



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00819-CV

In the Interest of J.H., I.H., E.H., M.H., and L.H., Children

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 15-0958-CV
Honorable Dwight Peschel, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: May 24, 2017

AFFIRMED

This is an accelerated appeal from an order terminating appellant-Father's parental rights to his five children, J.H., I.H., E.H., M.H., and L.H. Father contends the evidence is legally and factually insufficient to support the jury's finding that termination of his parental rights is in the best interests of the children. We affirm the trial court's termination order.

BACKGROUND

On March 25, 2015, the Texas Department of Family and Protective Services ("Department") received a referral alleging neglectful supervision against Father and Mother for assaulting an elderly man outside their apartment while the children were present. The referral additionally alleged both Father and Mother were intoxicated and under the influence of drugs at the time, there was ongoing domestic violence between Father and Mother in the home, and all

five children were left alone in the apartment. On March 27, 2015, the Department received an additional referral alleging neglectful supervision based on the parents' drug and alcohol use and frequent domestic violence. Upon validating the referrals and based upon the parents' history with the Department, the Department filed its Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent Child Relationship on May 11, 2015.

Following an adversary hearing held on June 22, 2015, the trial court signed a temporary order assigning the Department as temporary managing conservator and ordering that Father have limited access to and possession of the children. The children remained in the care of a fictive kin placement with H.A. A status hearing was held on July 2, 2015, and the family services plan was subsequently made an order of the court. The trial court ordered that Father: complete a psychological assessment as well as any recommendations; participate in individual counseling; complete a drug assessment as well as any recommendations; attend anger management and domestic violence classes; attend supervised visitations; obtain and maintain appropriate housing and employment; submit to random drug testing; refrain from criminal activity, including the use of substances; and pay child support as ordered.

Department caseworker Jessica Kathka met with Father in the Guadalupe County Jail on October 19, 2015, but Father could not yet begin services because his incarceration period at that time was indefinite. Father was released from jail on November 2, 2015, and Kathka met with Father on November 13, 2015. Kathka reviewed the service plan with Father and advised Father of the court's orders, including the need for anger management and domestic violence counseling. According to the record, Father disagreed with the need for domestic violence or anger management counseling and, therefore, refused to sign the service plan.

Father voluntarily initiated services by undergoing a drug and alcohol assessment at Bluebonnet Trails Community MHMR Center, where he was also scheduled for bi-monthly counseling, a psychological appointment, and an intake interview at Teddy Buerger Center licensed treatment center. At Teddy Buerger, it was recommended Father complete an intensive outpatient counseling program, which he began attending. Father also began participating in supervised visits with the children.

Kathka met with Father and Mother in December 2015. According to Kathka, Mother demonstrated evidence of abuse in the form of a black eye and a swollen forearm and hand, but Father stated he had not seen the injuries. Kathka administered a drug screen to Father, which tested positive for methamphetamine use. In March 2016, Father refused a drug screen and informed the caseworker he relapsed.

In April, Kathka administered a hair follicle test to Father, which resulted in a negative result. Father was discharged from the Teddy Buerger counseling program in April 2016 prior to completion because of poor attendance. Further, Father attended fewer than five total of the scheduled bi-monthly counseling sessions, and he did not address the issues of domestic violence and anger management as directed by the trial court. Also in April 2016, Father stopped visiting or attempting to schedule visits with the children.

Kathka discovered in June 2016 that Father had moved to Lampasas in April or May, but had not informed the Department. Upon obtaining contact information, Kathka arranged for a courtesy caseworker from the Lampasas region to meet with Father. The courtesy caseworker attempted to contact Father at the provided address and phone number, but was unable to do so. Kathka had no further contact with Father after June 2016. In October 2016, caseworker Tracy Fewell, who had previously been the secondary caseworker, took over the case. Fewell also

attempted to obtain updated contact information for Father, but was still unable to make contact with Father.

The trial court held the required status and permanency hearings, and on November 22, 2016, the Department filed an amended petition to terminate Father's parental rights. The parties tried the case to a jury November 28 through December 2, 2016. Father was present at trial, represented by court-appointed counsel, and testified on his own behalf. The jury also heard testimony from several witnesses, including former Department investigator Jeri Hudson; Department caseworkers Jessica Kathka and Tracy Fewell; Seguin Police Department ("SPD") Officers Suzanne Gonzalez and Cody Dean; SPD Detective Bradlee Flippin; counselors Amy Nelson and Leeland Cox; Mother; and foster care provider H.A.

After receipt of evidence and testimony, the jury tendered judgment recommending termination of Father's parental rights to each child pursuant to Texas Family Code Sections 161.001(b)(1)(D), (E), (N), (O), and (P). The jury also found termination of Father's parental rights was in the best interest of the children, pursuant to Texas Family Code Section 161.002(2). Based upon the jury's recommendations, the trial court signed an order terminating Father's parental rights.

This appeal followed.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Code, the Department has the burden to prove: (1) one of the predicate grounds in subsection 161.001(b)(1); and (2) that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). The applicable burden of proof is the clear and convincing standard. TEX. FAM. CODE ANN. § 161.206(a) (West 2014); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). "'Clear and convincing evidence' means 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.” TEX. FAM. CODE ANN. § 101.007.

In reviewing the legal sufficiency of the evidence to support the termination of parental rights, the court must “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. “[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.” *Id.* “A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *Id.*

In reviewing the factual sufficiency of the evidence to support the termination of parental rights, a court “must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing.” *Id.* “A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *Id.* “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.*

BEST INTEREST OF THE CHILDREN

Father challenges the sufficiency of the evidence to support the jury’s finding that termination of his parental rights is in the children’s best interests.

