

Opinion issued January 19, 2017



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00674-CV

**IN THE INTEREST OF J. A. W., K. C. W., AND E. T. W. / AKA / E. W.,
Minor Children**

**On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2015-04011J**

MEMORANDUM OPINION

In this accelerated appeal, appellant, K.W. (“Mother”) challenges the trial court’s decree terminating her parental rights to her three minor children, J.A.W.

(“Jason”) K.C.W. (“Kacey”) and E.T.W. (“Eddie”).¹ In her sole issue, Mother contends that the evidence is legally and factually insufficient to support the trial court’s finding that termination of her parental rights was in the children’s best interest. We affirm.

Background

Mother has three children: Jason, born in 2011; Kacey, born in 2014; and Eddie, born in 2015. In July 2015, the children were placed in the temporary managing conservatorship of appellee, Texas Department of Family and Protective Services (“the Department”) due in large part to Mother’s illicit drug use both during and after her pregnancies with Kacey and Eddie. After the Department was appointed managing conservator, Mother continued to abuse illicit drugs and failed to comply with the terms of her court-ordered family service plan, resulting in the termination of her parental rights to all three children in August 2016.

The Department receives a referral accusing Mother of neglectful supervision

In June 2015, Mother delivered Eddie at a hospital in Houston. While Mother and Eddie were still at the hospital, the Department received a referral accusing Mother of neglectful supervision of Eddie. According to the referral,

¹ Appellant will be referred to as “Mother” and the children and other interested parties will be referred to by pseudonyms, both to protect their privacy and for ease of reading.

Eddie had been born premature and underweight,² and Mother had tested positive for Xanax, ecstasy, and marijuana on the day of delivery. After receiving the referral, the Department sent an investigator to the hospital.

The Department investigates Mother, then petitions to terminate her parental rights

At the hospital, the investigator interviewed Mother. Mother told the investigator that she was currently unemployed and that she and her siblings lived with their maternal grandmother, Kathryn. She said that Eddie's alleged father, Michael, had a history of drug use, mental illness, and criminal activity, and that Jason's and Kacey's father, Andrew, was "out on the streets selling stuff."³

Mother told the investigator that she took two Xanax pills a day and smoked marijuana in the mornings and evenings while she was pregnant with Eddie. She also told the investigator that, shortly before Eddie was born, she took ecstasy, but claimed that she did not take the drug regularly. The hospital's records confirmed that, on the day of Eddie's delivery, Mother tested positive for methamphetamines, benzodiazepines, and THC, and Eddie tested positive for benzodiazepines.

² The referral stated that Eddie was delivered after 32 weeks' gestation, weighing three pounds, six ounces.

³ Mother initially claimed that Michael was Eddie's father, but DNA testing later confirmed that Andrew is the father of all three children.

Mother also told the investigator that her daughter Kacey was born premature, and that she had used drugs while pregnant with her as well. The Department's records confirmed that Kacey, like Eddie, had been born premature and underweight,⁴ that Mother had tested positive for Xanax and marijuana on the day of delivery, and that Kacey's meconium drug screen had tested positive for THC.

The Department's records further showed that, after Kacey was born, the Department received referrals accusing Mother of neglectful supervision of Jason and Kacey. The referrals alleged that Mother abused illicit drugs during her pregnancy with Kacey, and that Mother had been observed, shortly after Kacey's birth, "passed out on the couch at her apartment, high on Xanax." The Department's records showed that, as a result of these referrals, Mother was ordered to participate in one of the Department's family services programs, which she successfully completed.

After interviewing Mother, the investigator met with Kathryn at her residence. Kathryn confirmed that Mother and her two other children, Jason and Kacey, lived with her. Kathryn told the investigator that she knew Mother abused illicit drugs. She said that she had asked Mother to change her ways and warned her that there would be consequences to her actions.

⁴ Kacey was born 8 weeks' premature, weighing 3 pounds, 15 ounces.

After the Department finished its preliminary investigation, Jason and Kacey were placed with their paternal grandmother, Alice, while Eddie remained at the hospital. Shortly thereafter, the Department petitioned to terminate Mother's parental rights to all three children.

