

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT AT AMARILLO

In the Interest of B.C.A., a Child

No. 07-20-00258-CV · No. 07-20-00258-CV · Decided January 6, 2021

SUMMARY

The Texas Court of Appeals for the Seventh District affirmed an order terminating Father's parental rights to B.C.A. The court held, after independently reviewing the record in connection with appointed counsel's Anders brief, that sufficient evidence supported termination based on endangerment and that termination was in the child's best interest.

CASE DETAILS

COURT	Court of Appeals of Texas, Seventh District at Amarillo
WRITING FOR THE COURT	Judy C. Parker; Pirtle, J.; Parker, J.; Doss, J.
JURISDICTION	Texas
DECIDED	January 6, 2021
DOCKET	07-20-00258-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Father appealed an order terminating his parental rights. His appointed appellate counsel filed an Anders brief and a motion to withdraw, asserting that the appeal presented no arguably reversible error. The court independently reviewed the record and affirmed.
STANDARD OF REVIEW	Termination of parental rights must be supported by clear and convincing evidence. For legal sufficiency, the court reviews all evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. For factual sufficiency, the court considers the entire record to determine whether a factfinder could reasonably form a firm conviction or belief. In an Anders parental-termination appeal, the appellate court independently examines the entire record for nonfrivolous grounds for reversal.
PRECEDENTIAL VALUE	Published memorandum opinion under the supplied metadata; no reporter citation appears in the source.
PARTIES	Father v. Texas Department of Family and Protective Services

TOPICS

termination of parental rights parental rights family law procedure appellate procedure due process

PRACTICE AREAS

family law termination of parental rights appellate procedure constitutional law

QUESTIONS PRESENTED

1. Whether the record presented any nonfrivolous or arguably reversible issue in Father's Anders appeal from the termination of his parental rights.
2. Whether clear and convincing evidence supported termination under Texas Family Code section 161.001(b)(1)(E), based on conduct endangering the child's physical or emotional well-being.
3. Whether the evidence supported the finding that termination of Father's parental rights was in B.C.A.'s best interest.

HOLDINGS

1. After independently examining the entire record and the Anders brief, the court found no plausible or nonfrivolous ground for reversal.
2. Clear and convincing evidence supported termination under subsection (E) because Father's methamphetamine use and unwillingness to seek treatment demonstrated conduct endangering B.C.A.'s physical or emotional well-being.
3. The evidence supported the trial court's finding that termination of Father's parental rights was in B.C.A.'s best interest.

KEY QUOTATIONS

"Due process requires that termination of parental rights be supported by clear and convincing evidence."
(4)

"Clear and convincing evidence is that 'measure or degree of 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.'" (4)

"Termination under subsection (E) must be based on more than a single act or omission. A voluntary, deliberate, and conscious course of conduct by a parent is required." (5)

FACTUAL BACKGROUND

The Department became involved after Mother and newborn B.C.A. tested positive for methamphetamine. Father was identified as the biological father nearly a year later, after which he received an abbreviated service plan. Father tested positive for methamphetamine twice, admitted using methamphetamine during counseling, had been dishonest about his drug use, and showed no interest in obtaining addiction services. B.C.A. had remained in the same foster home since shortly after birth, was bonded with the foster mother, and the foster mother was willing to adopt him.

PROCEDURAL HISTORY

The Department filed a petition for protection, conservatorship, and termination after Mother and the newborn child tested positive for methamphetamine. After genetic testing established Father's paternity, the Department amended its petition and provided Father services. Following trial, the 84th District Court of Ochiltree County terminated Father's parental rights under Texas Family Code section 161.001(b)(1)(E) and (O), finding termination in the child's best interest. Father appealed, and the Amarillo Court of Appeals affirmed after an Anders review.

