Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00706-CV

IN THE INTEREST OF E.E.H., E.E.H., J.A.M., F.V.M., Children

From the 57th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-PA-02107
Honorable Richard Garcia, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: March 29, 2016

AFFIRMED

This is an accelerated appeal from the trial court's order terminating appellant mother's ("Mother") parental rights to her children, E.E.H., E.E.H., J.A.M., and F.V.M. On appeal, Mother argues the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interests of her children. We affirm the trial court's order of termination.

BACKGROUND

The Texas Department of Family and Protective Services ("the Department") initially became involved in the underlying matter after it received a referral alleging E.E.H., E.E.H., J.A.M., and F.V.M. were living in unsanitary and hazardous conditions. The referral further alleged the children — specifically, the twins, E.E.H. and E.E.H., who were both having potty

training accidents — were being inappropriately disciplined. In addition to these allegations, the referral alleged the children witnessed episodes of significant domestic violence between Mother and Mother's husband, Mr. M. At the time of the referral, the twins were four-years-old, J.A.M. was two-years-old, and F.V.M. was one-year-old.

Natasha Meckler, a caseworker from the Department, visited the home and spoke to Mother and Mr. M. regarding the allegations. During her visit, Ms. Meckler made a number of observations. Ms. Meckler first noted a large hole in a ramp placed against the front doorway. The hole was large enough for an adult to fall though, and below the ramp were a number of objects, including pipes, trash, and metal. Inside the home, Ms. Meckler also noted the lack of kitchen appliances; the family was using portable coolers to hold drinks and snacks as well as a microwave oven to reheat small meals. When asked about the lack of food in the home, Mother stated they ate out each day for their three meals. At the end of the visit, Mother agreed to take the children out of the home and to stay with Mr. M.'s brother while Mr. M. repaired the ramp. Mother and Mr. M. also agreed they would live separately to avoid any further confrontations.

Five days later, the Department received a second referral that the police had arrested Mother for a domestic violence incident. The referral alleged Mother had hit Mr. M. with a belt, kicked him, and attacked him with a box cutter in front of the children. The Department spoke to Mother at the Bexar County jail, and Mother admitted there was an altercation between her and Mr. M. in front of the children. While Mother was in jail, the children were staying with Mr. M. at the home. Thereafter, the Department removed the children from the home, placing them at a children's shelter. Before they were taken to the shelter, J.A.M. and F.V.M. were taken to the children's hospital due to severe bleeding from diaper rashes. At the time of removal, the Department was unable to locate any family members willing to take the children.

That same day, the Department filed its original petition for protection of the children, for conservatorship, and for termination of parental rights.[1] The following day, the trial court rendered an ex parte order designating the Department as temporary managing conservator. The matter was set for a full adversarial hearing a month later. At the hearing, the trial court granted the Department temporary conservatorship and awarded Mother weekly supervised visitation with the children. Over the next couple of months, the required statutory hearings were conducted, and Mother's compliance with her service plan was noted. However, after six months, the Department filed a report, expressing concern that Mother was involved in a relationship with a registered sex offender and continued to have ongoing issues with Mr. M.

At the final hearing, the trial court heard testimony from: (1) Ms. Meckler; (2) Sandra Pierce, Mother's probation officer; (3) Aurora Garcia, another Department caseworker involved with the case; (4) a CASA advocate; (5) Mr. M.; and (6) Mother. At the time of trial, Mother was pregnant and wearing an ankle monitor because she had violated the terms of her probation relating to the prior domestic violence arrest. After hearing the testimony, the trial court rendered an order terminating Mother's rights. The trial court found Mother violated sections 161.001(b)(1)(D), (E), and (O) of the Texas Family Code ("the Code") and termination was in the children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O) (West Supp. 2016); *id.* § 161.001(b)(2). Thereafter, Mother perfected this appeal.

ANALYSIS

On appeal, Mother does not challenge the evidence with regard to the trial court's findings under section 161.001(b)(1) of the Code. *See id.* § 161.001(b)(1)(D), (E), (O). Rather, Mother

[1] In addition to termination of Mother's parental rights, the Department sought termination of Mr. M.'s parental rights to J.A.M. and F.V.M. as well as termination of the parental rights of the twins' father. The trial court ultimately terminated all of the parents' rights to all four children; however, neither Mr. M. nor the twins' father appealed the order of termination.

argues the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interests of her children. *See id.* § 161.001(b)(2).

