**Affirmed and Opinion filed December 7, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00718-CV**

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**IN THE INTEREST OF J.D.**

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**On Appeal from the 313th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1997-01410J**

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## O P I N I O N

Appellant appeals from a lower court judgment terminating his parental rights to the minor child J.D. Because appellant has failed to preserve his complaint about certain constitutional issues and because sufficient evidence supports the judgment, we affirm.

### I. Background

The state Department of Protective and Regulatory Services filed suit below to terminate the parental rights to four children, N.M., a female born July 3, 1987; J.D., a male born January 1, 1989; F.T. Jr., also known as F.T. IV, a male born December 31, 1992; and B.T., a female born January 24, 1996. The respondents in the suit below were four adults, the children's mother; F.T. the alleged biological father of F.T., Jr., and B.T.; Ron Bell, address

unknown, the alleged biological father of N.M.; Dennis Henry Lewis, address unknown, also the alleged biological father of N.M.; and appellant, a California prison inmate and the alleged biological father of the child at issue, J.D. On appeal we are concerned only with the termination of parental rights of appellant as to the minor child, J.D. Because the adult appealing the judgment and the child at issue both have the initial "J.D.," the parties will be identified as "appellant" and "J.D."

The evidence shows that the mother had regularly used illegal drugs since she was about12 years old, a period of about twenty years. The evidence also shows that for most of that time she collected welfare, having held two jobs for a total period of about seven months. Over the years she had used marihuana, methamphetamines, and cocaine. After she gave birth to N.M., in California, she met appellant. After the birth of the J.D., she and appellant smoked marihuana and used methamphetamines in the home with N.M. and J.D. She testified that appellant continued to live with her for about six months after the birth of J.D. She then left for Oklahoma. She testified that appellant provided some food and clothes but that she paid the house bills.

The mother testified that she met F.T. a year or two after she and appellant separated. She and F.T. moved to Texas about six years before the trial. During the time the mother was with F.T., she gave birth to her third and fourth children and continued to use marihuana, methamphetamines, and cocaine. After the fourth child, B.T., was born cocaine positive, the Department of Protective and Regulatory Services placed the mother and the child in a thirty-day rehabilitation program. About a year later, as part of a second department investigation, the mother again tested positive for cocaine. After she refused a department offer to place her in another rehabilitation program, the department removed the four children from the home.

Trial evidence shows that the mother and F.T. physically abused and neglected the children and that the adults used drugs in the children's presence. The children complained that they did not have enough to eat and that the home had problems with roaches and rats. N.M.

stated that she had been bitten at least once by a rat. The children frequently missed school. Evidence also was developed that F.T. sexually abused at least three of the children. At the time of trial, three of the children were with foster parents. J.D., however, had been removed from the foster home and placed in an institution.

The trial court terminated parental rights to all of the respondents. In connection with appellant, the court in its decree entered certain findings, namely that termination of appellant's parental rights was in the best interest of the child and that appellant had engaged in certain conduct listed in Chapter 161 of the Family Code.

## II. Discussion

### A. Constitutional Complaints

In his first point of error, appellant complains that the trial court erred in terminating his parental rights on grounds the he knowingly engaged in criminal conduct that resulted in his imprisonment and inability to care for J.D. for not less than two years from the date of filing of the petition because section 161.001(Q) of the Family Code is vague, ambiguous, and, therefore, unconstitutional. In his second point, appellant complains the trial court erred in terminating his parental rights based on those grounds listed in section 161.001(Q) because that section was applied retroactively after the date of implementation of the statute and that such application is an unconstitutional ex post facto application.

As a prerequisite to presenting a complaint for appellant review, a complaining party must show that the complaint was made to the trial court by timely request, objection, or motion that stated the grounds the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, and the trial court ruled on the request, objection or motion either expressly or implicitly. *See* TEX. R. APP. P. 33.1. A party must assert even constitutional claims at trial in order to raise them on appeal. *See Dreyer v. Green*, 871 S.W.2d 697, 698 (Tex. 1993).

Appellant has not shown, nor have we found, where he raised these constitutional issues before the court below. Apparently he raises them for the first time on appeal. He has failed to preserve his complaint for appellate review. We overrule his first two points of error.

**B. Rendition vs. Decree**

In his third point of error, appellant complains that the court below erred in entering the decree terminating his parental rights because there is a conflict between the trial court's rendition of judgment and the findings therein and the decree for termination entered by the court making the specific findings not in the rendition.