The trial court orders Mother to follow her family service plan

After the Department filed its petition, the trial court appointed the Department temporary managing conservator of Jason, Kacey, and Eddie. The trial court later signed an order approving and requiring Mother to follow a family service plan prepared for her by the Department. Among other things, the plan required Mother to:

- provide support for her children while they were in the custody of the Department;
- attend all hearings and meetings regarding her children;
- acquire and maintain employment and housing;
- refrain from engaging in drug-related or criminal activity; and
- participate in a substance abuse assessment, follow all recommendations from the assessment, and participate in random drug testing.

Both the family service plan and the trial court's order approving it included language emphasizing that failing to comply with the plan could result in the termination of Mother's parental rights.

The case is tried to the bench, and the trial court terminates Mother's parental rights

The case was tried to the bench in July 2016. Three witnesses testified: the Department's caseworker, a Child Advocates' volunteer, and Mother.

The Department presented evidence that Mother continued to abuse drugs throughout the pendency of the case. The Department presented the results of various drug tests showing that Mother continued to use marijuana and cocaine after her children were placed in the Department's custody. The reports showed that Mother tested positive for marijuana or cocaine (or both) at least four times, including after the Department was appointed conservator, after the trial court ordered her to follow her family service plan, and after she discharged herself from court-ordered drug treatment. Mother admitted that the drug tests were accurate and that she had "messed up." Further, the caseworker testified that Mother had walked out of a drug test on February 22, 2016, and that Mother's visitation rights had been suspended because she continued to test positive for drugs.

The Department also presented evidence that Mother failed to complete drug treatment. The caseworker and child advocate both testified that Mother began, but did not successfully complete, drug treatment. Mother admitted that she discharged herself from treatment early, but testified that she had been permitted to do so because she had found employment. Mother presented a discharge summary from the drug treatment center corroborating her testimony.

However, Mother further testified that she was currently unemployed. She said that she had initially found a job working night shifts on an air conditioning company assembly line, and then began working at the airport. But then Mother testified that she was no longer working at either job, and had been unemployed since her house was flooded in April 2016.

Finally, the Department presented evidence that the children were happy and thriving in the home of their paternal grandmother, Alice. The caseworker and child advocate both testified that Alice was meeting all of the children's needs, providing them with a "very stable, loving environment" The caseworker said that Alice had a long-standing and healthy relationship with the children and wanted to adopt them. The child advocate agreed that Alice was doing an "outstanding job" raising the children and that it was in the children's best interest for Alice to adopt them.

When asked why her parental rights should not be terminated, Mother testified that she wanted another chance, and did not want to give up her children because she did not want them to think she did not care. She said that she loved them, was able to parent them, and had a place for them to live. She claimed that she was drug-free.

After the hearing, the trial court granted the Department's petition to terminate Mother's parental rights. Mother timely appealed.

Issue Presented

In her sole issue, Mother contends that the evidence was legally and factually insufficient to support a finding that termination of her parental rights was in the children's best interest.

Analysis

A. Applicable Law and Standard of Review

Under Section 161.001 of the Texas Family Code, the Department may petition a trial court to terminate a parent-child relationship. The trial court may grant the petition if the Department proves, by clear and convincing evidence, that (1) the parent committed one or more of the enumerated acts or omissions justifying termination and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West 2016). Clear and convincing evidence is “the 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.” *Id.* § 101.007; *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

Section 161.001 of the Family Code lists twenty acts and omissions justifying termination of the parent-child relationship. TEX. FAM. CODE ANN. § 161.001(b)(1) (West 2016). Under Section 161.001, termination is justified if, among other acts and omissions, the parent:

- engages in conduct which endangers the physical or emotional well-being of the child, *id.* § 161.001(b)(1)(E);