Standard of Review

In order to terminate a parent's right to her children, the Department must establish by clear and convincing evidence that the parent committed an act prohibited by section 161.001(b)(1) of the Code and termination is in the best interests of her children. *Id.*; *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *In re B.R.*, 456 S.W.3d 612, 615 (Tex. App.—San Antonio 2015, no pet.). "Clear and convincing evidence" is defined as "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." TEX. FAM. CODE ANN. § 101.007 (West 2014); *see J.O.A.*, 283 S.W.3d at 344; *In re E.A.G.*, 373 S.W.3d 129, 140 (Tex. App—San Antonio, 2012, pet. denied); *B.R.*, 456 S.W.3d at 615. This heightened standard of review is required because termination of a parent's rights to her children results in permanent and severe changes to the parent–child relationship, which implicates due process. *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2015); *In re D.M.*, 452 S.W.3d 462, 468–69 (Tex. App.—San Antonio 2014, no pet.); *E.A.G.*, 373 S.W.3d at 140. Based on the foregoing, we must determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction that termination was in the children's best interests. *A.B.*, 437 S.W.3d at 502; *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005).

In reviewing the evidence for legal sufficiency, we must view the evidence in the light most favorable to the trial court's findings and judgment, resolving any disputed facts in favor of the trial court's findings so long as a reasonable fact finder could have done so. *J.P.B.*, 180 S.W.3d at 573. We also disregard all evidence a reasonable fact finder could have disbelieved and consider undisputed evidence even if such evidence is contrary to the trial court's findings. *Id.* Stated differently, we consider evidence favorable to termination if a reasonable fact finder could, and

we disregard contrary evidence unless a reasonable fact finder could not. *Id.* We do not weigh witness credibility issues "that depend on appearance and demeanor;" such issues are within the domain of the fact finder. *Id.* Even if credibility issues are found in the appellate record, we must defer to the fact finder's reasonable determinations. *Id.*

In reviewing the evidence for factual sufficiency, we give due deference to the fact finder's findings and avoid substituting the fact finder's judgment for our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). "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 [in the truth of its finding], then the evidence is factually insufficient." *Id.* (quoting *J.F.C.*, 96 S.W.3d at 266). And as in a legal sufficiency review, witness credibility issues are made by the fact finder, and we cannot second guess the fact finder's resolution of such factual disputes. *H.R.M.*, 209 S.W.3d at 109.

Best Interests — Substantive Law

In reviewing the sufficiency of the evidence to support a best interest finding, a court may consider the following nonexclusive factors set forth by the Texas Supreme Court in *Holley v. Adams*:

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 the 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 367, 371–72 (Tex. 1976). These factors — commonly referred to as "the *Holley* factors" — are not the only factors a court may consider. *See In re E.N.C.*, 384 S.W.3d 796, 807–

08 (Tex. 2012); *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Moreover, evidence of each and every *Holley* factor is not required before a court may find that termination is in a child's best interest. *C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The absence of evidence as to some of the *Holley* factors does not preclude a trier of fact from reasonably forming a strong conviction or belief that termination is in a child's best interest. *Id.* As this court has previously recognized, in conducting our review of a trial court's best interest determination, we focus on the best interest of the child — not the best interest of the parent. *D.M.*, 452 S.W.3d at 470. And although there is a strong presumption that maintaining the parent–child relationship is in a child's best interest, we also presume that promptly and permanently placing a child in a safe place in a timely manner is in a child's best interest. TEX. FAM. CODE ANN. § 263.307(a); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam).

In determining whether a parent is willing and able to provide the child with a safe environment, courts consider the factors set forth in section 263.307(b) of the Code. TEX. FAM. CODE ANN. § 263.307(b); *R.R.*, 209 S.W.3d at 116; *In re A.S.*, No. 04–14–00505–CV, 2014 WL 5839256, at *2 (Tex. App.—San Antonio Nov. 12, 2014, pet. denied) (mem. op.). These factors include (1) the child's age and physical and mental vulnerabilities; (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 or other agency; (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; 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); *R.R.*, 209 S.W.3d at 116; *A.S.*, 2014 WL 5839256, at *2.