The trial judge signed a "Rendition of Judgment" April 19, 1999, in which the trial court found that terminating the parent-child relationship between the respondents and each child would be in the best interest of each child. The court in the rendition further purported to find that the state had "sustained its burden of proof in proving up the statutory grounds of termination." The handwritten docket notation appears to read, "Rendition of Judgment—4/19/99." On April 21, 1999, the judge signed a "Decree for Termination," which also purported to make certain findings and to terminate the parent-child relationship between the children and the respondents. The related hand-written docket notation appears to read "Entry of Judgment—4/21/99." This docket notation is followed by another notation, stamped "Apr 21 1999," with a hand-written notation reading, "Decree Signed Termination." On April 26, 1999, appellant filed a motion for a new trial, which was overruled by operation of law.

Appellant complains that the written rendition of April 19 had the effect of a judgment. Thus, appellant argues, the trial court erred in signing the decree of April 21, in which the trial court made certain specific findings with regards the reasons for terminating appellant's parental rights.

Four steps usually occur in the rendition and entry of a judgment: (1) the announcement of the judgment, either orally in open court or by some memorandum filed with the clerk, sometimes called the "rendition"; (2) the notation on the docket; (3) the signing of the

judgment, also sometimes called "rendition," where the judge signs a written draft of the judgment used to calculate appellate time limits; and (4) entry of the judgment in the court's minutes, where a signed draft of the judgment is placed in the custody of the trial court clerk, sometimes called "filing," and where the clerk places a copy of the judgment in the court's official record, which is its minutes. *See Ortiz v. O.J. Beck & Sons., Inc.*, 611 S.W.2d 860, 863-64 (Tex. Civ. App.—Corpus Christi 1980, no writ); 5 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 27:9 (1999). A trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed. *See* TEX. R. CIV. P. 329(b); *Wang v. Hsu*, 899 S.W.2d 409, 411 (Tex. App.—Houston [14th Dist.] 1995, writ denied). There can be only one final appealable order. *See Wang*, 899 S.W.2d at 411. If a trial court modifies, corrects, or reforms a judgment in any way, the second judgment becomes the "judgment" in the case; it is as if the first judgment was never entered. *See id.*

It appears that the trial court announced, noted, signed, and entered a final judgment on April 19 with the "Rendition of Judgment." If we construe the initial "Rendition of Judgment," as a final judgment, then that judgment was superseded by the "Decree of Termination," which the court noted, signed, and entered two days later. Appellant's sole complaint is that the latter "Decree of Termination" contained certain findings and conclusions missing from the former "Rendition of Judgment." He fails to demonstrate that the trial court erred by modifying the judgment. Nor does appellant demonstrate how the modification probably caused the rendition of an improper judgment or probably prevented him from properly presenting his case on appeal. *See* TEX. R. APP. P. 44.1(a). Appellant has failed to demonstrate error, and even if we were to presume error, he has failed to demonstrate harm. We overrule his third point of error.

### C. Factual Sufficiency of the Evidence

It his fourth point of error, appellant complains the evidence was factually insufficient to support the termination of his parental rights.

Here, the State in its pleadings sought to terminate appellant's parental rights on grounds that he violated one or more of the acts listed in section 161.001 of the Family Code and that termination was in the best interest of the child. TEX. FAMILY CODE ANN. § 161.001 (Vernon Supp. 2000). In its Decree of Termination, the court below included certain findings, specifically (a) that termination of parental rights would be in the child's best interests, *see* § 161.001(2), and (b) that appellant had (1) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child, *see* § 161.001 (1)(E); (2) knowingly engaged in criminal conduct that resulted in the parent's imprisonment and inability to care for the child for not less than two years from the date of filing the petition, *see* § 161.001(1)(Q); (3) after being served with citation herein, failed to timely file an admission of paternity or counter-claim for paternity prior to the final hearing in this suit and is not the presumed father of the child nor does the child have a presumed father, *see* TEX. FAM. CODE ANN. § 161.002 (b) (Vernon Supp. 2000). Appellant requested no additional findings or conclusions.

