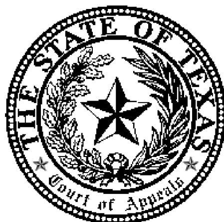
Affirmed and Opinion filed February 7, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00591-CV

SHEILA SMITH, Appellant

V.

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES, Appellee

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On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 98-05596J

OPINION

Sheila Smith appeals from a judgment terminating her parental rights. In two points of error, appellant argues (1) the trial court abused its discretion by receiving additional evidence after written findings were entered by a juvenile law master and (2) the evidence was factually insufficient to support the trial court's finding that termination was in the best interest of the children. We affirm.

In August 1998, Texas Department of Protective and Regulatory Services (TDPRS) received a report that appellant had left three of her children with an elderly neighbor for

several days and had not returned for them. TDPRS took custody of the children and later took custody of a fourth child whom appellant had left with an acquaintance. It was later discovered that appellant was being held in the Harris County jail. TDPRS filed suit to terminate the parent-child relationship between appellant and these four children. The suit also sought to terminate the parental rights of Larry Allen, the alleged biological father of one of the children, and of Thomas Guillory, the biological father of the other three children.[1] At the time suit was filed, the children ranged in age from 5 years to 11 months.

The proceeding was referred to the associate judge for the 315th District Court sitting as a juvenile law master under Chapter 54, Subchapter I of the Texas Government Code. *See* TEX. GOV'T CODE ANN. §§ 54.681-.700 (Vernon 1998).[2] Trial was held on November 22, 1999, at which appellant, Guillory, a TDPRS caseworker, and a court-appointed child advocate testified. On December 29, the associate judge signed a recommended decree providing the following: (1) termination of the parent-child relationship between Larry Allen and his child, (2) appointment of TDPRS as sole managing conservator of the four children, and (3) appointment of appellant and Guillory as possessory conservators.

On January 24, 2000, the presiding judge reconvened the case to hear further evidence. The only witness to testify at this proceeding was the TDPRS caseworker, although the court took judicial notice of its file and indicated it had carefully reviewed the November 22 transcript. Following this second proceeding, the court entered a decree terminating the parent-child relationship between appellant and her four children. This appeal followed.

In her first point of error, appellant complains the trial court abused its discretion by reconvening the case to hear additional testimony. We disagree. The presiding judge in this

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[1] Neither father is a party to this appeal.

[2] The case was automatically referred pursuant to Local Rule 3.6 of the Harris County District Courts, Juvenile Trial Division. *See* TEX. GOV'T CODE ANN. § 54.689 ("A case may be referred as prescribed by published local rules . . . .").

case had express statutory authority to accept or reject the master's recommended decree and to hear additional evidence before entering a final judgment. *See* TEX. GOV'T CODE ANN. § 54.697 (providing that the court may "adopt, modify, correct, reject, or reverse the master's report" and if a judgment has been recommended, the court may "hear more evidence before making its judgment"). Accordingly, the trial court did not abuse its discretion by reconvening the case and modifying the associate judge's recommended decree. We overrule appellant's first point of error.

In her second point of error, appellant argues the trial court abused its discretion by failing to consider the factual sufficiency of the evidence in finding that termination of appellant's parental rights was in the best interest of the children. The trial court found "by clear and convincing evidence that it is in the best interest of each and every child that the parental rights of [appellant] be terminated." We construe appellant's second point of error as a challenge to the factual sufficiency of the evidence supporting this finding.

Involuntary terminations of the parent-child relationship are governed by section 161.001 of the Texas Family Code. A court may order termination if it finds the following by clear and convincing evidence: (1) one or more of the statutory grounds set forth in section 161.001(1), and (2) that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 2002). Appellant does not challenge the trial court's finding by clear and convincing evidence that appellant engaged in conduct meeting two of the statutory grounds for termination under section 161.001(1).[3] Appellant attacks only the trial court's finding that termination of her parental rights is in the children's best interest.

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[3] Specifically, the court found by clear and convincing evidence that appellant

a. knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children.

b. engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children.

See TEX. FAM. CODE ANN. § 161.001(1)(D), (E).

TDPRS initially contends that appellant waived her complaint by failing to preserve it in the trial court. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was presented by a timely request, objection, or motion with sufficient specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a). In this case, appellant filed a motion for new trial alleging that "the disposition in this matter was improper in light of the facts presented at trial and the rights of the mother Sheila Smith were improperly terminated." We find that appellant's motion for new trial was sufficient to inform the trial court of appellant's complaint that the evidence was factually insufficient to support the judgment. We therefore turn to the merits of appellant's factual sufficiency challenge.

