated appeal, a mother challenges the trial court's judgment terminating her parental rights to her child, R.R.

The mother contends that the trial court erred in: (1) denying her motion for continuance; (2) admitting exhibits proffered by the Department of Family and Protective Services (the "Department"); (3) failing to ensure that the mother received the family service plan in Spanish, her native language; (4) admitting the casework supervisor's testimony regarding the child's medical condition and treatment; (5) deviating from the "traditional" order of witnesses in trial; (6) failing to appoint an attorney for the mother before trial; and (7) relying on erroneously submitted medical evidence in reaching its ruling.

The mother also challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of her parental rights is in R.R.'s best interest. Finding no error, we

affirm. Background The mother gave birth to R.R. in 2009. When R.R. was five months old, his mother got a full-time job working as a cook in a meat market.

On her first day of work, she could not find a babysitter to care for R.R., so the mother left him with his father. When she returned three hours later, the mother noticed that R.R. was in distress and that his right leg was swollen.

The mother took R.R. to stay with her cousin, but did not immediately seek medical treatment for him. Over the next several days, R.R. had diarrhea and vomiting and had trouble sleeping. After nine days, the mother finally brought R.R. to the doctor, who, after observing the severity of R.R.'s injuries, referred him to Texas Children's Hospital, where he was diagnosed with a broken femur, multiple skull fractures, and a subdural hematoma.

The mother first explained that she did not immediately bring R.R. to the doctor because she thought the swelling was due to immunizations R.R. had received several weeks earlier. After learning the extent of R.R.'s injuries, however, the mother admitted that she had left R.R. alone with his father.

The mother stated that she was afraid of the father, who was abusive. She explained that R.R.'s father had threatened her with knives, attempted to suffocate her with a pillow, and had also hit her while she was pregnant. Based on those prior experiences, as well as her conversations with the father when she saw R.R.'s swollen leg, the mother believed that the father had injured R.R.

The mother also admitted that she delayed in bringing R.R. to the hospital because she did not want to answer any questions about how R.R. came to be injured. In R.R.'s hospital records, the attending physician noted that R.R.'s injuries were consistent with abuse and neglect, that he was in serious danger of further harm, and that he could have suffered serious injury or death.

To repair the broken femur, R.R. was placed in a body cast. To address R.R.'s developmental delay, which was attributed to the brain injuries, R.R. was referred to the state's early childhood intervention program. After R.R. was discharged from the hospital, the mother took him to stay with one of her friends. A few weeks later, however, the friend told the mother that she could no longer care for R.R.

The mother then placed R.R. with his father's nephew and the nephew's wife. Several days after this second placement, the mother and her niece brought R.R. to the hospital for a follow-up appointment. The examination revealed that R.R. suffered a new leg fracture since his last visit. A social worker and Spanish translator were present during R.R.'s examination.

The social worker asked questions about the baby's condition during the past few days. The mother's answers contradicted those of the niece. The mother said she did not notice anything

unusual about R.R.'s condition, but the niece responded that R.R. had been crying and in apparent pain.

The social worker noted that the mother gave evasive and inconsistent answers. Based on the information obtained during the interview, the circumstances surrounding R.R.'s injuries, the severity of those injuries, and other pertinent observations, the social worker opined that R.R. was in substantial risk of future harm and recommended that the Department take custody of R.R.

When no other relative came forward to care for R.R., the trial court granted the Department temporary conservatorship. The Department placed R.R. in foster care and began proceedings to terminate parental rights. In its petition, the Department declared that its goal for R.R. was alternative family or non-related adoption.

The Department also prepared a family service plan, which required the mother and father to maintain contact with the Department, attend parenting and domestic violence classes, attend court meetings in the case, undergo psychological evaluation, and comply with other stability requirements.

The trial court signed an order incorporating the family service plan by reference and requiring R.R.'s parents to comply with the plan. A CPS caseworker provided the mother with a copy of the plan written in Spanish, and a court interpreter explained the plan to the mother in Spanish.

