Affirmed and Opinion filed May 31, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00047-CV

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IN THE INTEREST OF B.A., Appellant

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 81,555

O P I N I O N

This is an appeal from an order terminating appellant's parental rights. In two issues, appellant challenges the factual sufficiency of the trial court's findings. We affirm.

Background

The child, B.A., was born on July 5, 1992. Approximately three months later, appellant, Segun Adebowale, and the child's mother, Naratu Lawanson,[1] were arrested for the offense of

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[1] Although Lawanson, together with her husband, filed a handwritten notice of appeal, Lawanson has not pursued appeal by filing a brief. A notice of intention to dismiss her appeal for want of prosecution was forwarded to Lawanson's last known address, but the notice was returned undelivered. Accordingly, we must dismiss Lawanson's appeal for want of prosecution.

wire fraud. The parents were convicted and imprisoned. In January 1993, Texas Department of Protective and Regulatory Services (TDPRS) took custody of B.A. and placed her in foster care. Kimberlye Parker, B.A.'s caseworker at that time, testified that TDPRS received a call that B.A. had been left with a friend of the parents and she could no longer care for her. Parker noted that, at the time she came into placement, B.A. was diagnosed with a failure to thrive, meaning she was underweight.

Despite this diagnosis in 1993, B.A.'s actual condition, Hirschsprung's disease, was not diagnosed until approximately 1996. Hirschsprung's disease inhibits the passage of food through the colon. Because B.A. was not diagnosed for a lengthy period of time, she had sustained damage to her colon, requiring surgery. Ultimately, a colostomy was performed. B.A. also has Down's Syndrome.

Appellant was in a federal prison from 1992 until February 1999. Thereafter, appellant was detained by the Immigration and Naturalization Service. At the time of the hearing in this case, appellant was still in detention and did not know when he would be released. While incarcerated or detained, appellant made one telephone call in 1994 to the foster parent and sent one letter to the caseworker regarding the child.

An evidentiary hearing was held and the trial court signed an order, finding by clear and convincing evidence two grounds for termination of the parent-child relationship between B.A. and her father: (1) appellant 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; and (2) appellant constructively abandoned the child who has been in the managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less than six months.[2] The court further found that termination of the parent-child relationship was

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[2] The court also found three other grounds, but these other grounds were actually the individual elements of constructive abandonment and not separate grounds for termination of the parental relationship. *See* TEX. FAM. CODE ANN. § 161.001(N)(i)-(iii) (Vernon Supp. 2001).

in the child's best interest.

Endangering Conduct

In his first issue, appellant claims the record is factually insufficient to support the trial court finding by clear and convincing evidence that appellant engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child.

Because termination of parental rights is such a drastic remedy and is of such weight and gravity, due process requires the petitioner to justify termination by clear and convincing evidence. *See In the Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *In the Interest of B.S.T.*, 977 S.W.2d 481, 484 (Tex. App.–Houston [14th Dist.] 1998, no pet.). Termination proceedings should be strictly scrutinized and involuntary termination statutes are strictly construed in favor of the parent. *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

Although the standard of proof in the trial court is clear and convincing evidence, our review of the factual sufficiency of the evidence supporting the trial court's judgment is guided by the traditional factual sufficiency standard of review. *See B.S.T.*, 977 S.W.2d at 486 (citing *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975)).[3] Accordingly, we must consider all of the evidence supporting and contrary to the trial court's determination and set aside the verdict only if the evidence supporting the trial court's finding is so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

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[3] Some courts have adopted a heightened standard for assessing factual sufficiency of "clear and convincing" evidence. *See, e.g., Spangler v. Texas Dept. of Protective Servs.*, 962 S.W.2d 253, 257 (Tex. App.—Waco 1998, no pet.) (holding that a factual insufficiency point will be sustained if the 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). In light of the facts presented here, as are more fully discussed under each ground for termination, we find the evidence is factually sufficient under either the traditional or heightened standards of review.