If a party attacks the factual sufficiency of an adverse finding on an issue to which he did not have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding. *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied). In reviewing the insufficiency of the evidence challenge, we must first consider, weigh, and examine all of the evidence that supports and that is contrary to the fact-finding. *See Plas-Tex, Inc. v. United States Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). Having done so, we should set aside the finding only if the finding is so against the overwhelming weight of the evidence that the finding is manifestly unjust and clearly wrong, *see Matter of W.A.B.*, 979 S.W.2d 804, 806 (Tex. App.—Houston [14th Dist.] 1998, pet. denied), or if the evidence standing alone is too weak to support the finding, *see Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

A court's termination of parental rights must be supported by clear and convincing evidence. *See* § 161.001; *Matter of W.A.B.*, 979 S.W.2d at 806. The clear-and-convincing

standard 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 determined. *See id.* The clear and convincing standard of proof required to terminate parental rights does not alter the appropriate standard for appellate review. *See id.*

A court may terminate a party's parental rights based on a finding that termination would be in the best interest of the child and a finding that the party has engaged in any of those acts listed in section 161.001 of the Family Code. Among those acts is engaging in conduct or knowingly placing the child with persons who engage in conduct that endangers the child's physical or emotional well-being. *See* § 161.001(E).

The evidence shows that while the children's mother and appellant were together that appellant physically abused the mother, they took illegal drugs, including methamphetamines and marihuana, appellant purchased drugs, and the mother and appellant took illegal drugs in the house while living with the children, including J.D. The mother testified that when she lived with F.T., the house was "dirty" and "filthy," that the yard and surroundings were dirty; and that the house was infested with roaches. There also was evidence, controverted by the mother, that the house had rats and that one child was bitten by a rat. The mother testified that when she and appellant lived together with the children, they lived in similar circumstances. The evidence further shows that appellant had been convicted of second-degree murder, was sentenced to fifteen years to life, and that J.D. knew of the conviction. The mother testified that while she and appellant lived together, appellant helped with the food and clothes but that she "paid the bills." After she and appellant separated, and before she met F.T., she collected welfare. A department caseworker, Cora Siner, testified that, considering appellant was imprisoned for murder and considering that appellant had failed to support the child, it would be in the best interest of J.D. that appellant's parental rights be terminated. There also was testimony that it would be in the child's best interest to be adopted eventually by the foster parents.

Appellant, for his part, offered evidence that after he and the mother separated, he continued to see the child, sometimes taking him swimming. The mother testified that she was never concerned about the safety of the child when the child was with appellant. She further testified that after she took the children to Texas, she did not tell appellant of the family's living conditions. The evidence further shows that appellant wrote some two or three letters from prison to J.D., that J.D. had written back to appellant, and that J.D. wished to maintain a relationship with appellant. Further, a department caseworker failed to testify that termination of appellant's parental rights would be in the best interest of the child. Additionally, a psychologist treating J.D. agreed that an ongoing relationship between J.D. and his father was neither "positive" nor "negative."

While "endanger" means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child suffer injury. *See Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Endanger can mean "expose to loss; to jeopardize." *See id.* Although imprisonment, standing alone, does not constitute engaging in conduct that endangers the child's well-being, imprisonment can be part of a course of conduct that has the effect of endangering the child's physical or emotional well-being. *See id.* at 533-54. Here the course of conduct includes not only the murder underlying the conviction, but drug abuse and the physical abuse of the mother. *See W.A.B.*, 979 S.W.2d at 806-07 (holding that evidence supports termination where mother admitted drug addiction, ingesting cocaine during pregnancy, twice testing positive for cocaine after birth of son, and being arrested and imprisoned before and after birth of son for possession of drugs and prostitution); *In Interest of J.N.R.*, 982 S.W.2d 137, 143 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding that evidence factually sufficient to support termination where father's visitation with child and participation in parenting classes interrupted by father's arrest for passing counterfeit bill, where father failed to participate in parenting classes and failed to secure a safe home

environment, where father's consistent inability to avoid criminal activity implied conscious disregard for responsibilities).

After viewing all of the evidence both for and against terminating appellant's parental rights, we can say that the trial court did not err in finding by clear and convincing evidence that appellant's conduct endangered the child's well-being. The drug use, the physical abuse of the mother, the evidence that appellant and the mother lived in unclean conditions, and the appellant's murder conviction and his imprisonment show a pattern of engaging in harmful conduct.

As for the second prong, appellant does not directly attack the finding, except to note that one caseworker failed to testify specifically that termination of his rights would be in the best interest of the child. The aforementioned evidence, plus appellant's uncertain future support a finding, by clear and convincing evidence, that it would be in the child's best interests to terminate appellant's parental rights. We overrule appellant's fourth point of error.

## Conclusion

Having overruled all of appellant's points of error, we affirm the judgment of the court below.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Amidei, Hudson, and Draughn.[1]

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

[1] Senior Justice Joe L. Draughn sitting by assignment.