The mother confirmed that she had received the Spanish copy of the plan and that she understood its purpose and requirements. By the second permanency hearing, the mother had completed the anger management, domestic violence, and parenting classes required by the plan, but had not yet submitted to the required psychological evaluation. According to CPS program director Lisa McCartney, the mother did not display any improved understanding of her parental obligations after completing the coursework.

The mother appeared in person without counsel in the pretrial hearings, but no record was made of those proceedings. On the first day of the trial in November 2010, however, the mother appeared with counsel and filed a motion for continuance.

The trial court did not make a written ruling on that motion, but nevertheless proceeded with trial. Ultimately, the trial court ordered that the father's and mother's parental rights to R.R. be terminated. Discussion I. Motion for Continuance A. Preservation of error The mother maintains that the court erred in denying her motion for continuance.

The Department claims that the mother waived this complaint by failing to obtain a ruling. We disagree. Defense counsel filed a handwritten motion for continuance along with a proposed order. In the motion, counsel represented that the mother was confused about the judicial process and had

not prepared a defense, and that he had been retained the day before and needed additional time to prepare the case.

Although the trial court did not sign a written order denying the motion, defense counsel stated on the record, “Before we get started, I wanted to renew my objection to the motion for continuance, which was previously denied.” Before the trial court could rule, the Department requested that the trial court take notice of documents in its own file showing when the mother received notice of the trial setting, and the trial court proceeded with trial.

Counsel’s objection could have been clearer, but a fair reading of the record in context shows that counsel presented specific grounds for his motion for continuance and secured a ruling on it. See Tex. R. App. P. 33.1(a)(2)(A) (declaring that appellant presenting complaint for appellate review preserved same where record shows that specific grounds for motion apparent from the context, appellant complied with pertinent rule of civil procedure, and record shows that trial court ruled on motion “either expressly or implicitly”).

B. Standard of review We review the denial of a motion for continuance for an abuse of discretion. In re R.R., 209 S.W.3d 112, 114 (Tex. 2006); Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986). A trial court abuses its discretion when it acts in an arbitrary and unreasonable manner or when it acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex.

1985). Under the abuse of discretion standard, we view the evidence in the light most favorable to the trial court’s actions and indulge every presumption in favor of the judgment. Holley v. Holley, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied). If some probative and substantive evidence supports the order, there is no abuse of discretion.

Whitworth v. Whitworth, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.). C. Analysis A motion for continuance may not be granted “except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.” Tex. R. Civ. P. 251; O’Connor v. O’Connor, 245 S.W.3d 511, 516 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Lack of counsel, standing alone, is not good cause for a continuance. Tex. R. Civ. P. 253; O’Connor, 245 S.W.3d at 516. The record shows that the mother attended an August 30, 2010 hearing, during which the court set the November 17, 2010 trial date. A month later, the Department served the mother with written notice of the November trial setting.

Although the motion generally alleges that the mother was confused about the significance of the proceeding, it does not provide a reasonable explanation for her delay in seeking assistance or indicate that she was prevented from obtaining it, either from the Mexican Consulate or an attorney, until the day before the trial setting. Even if we would have decided the issue differently, we cannot disturb the trial court’s decision unless it is shown to be arbitrary and unreasonable.

See *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992). The trial court did not act unreasonably in denying the motion for continuance based on the grounds presented. II. Evidentiary complaints A. The Department’s exhibits The mother challenges the trial court’s admission of the Department’s exhibits 1 through 7, namely: the certificate of paternity registry search showing no man has claimed to be R.R.’s father (exhibit 1); the affidavit of status showing that the mother has identified R.R.’s alleged father (exhibit 2); the family service plan, English and Spanish versions, both unsigned (exhibits 3 and 4); the medical records from Texas Children’s Hospital concerning R.R.’s diagnoses and treatment (exhibit 5); the letter from the CPS caseworker to the mother requesting that she contact the caseworker as soon as possible concerning the November 17 court date, with return receipt signed by mother on or about October 26, 2010 (exhibit 6); and the family service plan (English version), signed by mother on June 10, 2010 (exhibit 7).

The mother failed to make timely and specific objections to exhibits 1, 2, 6, and 7, and thus waived her challenge to the admissibility of those exhibits. Objections not made at the trial court but raised only on appeal present nothing for review. See Tex. R. App. P. 33.1; See *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003).