Section 161.001(1)(E) of the Family Code provides for termination of the parent-child relationship if the court finds the parent has "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." TEX. FAM. CODE ANN. § 161.001(1)(E) (Vernon Supp. 2001). Under this subsection, the cause of danger to the child must be the parent's conduct alone, including omissions or failure to act. *See B.S.T.*, 977 S.W.2d at 484. "Endanger" as the term is used in the statute, means more than the possible ill-effects of a less-than-ideal family environment. *See Texas Dept. of Human Services v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). The endangering conduct need not be directed at the child and the child need not suffer actual injury. *Id.* "Endanger" means to expose to loss or injury, or to jeopardize. *Id.*

Appellant claims that TDPRS attempted to use appellant's imprisonment as the course of conduct that allegedly endangered the physical or emotional well-being of the child. Imprisonment alone does not constitute endangerment under the statute, although it may be considered along with other factors showing an endangering course of conduct. *See id.* at 533-34. If the evidence, including the imprisonment, shows a course of conduct having the effect of endangering the physical or emotional well-being of the child, we may uphold the trial court's finding. *See id.* at 533.

The State claims this case is strikingly similar to *In re B.S.T.*, 977 S.W.2d 481 (Tex. App.–Houston [14th Dist.] 1998, no pet.). In *B.S.T.*, the appellant made only two efforts to see his children during a three-year period that he was out of prison. *Id.* at 485. He made no effort, during this time, to provide financial support to his children. *Id.* Appellant also continued to engage in criminal conduct that resulted in his incarceration, during which time he was unable to care for or support his children. *Id.* There was additional evidence that appellant was imprisoned for injury to a child, conduct that reflected the possibility of danger to his children. *Id.*

Although the facts in *B.S.T.* are somewhat stronger than the facts here, the State need

only show a pattern of conduct endangering the child. The appellant in *B.S.T.* failed to contact his children, failed to support them, and engaged in criminal conduct for which he could be sent to prison and during which time he could not care for or support his children. *Id.* Similarly, appellant in this case made no attempts to contact his child by telephone or mail. He provided no financial support to his child and he engaged in criminal conduct, causing him to be incarcerated, during which time he could not care for or support his child. Furthermore, when he was arrested he left his infant child with a friend who was unable to care for the child, given the child's health problems. This is sufficient to show a course of conduct endangering B.A.

Appellant argues that *B.S.T.* is distinguishable in that the appellant in that case also engaged in the type of criminal conduct, injury to a child, from which endangerment to his own children could be inferred. *Id*. at 485. Appellant claims that he has never engaged in any conduct that would harm B.A. As support for his argument, appellant cites to a number of cases in which termination was upheld because the parent had engaged in physical abuse of the mother or children, had abused drugs, or had attempted suicide, *see, e.g., In re B.R.*, 950 S.W.2d 113 (Tex. App.–El Paso 1997, no writ). While these cases reveal strong evidence supporting termination, the supreme court has held that imprisonment, regardless of the offense committed, may be considered as one factor, among others, showing endangering conduct. *Boyd*, 727 S.W.2d at 534.

The State also argues that appellant's lack of contact endangered B.A.'s emotional well-being. B.A.'s foster mother, Wendy Meeks. stated that a lack of contact from a parent is detrimental to a child's emotional well-being. She noted that B.A. has been in custody since she was three months old, and, due to the lack of contact, does not know appellant. Helen Black, B.A.'s case worker at the time of the hearing, testified that B.A. has no bond with her biological parents because of the lack of contact for seven years. The absence of a father, in Black's opinion, has deprived B.A. of the nurturing, love, and sense of belonging that comes with knowing her father.

Appellant's complete lack of contact or support of the child, together with his imprisonment, is sufficient evidence supporting the trial court's finding of endangering conduct. We cannot say, based on the record before us, that evidence supporting the trial court's finding is so weak as to be clearly wrong and manifestly unjust.

