

Opinion issued February 24, 2017



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00868-CV

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**IN THE INTEREST OF K.M.F. AND B.E.F., Children**

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**On Appeal from the 314th District Court  
Harris County, Texas  
Trial Court Case No. 2015-04873J**

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**MEMORANDUM OPINION**

This is an accelerated appeal from a decree terminating parental rights. In one issue, the appellant mother asserts that the evidence was factually insufficient to show that termination was in the best interest of her children. *See* TEX. FAM. CODE § 161.001(b)(2). We find sufficient evidence to support the trial court's decree, and we affirm.

## **Background**

In December 2014, a 21-month-old infant boy, B.E.F., spilled boiling water on himself while he had been left unattended by his mother. The child was severely burned, resulting in the Texas Department of Family and Protective Services placing him and his 4½-year-old sister, K.M.F., with their father. The father planned to move, along with the children, to his father's house. But placement at the grandfather's house did not work out, and soon thereafter the father took the children to another house. This other house turned out to be an unsuitable environment for young children: the house was not clean, the kitchen was not functional, adults in the house used illegal drugs, and the children were not properly fed or clothed.

Meanwhile, the mother was not progressing well in satisfaction of family-based safety services offered by the Department. Although she initially tested negative for illegal drugs, in March 2015 the mother tested positive for methamphetamines and cocaine. She was evicted from her home, and while she testified that she kept in touch with the Department during that time, the contemporaneous removal affidavit showed that she failed to stay in contact with her caseworker from April through August 2015. By early August 2015, a caseworker realized that several months had passed since anyone from the Department had been in contact with the children, and their whereabouts were

unknown to the Department. That same month, the mother visited the home where the children were staying, and she reported to the Department that the children were living in “deplorable conditions.”

The Department located the children and determined the circumstances required their immediate removal. The children were placed in foster care, and they were determined to have developmental delays. B.E.F. was “mildly physically unbalanced” due to a medical condition involving his ears, and he did not speak. K.M.F., who by then was six years old, was not reading.

By the time of trial, the children were thriving in foster care, where all their needs were met. They had recovered from their developmental delays and were “doing great.” B.E.F., who by then was three years old, had begun “forming full sentences and counting to 20.” K.M.F. was reading and doing “really well in school.” After 4½ months together, the children and foster parents had bonded with each other.

At trial, the Department introduced evidence about the mother’s noncompliance with the court’s order and whether termination of the mother’s rights would serve the best interest of the children. The caseworker testified that the mother had “participated in most of her family service plan” and “mostly” cooperated with the Department. The mother had good visits with her children, and

the caseworker testified that the children seem to love their mother. The caseworker also testified that the mother had completed substance abuse therapy.

The caseworker also testified about parts of the plan that were unfinished. The mother did not attend all the required Narcotics Anonymous meetings, and she did not have an NA sponsor at the time of trial. The caseworker testified that the mother did not obtain and maintain a stable living environment. She had moved in with a sister, but that home was determined to be unsuitable for the children due to the sister's prior involvement with the Department and the criminal history of other adults present in the home. The mother did not provide child support while the case was pending. She also went to jail twice, once after being charged—though not convicted—with possession of a controlled substance.

The mother also failed to abstain from the use of drugs and alcohol while the case was pending. In October 2015, the mother tested positive for methamphetamines, cocaine, and ETG, an indicator of alcohol use. The level of ETG in her system was nearly 100 times the level at which the lab identifies a positive result. In January 2016, she tested positive for low levels of amphetamines and cocaine, and she tested positive for ETG and ETS, another indicator of alcohol use, but also at low levels. In April 2016, a hair sample tested positive for marijuana, and she again tested positive for ETG and ETS. This time, her ETG test result was more than 15 times the level at which a positive result is shown. The

mother could not recall the last time she used illegal drugs, but she admitted using methamphetamines twice in the year preceding trial, and she admitted that she had been using drugs intermittently for 12 years.

The caseworker testified that returning the children to the mother “would not be good for the kids,” and she recommended adoption by the foster parents and termination of the mother’s parental rights. The caseworker conceded that the mother was more stable by the time of trial than when the case began, but she opined that the mother had not demonstrated that she had the ability to provide a safe and stable environment consistently for her children.

At trial the mother testified that it was not in her children’s best interest for her rights to be terminated. She testified, “I am trying. I have done everything that I’ve supposed to do,” including “rehab” and attending biweekly NA meetings. Although she conceded that she did not have a NA sponsor, she testified that she was told that was not mandatory. She testified that she had worked for six months cleaning houses. She said she was a “good mom” and her children “are supposed to be with me.”

Rinku Patel, a volunteer Child Advocate, testified that termination of the mother’s parental rights was in the best interest of the children. Patel focused on the mother’s failure to demonstrate ability to provide a stable living environment and maintain stable employment. Patel noted the mother was evicted from one

home and then moved in with another person who could not pass a home study. Patel also testified that the mother had not provided her evidence of employment, though she was aware that the mother had worked at a restaurant and for a cleaning service. In Patel's opinion the mother had not become "more stable" over the course of the case.