We consider only those contentions on appeal that comport with the objections made at trial. See *In re L.M.I.*, 199 S.W.3d at 711. The mother timely objected to exhibits 3, 4, and 5. We therefore consider the merits of the objections to admission of the family service plan and medical records raised below.

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). We uphold the trial court’s evidentiary ruling if the record contains any reasonable basis for it. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010) (citing *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 51–52 (Tex.

2002) (per curiam)). With respect to the family service plan exhibits, a trial court may admit a document over a hearsay objection if it is a “[r]ecord[], report[], statement[], or data compilation[], in any form, of [a] public office[] or agenc[y] setting forth... the activities of the office or agency [or]... matters observed pursuant to duty imposed by law as to which matters there was a duty to report....” See Tex. R. Evid.

802, 803(8). Texas law requires the Department to file the family service plan in the trial court within 45 days after conservatorship is granted. Tex. Fam. Code Ann. § 263.101 (West 2009). The Department complied with this requirement.

As a statement and compilation of data required to be filed with the court, the plan qualifies as a public record. It thus was within the trial court’s discretion to determine that the copies of the plan were admissible. See *Owens-Corning Fiberglas v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Relying on section 263.102 of the Family Code, the mother also contends that the Spanish version of the family service plan is not competent evidence because the Department gave her only the English version of the plan, and her native language is Spanish.

See Tex. Fam. Code Ann. § 263.102 (West 2009). That provision requires the family service plan to “be in writing in a language that the parents understand, or made otherwise available.” *Id.* The mother, however, admitted at trial that she did receive the family service plan in Spanish.

In any event, she did not raise this objection at trial and therefore did not preserve it for appellate review. See Tex. R. App. P. 33.1. With respect to the medical records, the mother objected on the grounds that they were hearsay, “not relevant as a second opinion” and not made by the proper individual. Hearsay evidence may be admitted if it is a record [or] report... in any form of acts, events, [or] conditions... made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the... report [or] record... all as shown by the testimony of the custodian or... by affidavit that complies with Rule 902(10).

Tex. R. Evid. 803(6). The record indicates that the Department timely filed notice to use the medical records as a business record, as well as an affidavit from the custodian of those records. The records custodian affidavit averred that the custodian was providing the records; that they were made in the regular course of business, by someone with personal knowledge; and that it was the regular conduct of business to keep such records.

The affidavit complies with Texas Rule of Evidence 902(10), which provides a reasonable basis for admitting the medical records. See *Malone*, 972 S.W.2d at 43. B. Caseworker testimony The mother also challenges the trial court’s decision to allow McCartney to testify about medical issues because she did not qualify as a medical expert. Specifically, the mother claims that McCartney could not testify to the injuries R.R. suffered or give medical opinion testimony as to the mother’s psychological state.

The medical records addressing R.R.’s condition and care, however, were properly admitted before McCartney testified, and she did not form her own independent medical opinions about R.R.’s diagnosis and treatment. The mother also waived this objection by allowing the same or similar evidence to be introduced without objection at other times during the trial.

Her contention, therefore, lacks merit. See *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). III. Trial procedure The mother contends that the trial court erred in altering the trial proceedings by allowing the Department to call all of their direct witnesses before allowing the mother’s counsel to cross-examine them.

The mother’s trial counsel objected only once to a perceived alteration of trial procedure. This occurred when the judge stopped the questioning during defense counsel’s cross-examination of

McCartney to handle a matter for another case. When the trial resumed, defense counsel asked to call the mother to the stand instead of continuing the cross-examination.

The court refused the defense's request to call a witness during the plaintiff's case-in-chief. The counsel's request to call the mother to the stand during cross examination of another witness would have deviated from "traditional" trial procedure. See Tex. R. Civ. P. 262, 265. Defense counsel cross-examined every other Department witness or failed to object, and therefore presents no issue for review.