DISPOSITION

affirmed

CASES CITED

- Anders v. California, 386 U.S. 738 (1967)
- In re Schulman, 252 S.W.3d 403, 406 n.9 (Tex. Crim. App. 2008) (orig. proceeding)
- Porter v. Tex. Dep't of Protective & Regulatory Servs., 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, no pet.)
- In re L.J., No. 07-14-00319-CV, 2015 Tex. App. LEXIS 427, at *2-3 (Tex. App.—Amarillo Jan. 15, 2015, no pet.) (mem. op.)
- In re D.A.S., 973 S.W.2d 296, 297 (Tex. 1998) (orig. proceeding)
- In re A.V., 113 S.W.3d 355, 362 (Tex. 2003)
- In re T.N., 180 S.W.3d 376, 384 (Tex. App.—Amarillo 2005, no pet.)
- Kelly v. State, 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014)
- In re L.V., No. 07-15-00315-CV, 2015 Tex. App. LEXIS 11607, at *2-3 (Tex. App.—Amarillo Nov. 9, 2015) (order) (per curiam)
- In re E.M.E., 234 S.W.3d 71, 72-73 (Tex. App.—El Paso 2007, no pet.)
- In re J.F.C., 96 S.W.3d 256, 263, 266 (Tex. 2002)
- In re C.H., 89 S.W.3d 17, 28-29 (Tex. 2002)
- In re T.B.D., 223 S.W.3d 515, 517 (Tex. App.—Amarillo 2006, no pet.)
- In re N.G., 577 S.W.3d 230, 234-37 (Tex. 2019) (per curiam)
- In re M.M., 584 S.W.3d 885, 889-90 (Tex. App.—Amarillo 2019, pet. denied) (mem. op.)
- In re J.T.G., 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.)
- Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987)
- In re J.O.A., 283 S.W.3d 336, 345 (Tex. 2009)
- In re K.C.F., No. 01-13-01078-CV, 2014 Tex. App. LEXIS 6131, at *27 (Tex. App.—Houston [1st Dist.] June 5, 2014, no pet.) (mem. op.)
- Penson v. Ohio, 488 U.S. 75, 82-83 (1988)
- Stafford v. State, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991)
- In re P.M., 520 S.W.3d 24, 27 (Tex. 2016) (per curiam)

OPINION

PER CURIAM.

In The Court of Appeals Seventh District of Texas at Amarillo No. 07-20-00258-CV IN THE INTEREST OF B.C.A., A CHILD On Appeal from the 84th District Court Ochiltree County, Texas Trial Court No. 14,714, Honorable Curt Brancheau, Presiding January 6, 2021 MEMORANDUM OPINION Before PIRTLE and PARKER and DOSS, JJ. Appellant, Father, appeals the trial court's order terminating his parental rights to his son, B.C.A.¹ Appointed counsel for Father has filed an Anders² brief in support of a motion to withdraw.

Finding no arguable grounds for appeal, we affirm the judgment of the trial court. ¹ To protect the privacy of the parties involved, we will refer to the appellant as "Father," to the child's mother as "Mother," and to the child by initials. See TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2020); TEX. R. APP. P. 9.8(b). Mother's parental rights were also terminated in this proceeding.

Mother does not appeal. ² See *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Background In March of 2019, the Texas Department of Family and Protective Services became involved with Mother and her newborn baby, B.C.A., due to concerns of Mother's drug use. Both Mother and B.C.A. tested positive for methamphetamine when B.C.A. was born.

The Department filed its petition for protection, conservatorship, and termination of parental rights of Mother and the purported father. Following an adversary hearing, the Department was appointed temporary managing conservator of B.C.A. and he was placed in a foster home.

In January of 2020, Father requested genetic testing after he learned that his brother had been excluded as B.C.A.'s father. Once testing confirmed that he was the father of B.C.A., the Department amended its petition and offered services to Father. Since B.C.A. had been in the care of the Department for almost a year at the time that Father became involved in the case, the Department prepared an abbreviated service plan for Father.