Additionally, the evidence used to prove acts or omissions under section 161.001(b)(1) of the Code may be probative to prove the best interest of the child. *C.H.*, 89 S.W.3d at 28 (citing *Holley*, 544 S.W.2d at 370; *Wiley v. Spratlan*, 543 S.W.2d 349, 351 (Tex. 1976)). Moreover, in conducting a best interest analysis, a court may consider circumstantial evidence, subjective factors, and the totality of the evidence, in addition to direct evidence. *A.S.*, 2014 WL 5839256, at *2 (citing *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied)). Finally, a fact finder may judge a parent's future conduct by her past conduct in determining whether termination of the parent–child relationship is in the best interest of the child. *Id.*

Application

As stated above, Mother argues the evidence is legally and factually insufficient to support the trial court's finding that termination was in her children's best interests. In support of her argument, Mother emphasizes the crux of the Department's case against her revolves around allegations of domestic violence. And although the evidence shows instances of domestic violence occurred in front of the children prior to their removal, Mother points out there was no evidence of domestic violence after she completed her domestic violence classes. Mother further highlights she complied with the majority of her service plan and was never involved with controlled substances. According to Mother, because the trial court failed to take into consideration the

evidence showing she cooperated with the Department and instead focused on the past episodes of domestic violence, the evidence was insufficient to support the trial court's finding that termination was in the children's best interests. We disagree.

Here, the Department produced evidence that Mother repeatedly subjected the children to harm and failed to demonstrate a willingness or ability to effect positive environmental and personal changes within a reasonable amount of time. *See* TEX. FAM. CODE ANN. § 263.307(b)(2) (frequency and nature of out-of-home placements); *id.* § 263.307(b)(3) (magnitude, frequency, and circumstances of the harm to child); *id.* § 263.307(b)(4) (whether child victim of repeated harm after Department intervention); *id.* § 263.307(b)(11) (willingness and ability of child's family to effect positive environmental and personal changes within reasonable time period); *Holley*, 544 S.W.2d at 371–72. The evidence shows this was not the Department's first involvement with Mother. The Department caseworker, Ms. Meckler, testified her case with Mother was the twelfth investigation and third legal matter the Department had conducted with the family. The first legal case involved two of Mother's children — not part of this matter and who were eventually adopted by their maternal great-grandmother. When asked about these two children, Mother testified she voluntarily relinquished her parental rights to them as well as a third child — also not part of this matter and who was adopted by Mother's aunt. The second legal case involved the twins, who were eventually reunited with Mother after Mother successfully completed her service plan. A year later, however, this matter — the third legal case — arose, indicating Mother failed to make the necessary changes and reverted to her prior lifestyle. *See In re J.R.*, 501 S.W.3d 738, 744 (Tex. App.—Waco 2016, no pet.) (considering Department's history with family and multiple removals in its best interest determination).

As stated above, during her first visit, Ms. Meckler immediately noted the unsanitary and hazardous condition of the home. Ms. Meckler testified that in order to enter the front door, she

had to walk on a "ramp from the home onto the porch," and a hole was "immediately off of that ramp in the front porch … large enough that an adult could have fallen into." On the ground were pipes, trash and metal objects. Ms. Meckler also noted the lack of kitchen appliances during her investigation; she testified the family was using ice chests to store drinks and snacks and a microwave to cook. Upon Ms. Meckler's second visit to the home, the evidence shows the children were in a disheveled state, and Mr. M. asked the Department to take the children away. Although the twins were taken immediately to the children's shelter, J.A.M. and F.V.M. had to be taken to the children's hospital for severe diaper rashes.