Tex. R. App. P. 33.1. IV. Appointment of attorney ad litem The mother asserts that the trial court erred by failing to appoint an attorney ad litem for her. Section 107.013 of the Family Code requires mandatory appointment of an attorney ad litem for an indigent parent wishing to challenge their termination of parental rights. Tex. Fam. Code Ann. § 107.013 (West 2009).

Subsection (d) declares that a determination of indigence will not occur until the parent has filed an affidavit of indigence. See *id.* § 107.013(d) (citing Tex. R. Civ. P. 145(b)). Although the availability of mandatory appointment of counsel in parental termination cases is vitally important, appointment is not required when a parent makes no effort to seek such an appointment and appears with representation at trial.

See *Sylvia M. v. Dallas Cnty. Child Welfare Unit of Tex. Dep't of Human Servs.*, 771 S.W.2d 198, 205 (Tex. App.—Dallas 1989, no writ). The record does not show that the mother sought an appointment of counsel prior to the trial, and she appeared with counsel at the beginning of trial.

The mother never executed an affidavit of indigence, and the record shows that she had full-time employment and was able to support herself independently while the proceeding was pending. See Tex. Fam. Code Ann. § 107.013(d).

Under these circumstances, the trial court had no obligation to appoint counsel. The mother also contends that she should have been admonished by the court of her right to mandatory counsel prior to the final trial setting.

The mother received written notice of her right to counsel when she was served with the Department's original petition, which recites that counsel will be provided if the mother is found to be indigent. Because the mother did not seek such an appointment or show herself to be qualified for a mandatory appointment, we hold that the trial court did not err in failing to appoint a guardian ad litem for the mother.

V. Sufficiency of the evidence challenge A. Standard of Review The mother challenges the legal and factual sufficiency of the trial court's finding, pursuant to section 161.002(2), that termination was in R.R.'s best interest. See Tex. Fam. Code Ann. § 161.001(2) (West Supp. 2010). A strong

presumption exists that a child's best interests are served by maintaining the parent-child relationship.

In re L.M., 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The Department has the burden to prove by clear and convincing evidence that termination is in the child's best interest. In re G.M., 596 S.W.2d 846, 847 (Tex. 1980).

The same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) also may be probative in determining the best interests of the child. In re C.H., 89 S.W.3d 17, 28 (Tex. 2002); In re L.M., 104 S.W.3d at 647. B. Analysis In *Holley v. Adams*, the Texas Supreme Court provided a nonexclusive list of factors that the trier of fact in a termination case may use in determining the best interest of the child.

544 S.W.2d 367, 371–72 (Tex. 1976). These factors include: (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. These factors are not exhaustive, and the Department need not prove all factors as a condition precedent to parental termination. In re C.H., 89 S.W.3d at 27; *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Nevertheless, termination of the parent-child relationship is not justified when the evidence shows that a parent's failure to provide a more desirable degree of care and support of the child is due solely to misfortune or the lack of intelligence or training, and not to indifference or malice.

Clark v. Dearen, 715 S.W.2d 364, 367 (Tex. App.—Houston [1st Dist.] 1986, no writ). For legal sufficiency purposes, we consider those factors supporting the finding that termination was in the child's best interest. *Yonko v. Dep't of Family & Protective Servs*, 196 S.W.3d 236, 243 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Then, we balance the factors presented in the legal sufficiency argument against the evidence that undercuts any finding that termination is justified under the statute.

In re C.T.E., 95 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.

In re J.F.C., 96 S.W.3d 256, 266 (Tex. 2002). If, in light of the entire record, the disputed evidence weighing against termination is so significant that a factfinder could not reasonably have formed a

firm belief or conviction that termination was justified, then the evidence is factually insufficient to support termination. *Id.* A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of termination.

Id. at 266–67. 1. The desires of the child R.R. was five months old when he was removed from his mother’s custody, and thus cannot express his custody preference. The foster mother caring for R.R. testified that he was bonding to her family and that he was healing and showing improvement from the injuries he had sustained. She explained that when R.R. first came into her care, he would wake up most nights in the middle of the night screaming and trembling.

After about two months, she related, he stopped doing that and now seems very comfortable with the family. No evidence indicates that R.R. had any desire to return to the mother. In light of the evidence produced of the child’s progress and bonding, this factor weighs in favor of termination being in the child’s best interest. 2.