Constructive Abandonment

The second ground on which the trial court based termination was constructive abandonment. Section 161.001(1)(N) provides for termination if the parent has:

> constructively abandoned the child who has been in the permanent or temporary managing conservatorship fo the Department of Protective and Regulatory Services or an authorized agency for not less than six months, and:
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> (i) the department or authorized agency has made reasonable efforts to return the child to the parent;
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> (ii) the parent has not regularly visited or maintained significant contact with the child; and
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> (iii) the parent has demonstrated an inability to provide the child with a safe environment.

TEX. FAM. CODE ANN. § 161.001(1)(N) (Vernon Supp. 2001).

Appellant does not dispute that B.A. has been in continuous custody of TDPRS; however, he challenges the sufficiency of the evidence supporting the three elements constituting abandonment. Because appellant has been incarcerated continuously, subsection (i) regarding reasonable efforts to reunite appellant with B.A. is inapplicable. *See In re D.T.*, 34 S.W. 3d 625,633 (Tex.App.Fort Worth 2000, no.pet.h.).

1. Significant Contact

Appellant argues that he was precluded from visiting his child because he was in prison. The State cites *Jordan v. Hancock*, 508 S.W.2d 878 (Tex. Civ. App.–Houston [14th Dist.] 1974, no writ) as support for the argument that appellant's imprisonment, combined with

appellant's lack of significant contact with the child is sufficient to find abandonment.

In *Jordan*, the father left his pregnant wife and child with no financial assistance and traveled to another state, where he was subsequently arrested and imprisoned. *See id.* at 880. A divorce was granted while the father was in prison. *See id.* Upon his release from prison, the father held several jobs until he was again arrested and imprisoned. *See id.* During the seven month period he was free, the father failed to support the children, did not attempt to locate the children, and did not attempt to obtain a visitation order. *See id.* The court found this evidence, rather than imprisonment, was sufficient to support a finding of statutory abandonment. *See id.* at 881.

Similarly, appellant made no effort to contact B.A. since she has been in foster care. Appellant also has provided no financial support. Appellant did make two attempts to follow-up on the child, but two attempts to discover information about B.A. do not constitute maintaining *significant* contact with the child. Accordingly, we conclude that there is sufficient evidence of this element.

2. Safe Environment

The final element is whether appellant could provide a safe environment for the child. The State argues that appellant is unable to provide a safe environment because appellant is incarcerated and is oblivious to B.A.'s health needs. Appellant complains that TDPRS made no reasonable efforts to return the child to him so that he could demonstrate his ability to provide a safe environment.

Although imprisonment should not constitute abandonment as a matter of law, neither does it preclude a finding of abandonment. *Jordan*, 508 S.W.2d at 881. Furthermore, the record indicates that, because appellant was incarcerated, TDPRS did provide a family plan to appellant's wife, who was out of prison. Thus, the fact that no family plan was provided to appellant, who was incarcerated, is not determinative.

A review of the record indicates that appellant admitted he knows nothing about Down's Syndrome or Hirschsprung's Disease. The record shows that, because B.A. has a colostomy, she cannot eat a regular diet, but has to eat very soft foods. B.A. also requires close supervision to ensure that she does not remove her colostomy bag. B.A.'s foster mother obtained special training to learn how to care for B.A. B.A. also has Down's Syndrome, and she needs a stable, consistent home routine. She also needs assistance in communicating and dressing herself. Nothing in the record indicates that appellant understands or is able to handle B.A.'s special health needs.

Although appellant asserted he was anxious to obtain release and earn income to provide for his daughter and other children, appellant remains in custody and the record does not indicate when or if appellant will be released. Furthermore, the caseworker testified that, in her opinion, appellant had not demonstrated an ability to provide a permanent, stable home that would address B.A.'s medical needs.

Having reviewed the entire record, we find there is sufficient evidence that appellant was unable to provide B.A. with a safe environment. Accordingly, we find that sufficient evidence supports the trial court's finding of appellant's inability to provide a safe environment for B.A. Having found sufficient evidence of a lack of significant contact and the inability to provide a safe environment, we must uphold the trial court's finding of constructive abandonment.

Conclusion

Having found sufficient evidence supporting the trial court's finding of endangering conduct and constructive abandonment, we affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 31, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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