The trial court appointed an expert, Lisa McCartney, to testify on behalf of the attorney ad litem about the safety, permanency, and the well-being of the children. McCartney formed her opinion based on her experience, trial testimony, and her independent research of the mother's Facebook page. The Facebook page included comments about getting in fights, with pictures showing the mother at bars "hanging around with people who are obviously participating in activities she doesn't need to be around." Other photos showed her with bruises or a black eye. McCartney considered the Facebook evidence in the context of the trial evidence about the mother's history of drug and alcohol abuse. She testified that, in her opinion, the evidence indicated that the mother had not changed her conduct and would not change her conduct to create a stable environment for the children. McCartney agreed with the recommendation to terminate the mother's rights.

The trial court found that the mother had committed the predicate acts of endangerment and failure to follow a court order. The court further found that termination of the mother's parental rights was in the children's best interest. A

decree issued terminating the mother's parental rights, and the mother now appeals.

### **Analysis**

The Department sought termination of the mother's parental rights on grounds of endangerment, *see* TEX. FAM. CODE § 161.001(b)(1)(E), and failure to comply with a court order, *see id.* § 161.001(b)(1)(O). "Only one predicate finding" under section 161.001(b)(1) "is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). The mother concedes the sufficiency of those findings. Her sole issue on appeal is her argument that the evidence was factually insufficient to show that termination was in the best interest of the children. *See* TEX. FAM. CODE § 161.001(b)(2).

Protection of the best interests of the child is the primary focus of the termination proceeding in the trial court and our appellate review. *See A.V.*, 113 S.W.3d at 361. A parent's right to the care, custody, and control of her children is a precious liberty interest protected by the Constitution. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000); *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982). Accordingly, termination proceedings are strictly scrutinized on appeal. *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Clear and convincing evidence must support the decision to

terminate parental rights. *In re J.F.C.*, 96 S.W.3d 256, 263–64 (Tex. 2002); *see also Santosky*, 455 U.S. at 747–48, 102 S. Ct. at 1391–92.

In a factual sufficiency review, we consider the entire record, including evidence both supporting and contradicting the finding. *See J.F.C.*, 96 S.W.3d at 263–64; *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). “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.” *J.F.C.*, 96 S.W.3d at 266. In proceedings to terminate the parent-child relationship, the Department must establish by clear and convincing evidence that one or more of the acts or omissions listed in Family Code section 161.001(b)(1) occurred and that termination is in the best interest of the child. TEX. FAM. CODE § 161.001(b). Both elements must be established, and termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep’t of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

A strong presumption exists that a child’s best interests are served by maintaining the parent-child relationship. *See, e.g., In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In determining whether termination of a mother’s parental rights was in the children’s best interest, we consider several nonexclusive factors,



including (1) the children's desires, (2) the current and future physical and emotional needs of the children, (3) the current and future physical danger to the children, (4) the parental abilities of the person seeking custody, (5) whether programs are available to assist the person seeking custody in promoting the best interests of the children, (6) plans for the children by the person seeking custody, (7) stability of the home, (8) acts or omissions of the parent that may indicate that the parent-child relationship is improper, and (9) any excuse for acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The Department is not required to prove all of these factors, and the absence of evidence about some factors does not preclude the factfinder from reasonably forming a strong conviction that termination is in the children's best interest. *See C.H.*, 89 S.W.3d at 27. Evidence establishing one of the predicate acts under section 161.001(b)(1) also may be relevant to determining the best interests of the children. *See id.* at 27–28.

In her brief, the mother has presented her argument by grouping certain *Holley* factors together. We will use the same organization for our analysis of the *Holley* factors as applied in this case.

### **I. Children's desires and plans for the children**

The first *Holley* factor concerns the children's desires. Neither of the children testified. The children were removed from their mother when they were

about four and two years old. Although they were both too young to express their desired outcome at trial, Patel’s report to the court stated that K.M.F. told her therapist “that she wants to be adopted by the current foster parents.”

The sixth *Holley* factor is the plans for the children by the person seeking custody. The mother argues that there is little evidence about either her plans for the children or the foster parents’ plans for them. The mother had been living with her sister. To the extent the mother intended for her children to join her in her current residence—and there was no other evidence about where the mother proposed that they live—that living arrangement had been rejected by the Department as unsuitable for a variety of reasons. In contrast, the foster parents had been nurturing the children to help them overcome developmental delays. The children displayed signs of love and affection toward their mother, but they also appeared bonded to the foster parents, who loved them and wanted to adopt them.

Considering these two factors, we conclude that the factfinder reasonably could have concluded that they weighed in favor of terminating the mother’s parental rights.

**II. Needs of the children, mother’s parenting abilities, available assistance, and stability of the home**

The second *Holley* factor is the current and future physical and emotional needs of the children. The children had several developmental delays when they entered foster care. The evidence showed they have recovered from these delays

with care and therapy that they had not received before entering foster care. The mother notes that the children are currently thriving, but in light of the fact that the children were thriving in foster care, she does not explain how this factor weighs in her favor.