The emotional and physical needs of the child The foster mother testified that she has taken the child to the dentist, occupational therapist, ENT doctors, and a neurologist. She stopped working full-time so that she could devote her full attention to R.R.’s needs. These facts weigh heavily in favor of termination being in the child’s best interest. 3.

The emotional and physical danger to the child Medical records showed that R.R. suffered multiple severe injuries to his head and legs. Those records also showed the treating physician believed that these injuries resulted from abuse or neglect. R.R. suffered additional serious injury even after he was removed from the mother’s care and placed with a caregiver of her choice.

The mother waited nine days before taking the baby to the doctor after noticing that his leg was swollen. By the time the mother took R.R. for medical treatment, he suffered from vomiting and diarrhea. McCartney testified that R.R.’s injuries were more serious than those usually found in child abuse cases.

The mother admitted to being numerous occasions of physical abuse in her relationship with R.R.’s father, as well as having had a previous marriage of twenty years that also was physically abusive. The mother also admitted that she left R.R. alone with the father even though she knew he was abusive.

Although she took the parenting and domestic violence courses required by the Department, but she did not demonstrate that she learned how to better care for a child or avoid abusive relationships in the future. This factor weighs in favor of termination. 4.

The parental abilities of the individuals seeking custody The foster mother with whom R.R. had been staying for eight months testified that the child was receiving therapy and has been taken to multiple medical specialists.

The foster mother took time off from her full-time job to commit herself to R.R.'s care. R.R. has become comfortable with the foster family. The foster mother has cultivated substantial stability and security in R.R.'s life and has demonstrated proficiency in meeting R.R.'s needs.

The mother testified that she intended to protect R.R. and keep him safe. Her history of abusive relationships and instability, however, outweigh her positive intention to provide security. The mother parented three children during her previous marriage.

The youngest was fourteen when she left Mexico, and all of those children remained in Mexico with their grandmother after the mother moved to Texas. She had not seen them for three years. The mother raised those children in an abusive household, and then began another abusive relationship that produced R.R. R.R.'s initial injuries occurred while he was in the mother's custody, and she delayed in obtaining medical treatment for him for nine days after his leg became swollen.

Additional injuries occurred after the child was placed with a caregiver of the mother's choice. R.R.'s serious injuries and the delay in obtaining medical treatment show a lack of parenting ability. Those circumstances weigh in favor of termination being in R.R.'s best interests. 5.

The programs available to assist these individuals to promote the best interest of the child The family service plan laid out specific requirements that the mother needed to complete. Completing the plan, however, did not mean that the mother would regain custody of R.R.

After R.R.'s second visit to the hospital, where he was diagnosed with a new injury, the Department consistently stated that its goal for R.R. was substitute care. McCartney testified that under no circumstances would the mother regain custody of R.R., and that the plan's requirements were solely for the benefit of the mother and any child she might have in the future.

The evidence showed that the mother completed the domestic violence and parenting classes, but that she did not display any improved understanding of those issues afterward. The mother also made no attempt to undergo the required psychological evaluation, which McCartney explained was much more important than the class completion requirements. Additionally, the mother was not in regular contact with her caseworker regarding her progress in completing the plan's requirements.

The mother's attempt to complete some of the plan's requirements weighs against termination being in the child's best interest. But the mother's failure to successfully take advantage of the programs offered by the Department weighs in favor of the conclusion that termination was in R.R.'s best interest. 6.

The plans for the child by these individuals The mother's stated plan for R.R. was that he "stay with her and to keep him in church and on the right path. She wants to give him the best that she is

able and for him to be in good health and be a good boy.” The foster mother stated that she plans to place him in private school and continue to work with the occupational and communication therapists on minimizing his developmental delays.

The foster mother stated that her family prioritizes love, security, and care in its plans for the child’s future. The foster family has already started physical and occupational therapy for the child. The mother’s plans show some awareness of the child’s needs, but her inability to give R.R. a safe and secure environment in the past indicates that she may fall short in implementing them.