The record also reflects Mother subjected the children to continuing episodes of domestic violence, endangering the children's well-being. *See* TEX. FAM. CODE ANN. § 263.307(b)(3); *id.* § 263.307(b)(7) (history of abusive or assaultive conduct by child's family); *Holley*, 544 S.W.2d at 371–72. "Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment." *In re S.R.*, 452 S.W.3d 351, 361 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). In this case, Mother admitted instances of domestic violence between herself and Mr. M. took place in front of the children on more than one occasion. Specifically, Mother admitted she threw a wrench at Mr. M., ultimately striking him, as well as attacked him with a belt and a box cutter. When asked about the assaults, Mr. M. admitted "[t]here's been a lot of bumpy rides with [Mother]" and that Mother has "even gone to jail for issues like that." Such conduct creates a dangerous environment even though it may not be directed at the children. *See P.A.G. v. Tex. Dep't of Family & Protective Servs.*, 458 S.W.3d 595, 600 (Tex. App.—El Paso 2014, no pet.). And although there were no allegations the children were physically abused, Ms. Meckler testified she observed one of the twins "had a busted lip and then a bruise and a scab on her forehead." According to Mother, the twin girl had tripped and fell, hitting the bathroom floor, when she was running through the house.

In addition to Mother's violent behavior, the evidence also shows Mother continually engaged in unhealthy relationships, again demonstrating an unwillingness to effect positive changes. *See* TEX. FAM. CODE ANN. § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. At the time of trial, Mother was on probation for her assault against Mr. M. and wearing a GPS monitor. The trial court heard testimony from Ms. Pierce, Mother's probation officer, who stated Mother violated the terms of her probation by failing to avoid a person of disreputable character. According to Ms. Pierce, Mother was engaged in a relationship with a registered sex offender. Ms. Garcia, the other Department caseworker involved in Mother's case, also stated she had concerns about Mother's relationships because Mother was not only involved in a relationship with a registered sex offender, but also because there were continuing episodes of domestic violence between Mother and Mr. M. The record reflects there was some evidence Mr. M. lived under Mother's trailer after the Department removed the children from the home. In response to this evidence, Mother testified she was unaware Mr. M. was staying under her trailer, but called the police when she discovered him. With regard to her relationship with the registered sex offender, Mother admitted she had been in that relationship, but she ended the relationship after she learned he was a registered sex offender.

Despite the foregoing, Mother argues the evidence demonstrates she cooperated with the Department and completed a majority of the tasks on her service plan. *See* TEX. FAM. CODE ANN. § 263.307(b)(10) (willingness and ability of child's family to seek out, accept, and complete counseling services); *Holley*, 544 S.W.2d at 371–72. In support of her argument, Mother points out that although she did not complete all of her service plan requirements, she completed her anger management class, domestic violence class, and parenting class. Mother also testified she attended some individual therapy sessions, but was having trouble scheduling sessions that worked with her new work schedule. Mother explained she started a new job, in which she was in training

for four weeks from 7:00 a.m. until 7:00 p.m., and after completing the training program, she was working from 9:00 a.m. until 5:00 p.m. Mother further testified she was unable to complete a psychological assessment because her caseworker failed to provide her with contact information. Mother stressed she was trying to "get away from trouble" and wanted to file for divorce from Mr. M., but was unable to because of "probation, CPS, work, [and] transportation" issues.

Notwithstanding Mother's testimony regarding her attempt to make positive changes, the record also reflects Mother has been involved with the Department multiple times, continued to engage in unhealthy relationships, failed to complete all of the tasks within the service plan, and violated the terms of her probation after the Department removed the children from her home. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *Holley*, 544 S.W.2d at 371–72. In addition to engaging in a relationship with a registered sex offender, Ms. Pierce testified Mother violated the terms of her probation in several other ways, including providing a false address, failing to complete the Department's directives, and failing to provide an address to the Department caseworkers. Ms. Pierce testified Mother was currently in danger of having her probation revoked. The record also reflects the Department was unable to locate Mother for approximately a month before trial. When asked about Mother's progress, both Department caseworkers testified Mother was not improving. Likewise, the CASA advocate testified, "I have been following the case for a long time and at first I thought maybe we could get [the children] back with [Mother]. Okay. She made some bad decisions, like we all have at some point in our life. But her life has gotten worse and just keeps going down and down, it doesn't get better." He continued, explaining how Mother ended up in jail, was evicted from her trailer, and did not currently have a stable living situation.