The fourth *Holley* factor is the parental abilities of the person seeking custody. The mother argues that this weighs in her favor because she completed all but three parenting classes, engaged with her children at visitations, and brought activities, books, and food to the visits. But she did not complete parenting classes, and she did not pay child support. She also argues that her attempts to locate her children when they went missing and her actions in notifying the Department of her children's whereabouts when she found them in "deplorable" conditions indicate some parenting ability. But the fact that she allowed the children to remain in those conditions for week before making a report to the Department reasonably could be found to weigh against her.

The fifth *Holley* factor is whether programs are available to assist the person seeking custody in promoting the best interests of the children. The mother argues that both her group therapy and individual substance abuse therapy sessions would assist her in maintaining her sobriety. But her sobriety was called into question by test results from April 2016 indicating the presence of a large amount of ETG, a metabolite of alcohol. A reasonable factfinder could infer from this that she

recently had been drinking. Similarly, April 2016 test results suggested that she had at least been around others smoking marijuana even if she had not been using it herself. A reasonable factfinder could weigh these test results in considering how effective the substance-abuse programs have been or could be to the mother.

The seventh *Holley* factor is stability of the home. Stability of the home has been found “to be of paramount importance in a child’s emotional and physical well-being.” *Quiroz v. Dep’t of Family & Protective Servs.*, No. 01–08–00548–CV, 2009 WL 961935, at \*10 (Tex. App.—Houston [1st Dist.] April 9, 2009, no pet.) (mem. op.). “Without stability,” a parent cannot “provide for the child’s emotional and physical needs.” *In re C.A.J.*, 122 S.W.3d 888, 894 (Tex. App.—Fort Worth 2003, no pet.). A parent’s drug use may indicate instability in the home because it exposes the children to the possibility that the parent may be impaired or imprisoned. *See In re A.M.*, 495 S.W.3d 573, 579 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *P.W. v. Dep’t of Family & Protective Servs.*, 403 S.W.3d 471, 479 (Tex. App.—Houston [1st Dist.] 2013, pet. dism’d w.o.j.).

According to testimony and test results admitted at trial, the mother continued to use illegal drugs while this case was pending. She admitted using methamphetamines twice in the year before trial. Her continued use of illegal drugs exposed her to the possibility of imprisonment and jeopardized her continued relationship with her two young children. The mother also failed to take advantage

of family based safety services offered by the Department. In March 2015, she tested positive for methamphetamines and cocaine despite having previously tested clean.

The mother failed to secure and maintain a safe and stable living environment for the children. She moved in with a sister who had prior involvement with the Department. Other adults in the home had criminal histories. The mother argues that the nature of the criminal history is unknown, but the caseworker testified at trial that the “people in the home had criminal history that . . . we wouldn’t be able to place the children with.” Thus, the mother’s living arrangements also jeopardized her continued relationship with her two young children.

The mother also argues that at the time of trial she had a steady job and was participating in services to become a better parent. She had been working for six months by cleaning houses, and there was testimony from Patel that she had worked elsewhere prior to that job. Yet the mother never paid any child support.

We conclude that the factfinder reasonably could have concluded that each of these factors weighed in favor of terminating the mother’s parental rights.

### **III. Physical danger to the child and parental acts or omissions**

The third *Holley* factor is current and future physical danger to the children, the eighth factor is acts or omissions of the parent that may indicate that the parent-

child relationship is improper, and the ninth factor is any excuse for acts or omissions of the parent. The mother argues that the evidence related to these factors centers on her drug use and criminal history.

The mother notes that drug use can be considered in regard to both the stability-of-the-home factor as well as the physical-danger-to-the-child factor. *See A.C.*, 394 S.W.3d at 642. In particular, the mother argues that her drug tests showed improvement throughout the case. Her urine drug samples were always negative, the amount of drugs shown in her hair samples decreased over time, and she could not recall the last time she used illegal drugs. But there was not a similar decrease with respect to the metabolites of alcohol.

The mother also argues that although she was arrested for possession of a controlled substance, she was not convicted for that charge. While she concedes that this arrest was a “major setback,” she emphasizes that she has otherwise complied with terms of probation for another, earlier offense. While the factfinder may not have been able to reasonably conclude that these particular factors, in isolation, compel the termination of the mother’s parental rights, we conclude that these factors also do not compel a conclusion that termination was not supported by clear and convincing evidence.

## Conclusion

We have considered the *Holley* factors in light of the entire record, including evidence both supporting and contradicting the termination decree. We conclude that the factfinder reasonably could have formed a firm belief or conviction, based on clear and convincing evidence, that termination of the mother's parental rights was in the best interest of the children. We overrule the mother's sole issue, and we affirm the judgment of the trial court.

Michael Massengale  
Justice

Panel consists of Justices Jennings, Higley, and Massengale.