- constructively abandons the child, *id.* § 161.001(b)(1)(N);
- fails to comply with the provisions of a court order that specifically establishes the actions necessary for the parent to obtain the return of the child, *id.* § 161.001(b)(1)(O);
- continues to abuse a controlled substance after completing a court-ordered substance abuse treatment program, *id.* § 161.001(b)(1)(P)(ii); or
- causes the child to be born addicted to a controlled substance for which the parent did not have a legal prescription. *Id.* § 161.001(b)(1)(R).⁵

In determining whether termination is in the child’s best interest, there are certain factors that should be taken into account. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). These include the statutory factors set forth in Section 263.307 of the Family Code that are relevant in the particular case and the non-exhaustive list of factors described by the Supreme Court in *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). *Id.*

Section 263.307 lists thirteen factors to consider when determining whether termination is in the best interest of the child:

- (1) the child’s age and physical and mental vulnerabilities;

⁵ Under Section 161.001, “born addicted to alcohol or a controlled substance” is defined to include a child (1) who is born to a mother who during the pregnancy used a controlled substance not legally obtained by prescription and (2) exhibits the demonstrable presence of the controlled substance in his or her bodily fluids. TEX. FAM. CODE ANN. § 161.001(a)(1), (2)(C) (West 2016).

- (2) the frequency and nature of out-of-home placements;
- (3) the magnitude, frequency, and circumstances of the harm to the child;
- (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;
- (5) whether the child is fearful of living in or returning to the child's home;
- (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
- (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
- (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;
- (9) whether the perpetrator of the harm to the child is identified;
- (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;
- (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;
- (12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:
 - (A) minimally adequate health and nutritional care;
 - (B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

- (C) guidance and supervision consistent with the child's safety;
 - (D) a safe physical home environment;
 - (E) protection from repeated exposure to violence even though the violence may not be directed at the child; and
 - (F) an understanding of the child's needs and capabilities; and
- (13) whether an adequate social support system consisting of an extended family and friends is available to the child.

TEX. FAM. CODE ANN. § 263.307(b) (West 2014). In considering these factors, “the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.” *Id.* § 263.307(a).

Under *Holley*, there are nine factors to consider when determining whether termination is in the best interest of the child:

- (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 which 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.

544 S.W.2d at 372. Further, “the same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) may be probative in determining the best interests of the child.” *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

In a legal sufficiency review in a parental-rights-termination case, the appellate court should look at 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. We assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, disregarding all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* If, after conducting a legal sufficiency review of the record, we determine that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude that the evidence is legally insufficient. *Id.*

In a factual sufficiency review, the appellate standard for reviewing termination findings is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). By focusing on whether a reasonable factfinder could form a firm conviction or belief, the appellate court maintains the required deference for the factfinder's role. *Id.* at 26. "An appellate court's review must not be so rigorous that the only factfindings that could withstand review are those established beyond a reasonable doubt." *Id.* We 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 at 266. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

B. Sufficiency of the Evidence

We now consider whether there was legally and factually sufficient evidence that termination was in the children's best interest.

The evidence shows that Mother used illegal drugs both during her pregnancies with Kacey and Eddie and throughout the pendency of this suit—including after her children were taken away from her, after the trial court ordered

her to refrain from abusing illegal drugs, after her visitation rights were suspended, and after she discharged herself from drug treatment. *In re A.C.*, 394 S.W.3d 633, 638, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (termination in best interest of children when mother tested positive for cocaine after completing family services substance abuse program). Mother continued to use drugs even though she was warned that doing so could result in the termination of her parental rights.

At trial, Mother testified that she was currently drug-free and that she had not used drugs for approximately six months. But, she also admitted to testing positive for drugs throughout the pendency of case, including testing positive for cocaine less than four months before trial.