Moreover, with regard to the children's needs, the evidence establishes Mother was unable to demonstrate adequate parenting skills and did not have an adequate social support system. *See* TEX. FAM. CODE ANN. § 263.307(b)(12) (whether child's family demonstrates adequate parenting

skills); *id* § 263.307(b)(13) (whether adequate social support system consisting of extended family and friends is available). At the time of trial, although Mother testified she had been working for the past couple of months, she was unable to report that she had a permanent residence. The CASA advocate described Mother's residence as "staying hotel to hotel." Mother testified her current living situation was a suite at a local hotel. The suite consisted of a bedroom with one queen bed as well as a kitchen and bathroom. Mother stated she planned to work during the remainder of her pregnancy and use her money to place the four children as well as her forthcoming baby in daycare. With regard to a support system, Mother testified she had a friend who had helped her for the past four years, but that friend was not aware of Mother's current involvement with the Department. Mother also testified she did not maintain contact with her grandmother, who, as stated above, adopted two of her other children. Similarly, Mother testified she did not keep in touch with her aunt, who had adopted another one of her children.

Additionally, there is evidence the children's needs are being met by a foster family that is interested in adopting them and that the children are thriving in their current placement. *See* TEX. FAM. CODE ANN. § 263.307(b)(1) (child's age and physical and mental vulnerabilities); *Holley*, 544 S.W.2d at 371–72 (emotional and physical needs of child now and in future, plans for child by individuals seeking custody, stability of home or proposed placement). According to the CASA advocate, J.A.M. and one of the twin girls were very angry and violent when they were removed from the home; however, now, they have "calmed down a lot" and are very happy and stable. The CASA advocate described the children as smiling, laughing and playing "like kids should." He further stated, "[T]hey are just doing great. Everybody's doing great," and it was his recommendation the children should remain in their current placement because they are happy and "their eyes are bright when you look at them and there's no violence."

Considering all of the evidence in the light most favorable to the trial court's best interest determination, we conclude the trial court could reasonably have formed a firm belief that termination of Mother's parental rights was in the children's best interests. *See J.P.B.*, 180 S.W.3d at 573. In reaching this conclusion, we are mindful of the fact that Mother does not contest the trial court's findings under section 161.001(b)(1) of the Code, and evidence used to prove up those acts or omissions is probative in our best interest analysis. *See C.H.* 89 S.W.3d at 28. Here, the trial court specifically found that Mother knowingly allowed the children to remain in conditions which endangered their well-being, knowingly placed the children with a person who engaged in conduct which endangered their well-being, and failed to comply with the trial court's orders. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O). Moreover, the evidence shows Mother had a history with the Department, which resulted in the removal of seven of her children — four of whom are the subject of this matter — establishing a pattern of neglect and endangerment. The trial court was free to judge Mother's future conduct by her past conduct. *See A.B.*, 2014 WL 5839256, at *2. The evidence also shows Mother continued to engage in harmful behavior and unhealthy relationships and did not currently have a stable environment for her children. Although Mother may have completed some of her service plan tasks, the evidence also establishes Mother did not consistently complete the programs necessary for reunification, and rather, repeatedly reverted to her prior behavior. Based on this evidence in conjunction with the above evidence of hazardous living conditions and ongoing domestic violence, we hold the evidence is legally sufficient to support the trial court's finding that appellants' parental rights should be terminated. *See J.P.B.*, 180 S.W.3d at 573.

Similarly, in reviewing the evidence for factual sufficiency, we determine the trial court could reasonably have formed a firm belief or conviction that termination of Mother's parental rights was in the children's best interests. *See H.R.M.*, 209 S.W.3d at 109. Therefore, we hold the

evidence is also factually sufficient to support the trial court's finding that Mother's parental rights should be terminated. Accordingly, we overrule Mother's sole issue on appeal.

CONCLUSION

Based on the foregoing, we hold the trial court did not err in finding that termination of Mother's parental rights was in the children's best interests. Therefore, we overrule Mother's sole appellate issue and affirm the trial court's order of termination.

Marialyn Barnard, Justice