Our analysis begins by determining the proper standard of review. As noted above, the Family Code requires a trial court's findings to be made by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001. Recently, in *In re W.C.*, 56 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2001, no pet.), this court addressed whether we should apply a heightened standard when reviewing a factual sufficiency complaint in such cases. Due to the fundamental constitutional rights implicated by termination of the parent-child relationship, and in light of the Texas Supreme Court's opinion in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), we concluded that an order terminating parental rights should be subject to a heightened standard of appellate review. *In re W.C.*, 56 S.W.3d at 868. Accordingly, we may sustain appellant's factual sufficiency challenge if (1) the evidence is factually insufficient to support the trial court's finding by clear and convincing evidence or (2) the court's finding is so contrary to the weight of contradicting evidence that no trier of fact could reasonably find the evidence to be clear and convincing. *Id.*

We note that under her second point of error, appellant does not identify in her brief any evidence that she contends is contrary to the trial court's finding that termination of her parental rights is in the children's best interest. Therefore, appellant has failed to

demonstrate that the trial court's finding was against the weight of contradicting evidence. Instead, appellant argues that no new evidence was presented at the January 24 proceeding before the presiding judge that would support a finding different than that recommended by the associate judge. As we noted above, however, the presiding judge is expressly authorized to reject or modify the associate judge's recommended findings. TEX. GOV'T CODE ANN. § 54.697. Accordingly, we may reverse only if, after reviewing all the evidence in the record, we determine that the evidence is factually insufficient to support the trial court's finding by clear and convincing evidence.

In *Holley v. Adams*, the Texas Supreme Court listed several factors courts have considered in determining whether termination is in a child's best interest. 544 S.W.2d 367, 371-72 (Tex. 1976). TDPRS primarily focuses on two of these factors: (1) appellant's acts or omissions that may indicate that the existing parent-child relationship is not a proper one, and (2) the emotional and physical needs of the children. *See id.* at 372. Appellant admitted that she used crack cocaine for one-and-a-half years after her oldest child was born and that she tested positive for marijuana use when she gave birth to twins in 1997. At the time of trial, appellant was serving a ten-year sentence in prison. Although the reason for her incarceration is unclear from the record, appellant testified it was for "[w]riting checks in '96." There was evidence in the record that appellant's earliest projected release date is November 2002 and that the maximum sentence would result in a release date of March 2008. Tonya Hughes, the TDPRS caseworker assigned to this case, testified that appellant made only one attempt to contact TDPRS or the children from the time she was incarcerated in August 1998. Hughes also testified that appellant has never sent the childen any kind of financial support, even in the form of presents or clothing.

With respect to the children's emotional and physical needs, Hughes testified the two oldest children have both been diagnosed with ADHD. The oldest child had a severe ear infection that apparently had gone untreated for some time, resulting in extensive hearing problems. He was also diagnosed with a hernia that required surgery. The court admitted

a report from Frank Rosie, the court-appointed child advocate, in which Rosie states that the two oldest children are both severely developmentally delayed and that both have exhibited aggressive behavior. Hughes testified the two youngest children are both developmentally delayed as well. Hughes and Rosie both testified all four children are adoptable and termination would be in their best interest so that adoption proceedings could begin, which would provide the children a permanent home to address their needs.

In contrast, appellant presented evidence she participated in a substance abuse program while she was incarcerated, as well as evidence she completed a "Changes Parenting Unit" and a "Mind of Christ Seminar." Appellant testified she felt she had done everything in her power to improve herself as a parent upon her release. However, nothing in the record provides any details on what information or assistance appellant received through these programs. In addition, there is no evidence that appellant participated voluntarily in these programs, and there is no evidence to suggest that any of these programs may be effective upon appellant's release.

Appellant also claims she provided TDPRS with the names of several relatives as potential placements for the children during her incarceration. However, Hughes and Rosie testified attempts were made to contact appellant's family members, including her mother and brother, and TDPRS received no response. Rosie testified he conducted a home study to determine whether placement would be appropriate with Thomas Guillory's mother, the paternal grandmother to three of the children. Rosie expressed serious concerns with such a placement because of the children's physical and behavioral needs, Ms. Guillory's physical condition, and her inability to provide a plan for appropriate day care for the children while she works. Rosie also expressed concern Ms. Guillory would give the children back to her son, the children's father, who had a history of criminal and violent behavior.[4]

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[4] The trial court's decree also terminated the parent-child relationship between Thomas Guillory and his three children. Guillory did not appeal this order.

We find the evidence is not factually insufficient to support a finding by clear and convincing evidence that termination of appellant's parental rights is in the best interest of her children. We overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed February 7, 2002.

Panel consists of Justices Yates, Edelman, and Guzman.

Do Not Publish — TEX. R. APP. P. 47.3(b).