Father participated in counseling, completed a substance abuse evaluation, and submitted to random drug screens. At trial, the Department produced evidence that Father tested positive for methamphetamine in March and June of 2020. Father's counselor testified that Father initially claimed to be surprised when his drug screen was positive for methamphetamine.

Father attributed the positive drug screen to his taking Sudafed. After the second hair follicle test in June was positive for methamphetamine at higher levels, Father admitted to his counselor that he was using methamphetamine throughout the time that he was in counseling. According to the counselor, Father was dishonest during his substance ² abuse evaluation regarding his past and current drug use.

The counselor further testified that Father had no interest in seeking services to address his addiction. B.C.A. was two days old when he was removed from Mother's care at the hospital and placed in a foster home. B.C.A. has remained in this same foster home where he has flourished, and he is very bonded with the foster mother.

The foster mother is willing to adopt B.C.A. if parental rights are terminated. The trial court terminated Father's parental rights to B.C.A. on the grounds of endangerment and failure to comply with a court order that established actions necessary to retain custody of the child. See TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (O) (West Supp. 2020).³ The trial court also found that termination was in the best interest of B.C.A.

See § 161.001(b)(2). Law and Analysis Pursuant to Anders, Father's court-appointed appellate counsel has filed a brief certifying that he has diligently searched the record and has concluded that the record reflects no arguably reversible error that would support an appeal.

In re Schulman, 252 S.W.3d 403, 406 n.9 (Tex. Crim. App. 2008) (orig. proceeding); Porter v. Tex. Dep't of Protective & Regulatory Servs., 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, no pet.) (“[W]hen appointed counsel represents an indigent client in a parental termination appeal and concludes that there are no non-frivolous issues for appeal, counsel may file 3 Further references to provisions of the Texas Family Code will be by reference to “section ____” or “§ ____.” 3 an Anders-type brief”); In re L.J., No. 07-14-00319-CV, 2015 Tex. App.

LEXIS 427, at *2- 3 (Tex. App.—Amarillo Jan. 15, 2015, no pet.) (mem. op.) (same). Counsel certifies that he has diligently researched the law applicable to the facts and issues and discusses why, in his professional opinion, the appeal is frivolous.

In re D.A.S., 973 S.W.2d 296, 297 (Tex. 1998) (orig. proceeding). By his Anders brief, counsel concludes that reversible error is not present because sufficient evidence supports termination under subsections (E) and (O) in the trial court's order. See In re A.V., 113 S.W.3d 355, 362 (Tex. 2003); In re T.N., 180 S.W.3d 376, 384 (Tex. App.—Amarillo 2005, no pet.) (only one predicate finding under section 161.001(b)(1) is necessary to support termination when there is also a finding that termination is in a child's best interest).

Counsel has complied with the requirements of Anders by providing a copy of the brief, motion to withdraw, and appellate record to Father, and notifying him of his right to file a pro se response if he desired to do so. Kelly v. State, 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014); In re L.V., No. 07-15-00315-CV, 2015 Tex. App. LEXIS 11607, at *2- 3 (Tex. App.—Amarillo Nov.

9, 2015) (order) (per curiam). Father has not filed a response to his counsel's Anders brief. Due process requires that termination of parental rights be supported by clear and convincing evidence. In re E.M.E., 234 S.W.3d 71, 72 (Tex. App.—El Paso 2007, no pet.) (citing In re J.F.C., 96 S.W.3d

256, 263 (Tex. 2002)). This standard falls between the civil preponderance of the evidence standard and the reasonable doubt standard of criminal proceedings.

Id. at 73. Clear and convincing evidence is that “measure or degree of 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.” § 101.007 (West 2019). Reviewing the legal sufficiency of the evidence supporting parental termination requires us to review “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 at 266.

In a factual sufficiency review, we are to determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief about the truth of the matter on which the movant bore the burden of proof.