Mother’s “pattern of illegal drug use suggests [she] was not willing and able to provide the [children] with a safe environment—a primary consideration in determining the [children]’s best interest.” *Id.* The evidence of Mother’s continual drug use weighs against Mother under the third, seventh, and eighth *Holley* factors, which consider the present and future danger to the children, the stability of Mother’s home, and any actions indicating an improper parent-child relationship. *Holley*, 554 S.W.2d at 372; *see also In re A.C.*, 394 S.W.3d at 642 (past and ongoing drug use supports finding that termination is in child’s best interest); *In re M. C. M.*, No. 01–15–00613–CV, 2015 WL 9241607, at *5–6 (Tex. App.—

Houston [1st Dist.] Dec. 17, 2015, no pet.) (mem. op.) (termination in best interest of child when mother admitted to drug use while pregnant and then tested positive for cocaine and marijuana during pendency of suit); *In re G.A.*, No. 01–11–00565–CV, 2012 WL 1068630, at *6 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, pet. denied) (mem. op.) (“A parent’s history of drug use or criminal conduct can show a pattern of conduct that subjects a child to an uncertain and unstable life, endangering the child’s physical and emotional well-being.”).

This evidence also weighs against Mother under the eighth, eleventh, and twelfth statutory factors, which consider whether Mother has a history of substance abuse, whether Mother is willing and able to effect positive environmental and personal changes within a reasonable period of time, and whether Mother demonstrates adequate parenting skills. TEX. FAM. CODE ANN. § 263.307(8), (11), (12) (West 2014).

The evidence also shows that Mother is currently unemployed. Although Mother testified that she had temporarily worked on an assembly line and then at the airport, she also admitted that, as of trial, she was currently unemployed—and had been unemployed for several months. She did not state what steps, if any, she had taken to find a new job. Mother’s employment status weighs against her under the second, fourth, and seventh *Holley* factors, which consider the children’s needs, Mother’s ability to satisfy those needs, and the stability of Mother’s home. *Holley*,

554 S.W.2d at 372. It also weighs against her under the twelfth statutory factor, which considers Mother’s ability to provide for her children. TEX. FAM. CODE ANN. § 263.307(12) (West 2014).

Further, the same evidence of acts or omissions proscribed by Section 161.001 may “may be probative in determining the best interests of the children.” *In re L.M.*, 104 S.W.3d at 647. And here, the trial court found that Mother committed five such acts or omissions. Specifically, the trial court found that Mother:

- engaged in conduct which endangered the physical or emotional well-being of her children;
- constructively abandoned her children;
- failed to comply with the provisions of the family service plan—a court order that specifically established the actions necessary for Mother to obtain the return of her children;
- continued to abuse a controlled substance after completing a court-ordered substance abuse treatment program; and
- caused at least one of her children to be born addicted to a controlled substance for which she did not have a legal prescription.

TEX. FAM. CODE ANN. § 161.001(b)(1) (E), (N), (O), (P)(ii), (R) (West 2016).

In her brief, Mother admits that all five findings were supported by sufficient evidence because she continued to use illicit drugs throughout the pendency of this

case, lost her visitation rights to her children, and failed to fully comply with her family service plan.

In contrast, the evidence showed that the children's placement with their paternal grandmother, Alice, afforded them a safer, healthier, and more stable environment. *In re A.C.*, 394 S.W.3d at 643 (comparing evidence about mother's home and parenting abilities with evidence of foster parents' home and parenting abilities).

The evidence showed that the children were happy and thriving in Alice's home. The caseworker and child advocate both testified that Alice was meeting all of the children's needs, providing them with a stable, loving environment. They further testified that Alice had a long-standing relationship with the children and planned on adopting them. This evidence weighs against Mother under the second, fourth, sixth, and seventh *Holley* factors, considering the children's present and future needs, Mother's and Alice's respective parental abilities and plans for raising the children, and the stability of their respective homes. *Holley*, 554 S.W.2d at 372.

We conclude that the evidence presented was sufficiently clear and convincing to support a fixed belief that termination of Mother's parental rights would be in the best interest of her children. The Department presented evidence that Mother's conduct had placed the children in physical danger, undermined her

parenting skills, and indicated an improper parent-child relationship. None of the *Holley* factors weighed in Mother's favor. The young age of the children rendered consideration of their desires neutral. On the other hand, the evidence presented about the paternal grandmother, Alice, showed that she was meeting the children's needs, had positive plans for their future, and provided them with a stable home. Accordingly, we overrule Mother's sole issue.

Conclusion

We affirm the trial court's decree terminating Mother's parental rights.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.