The foster family’s plans show a strong commitment to meeting the child’s needs and support the trial court’s finding that termination is in the best interest of the child. 7. The stability of the home or proposed placement R.R. came from an abusive home and suffered from night terrors when he initially was placed with the foster family.

The mother did not have adequate or safe child care arrangements for R.R. when she went to work. He suffered serious injuries after being left with caregivers chosen by the mother. When the mother was with R.R., she was inattentive to his obvious injuries.

In contrast, testimony showed that the child has bonded to the foster family, he now sleeps soundly through the night, and his behavior has changed over time, showing a degree of security in his new home. The stability of the foster family’s home supports the conclusion that termination is in the child’s best interest. 8.

The acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one The mother left the child with his father, a man she knew to be physically abusive and who previously had threatened to kill her.

The mother waited nine days to take her child, who was vomiting, had diarrhea, and a swollen leg, to a doctor, then purposefully withheld information for fear of further investigation. After the child was placed with another caregiver of the mother’s choosing the child sustained further substantial injury.

The attending physician at the hospital indicated that abuse or neglect was likely and that the injuries were serious. These acts and omissions weigh in favor of termination. 9. Any excuse for the acts or omissions of the parent When asked to explain her delay in obtaining medical care for R.R., the mother stated that she believed the injury was not serious and did not think that R.R.’s leg was broken, and she attributed his discomfort to immunizations R.R. received over a month before.

She also stated that, while she knew the father was abusive, she never saw him abuse R.R., and insisted that she only left R.R. with the father for three hours. The mother’s acts and omissions and the absence of any reasonable explanation for allowing her child to suffer for such a protracted

period before seeking medical treatment weigh in favor of the conclusion that termination is in R.R.'s best interest.

We find that the evidence in this case is legally and factually sufficient for the trial court to have formed a firm belief or conviction that termination was justified. This case is one where the mother's offending behavior is egregious.

The foster mother has had custody over R.R. for longer than the mother herself, allowing him to bond to his new placement. While away from his mother, R.R. has healed and improved in all areas of development. In light of all the evidence, the trial court could have reasonably formed a firm belief or conviction that termination of the mother's parental rights was in R.R.'s best interest.

See *Jordan v. Dossey*, 325 S.W.3d 700, 730 (Tex. App.—Houston [1st] 2010, pet. denied) (holding that evidence was sufficient where mother remained in an abusive relationship with the father, attempted suicide, showed a lack of parenting abilities, and foster family was stable, and bonded to the child); *In re T.M.J.*, 315 S.W.3d 271, 278–79 (Tex. App.—Beaumont 2010, no pet.) (holding that evidence was factually sufficient to find termination was in child's best interests even though mother completed two out of thirteen family service plan requirements; mother occasionally was physically abusive, and there was testimony indicating she was indifferent to her children); *In re J.H.G.*, 313 S.W.3d 894, 895–96 (Tex.

App.—Dallas 2010, no pet.) (holding that sufficient evidence supported termination where mother had completed majority of service plan but had not bonded to child, had no support system, and foster family was stable and willing to adopt); *M.C. v. Texas Dep't of Family and Protective Servs.*, 300 S.W.3d 305, 311 (Tex. App.—El Paso 2009, pet. denied) (holding that sufficient evidence supported termination where mother did not maintain contact with the Department, showed no emotion when attending to child, did not participate in services offered, displayed violent behavior; evidence also showed that foster parents had bonded to child and met medical needs mother had not).

Conclusion We hold that the trial court did not abuse its discretion in denying the mother's motion for continuance. We further hold that the mother waived any challenge to the admissibility of exhibits 1, 2, 6, and 7, and that the trial court did not abuse its discretion in admitting the other challenged exhibits.

The trial court did not err in finding that the mother received the family service plan in both English and Spanish or in allowing McCartney to testify to facts contained in R.R.'s medical records. We also hold that the trial court was not obligated to appoint counsel for the mother, and did not abuse its discretion in managing the trial procedure.

Finally, we hold that the evidence is legally and factually sufficient to support a finding that termination was in the best interest of the child. We therefore affirm the judgment of the trial court. Jane Bland Justice Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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