In re C.H., 89 S.W.3d 17, 28-29 (Tex. 2002); *In re T.B.D.*, 223 S.W.3d 515, 517 (Tex. App.—Amarillo 2006, no pet.). Pursuant to the Texas Supreme Court opinion in *In re N.G.*, we review the trial court’s findings under section 161.001(b)(1)(E), because of the potential future consequences to Father’s parental rights concerning a different child.

In re N.G., 577 S.W.3d 230, 235-37 (Tex. 2019) (per curiam);⁴ *In re M.M.*, 584 S.W.3d 885, 889 (Tex. App.—Amarillo 2019, pet. denied) (mem. op.). Section 161.001(b)(1)(E) permits termination when clear and convincing evidence 4 Subsection (b)(1)(M) permits parental rights to be terminated if the parent has “had his or her parent-child relationship terminated with respect to another child based on a finding that the parent’s conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state.” *In re N.G.*, 577 S.W.3d at 234 (quoting section 161.001(b)(1)(M) of the Family Code).

Because findings based on subsections (b)(1)(D) or (E) may become “a basis to terminate [a] parent’s rights to other children,” the Supreme Court reasoned that when a parent presents an appellate issue related to subsections (b)(1)(D) or (E) and the appellate court does not address the issue on appeal, the appellate court “eliminates the parent’s only chance for review of a finding that will be binding as to parental rights to other children.” *Id.* at 235.

According to the Supreme Court, “the parent’s fundamental liberty interest at stake outweighs the state’s interest in deciding only what is necessary for final disposition of the appeal.” *Id.* at 237. “Allowing section 161.001(b)(1)(D) or (E) findings to go unreviewed on appeal when the parent has presented the issue to the court thus violates the parent’s due process and due course of law rights.” *Id.* 5 shows that the parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the child’s physical or emotional well-being.

See § 161.001(b)(1)(E). Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child’s physical or emotional well-being was the direct result of the

parent's conduct, including acts, omissions, and failures to act.

In re J.T.G., 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). Termination under subsection (E) must be based on more than a single act or omission. A voluntary, deliberate, and conscious course of conduct by a parent is required. *Id.* To support a finding of endangerment, the parent's conduct does not necessarily have to be directed at the child, nor is the child required to actually suffer injury.

Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987). A factfinder is also not limited to consideration of the parent's actions before the child has been removed by the Department; any actions or inactions occurring before and after a child was born may be considered, including evidence of a parent's drug use or propensity for violence.

In re J.O.A., 283 S.W.3d 336, 345 (Tex. 2009). In this case, Father's use of methamphetamine and his unwillingness to seek help for his drug use demonstrates an inability to provide for B.C.A.'s emotional and physical needs and to provide a stable environment for the child.

In re K.C.F., No. 01-13- 01078-CV, 2014 Tex. App. LEXIS 6131, at *27 (Tex. App.—Houston [1st Dist.] June 5, 2014, no pet.) (mem. op.). As in a criminal case, we have independently examined the entire record to determine whether there is a non-frivolous issue that might support the appeal. See *6 Penson v. Ohio*, 488 U.S. 75, 82-83, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *Stafford v. State*, 813 S.W.2d 503, 511 (Tex.

Crim. App. 1991). Our independent review supports termination under subsection (E). See *In re N.G.*, 577 S.W.3d at 234-35. Based on this record, we conclude that a reasonable factfinder could have formed a firm belief or conviction that grounds for termination existed and that termination of Father's parental rights was in the best interest of B.C.A. See § 161.001(b)(1), (2); *In re M.M.*, 584 S.W.3d at 890.

After reviewing the record and the Anders brief, we agree with counsel that there are no plausible grounds for reversal. Conclusion We affirm the trial court's order terminating Father's parental rights to B.C.A.5 Judy C. Parker Justice 5We call counsel's attention to the continuing duty of representation through the exhaustion of proceedings, which may include the filing of a petition for review.

Counsel has filed a motion to withdraw, on which we will take no action. See *In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (per curiam). 7