The Texas Supreme Court has enumerated the following factors to assist courts in evaluating a child’s best interest: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future emotional and physical danger to the child; (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 held by the individuals seeking custody of the child; (7) the stability of the home of the parent and the individuals seeking custody; (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. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The foregoing factors are not exhaustive, and “[t]he absence of evidence about some of [the factors] would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child’s best interest.” *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). “A trier of fact may measure a parent’s future conduct by his past conduct and determine whether termination of parental rights is in the child’s best interest.” *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

Turning to the evidence regarding the best interest of the children, we consider the Holley factors as outlined above.

Desires of the Children

At the time of the incident giving rise to the current Department involvement, the children were ages 10, 7, 4, 3, and 2 months, respectively, and at the time of trial, each was a year older. The younger children were not able to verbally communicate their desires. However, when a child is too young to express its desires, the factfinder may consider whether the child has bonded with its current caregiver, is well-cared for, and whether the child has spent minimal time with the parent. *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

H.A. testified J.H. and I.H. initially stayed in her home following the March 24, 2015 incident upon their maternal grandfather’s request because Grandfather was unable to transport all five children in his vehicle. According to H.A., the following day she planned to return J.H. and I.H. to their parents’ apartment for a birthday celebration for M.H., but they did not want to go back to the apartment. Ultimately, H.A. took J.H. and I.H. to their grandparents, but Grandfather

later asked H.A. to pick up J.H. and I.H. again because Mother and Father were being arrested. Initially, all five children were to stay with their grandparents, but because of Grandmother's failing health, the children were placed with H.A. at Mother's request.

Amy Nelson, the licensed clinical social worker who led counseling sessions with the children, testified the children did not speak about Father unless specifically asked. According to Kathka, J.H. was aware Father was not complying with the service plan, which upset the child. Kathka testified the younger children did not talk about their relationship with Father much at all. Kathka further testified the children were well-adjusted to placement, felt safe, and enjoyed the activities in which they took part.

H.A. testified Father had not visited with the children since April 2016 and had phoned the children only once in nine months. According to H.A., she and the children had "run into" Father, but Father made no attempts to visit. Fewell testified J.H. speculated to her that Father did not care whether he was reunited with the children. H.A. further testified the older children generally told her that Father hurt Mother a lot and expressed their belief it would be dangerous to stay with Father.

Emotional and Physical Needs/Stability

A child's need for permanence is a paramount consideration for the child's present and future physical and emotional needs. *See Dupree*, 907 S.W.2d at 87. The goal of establishing a stable permanent home for a child is a compelling government interest. *In re M.A.N.M.*, 75 S.W.3d 73, 77 (Tex. App.—San Antonio 2002, no pet.). A factfinder may infer from a parent's past inability or unwillingness to meet a child's physical and emotional needs an inability or unwillingness to meet a child's needs in the future. *In re J.D.*, 436 S.W.3d at 118. Further, a factfinder is entitled to consider a parent's history of drug use in its determination. *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009).

Kathka testified J.H. reported Father was repeatedly in and out of their home prior to the March 24, 2015 incident. Mother also testified Father was not consistently in the home because of his incarceration. Although Father testified he did not recall much of the criminal history presented during trial, the record indicates Father has a long criminal history associated with alcohol abuse and domestic violence. In 2001, prior to J.H.'s birth, Father was convicted of the offenses of terroristic threat and assault-family violence, for which he served forty days in jail. In 2004, he was placed on probation for two years for the offense of assault-family violence, with Mother being the complainant. However, Father's probation was revoked, and he served two months in jail in 2006. Father pleaded guilty to the offense of interfering with an emergency call, with Mother as the complainant in 2008.

In 2010, Father was charged with the offense of assault-family violence for assaulting Mother; he pleaded guilty to the offense in 2014 and was sentenced to serve 180 days in jail. In 2011, Father was convicted of the offenses of driving with a suspended license and without insurance, and in 2012, he was convicted of two counts of DWI with a child passenger under age 15. J.H. and I.H. were the child passengers. This was Father's third DWI conviction, and he served two years in State jail. In December 2014, Father was arrested for the offense of public intoxication. SPD Officer Gonzalez testified she found Father passed out in the front seat of his car that was parked in a handicap spot with its engine running.

Father was charged with the offense of aggravated robbery for the March 24, 2015 incident, but pleaded guilty to a lesser included offense and served 140 days in jail. The assault victim testified, describing how Father picked him up, slammed him to the ground, and began "pounding" on his face. The assault victim testified his injuries included a broken clavicle and blunt force trauma to his head. Detective Lippin testified that when he arrived at the scene, a blood trail was evident from where the assault took place to the vehicle in which the assault victim was taken

away. The children witnessed this criminal activity. According to Detective Lippin, E.H. witnessed the assault and told him Father was fighting with another man before they dropped the man off at the beer place, and H.A. testified M.H. stated he was in the car when the assault took place.

When Detective Lippin executed a search warrant at the apartment, he found a spoon with methamphetamine residue and a syringe in the kitchen and a digital scale in the bedroom. The children also witnessed the drug use. H.A. testified the older children were able to explain to H.A. how different drugs were used and specifically described to her burning one substance in a spoon.

The record reflects J.H. was diagnosed with adjustment disorder with severe anxiety, posttraumatic stress disorder (“PTSD”), and child neglect. I.H. was diagnosed with adjustment disorder with moderate anxiety, PTSD, ADHD, speech sound disorder, and child neglect. E.H. was diagnosed with PTSD, adjustment disorder with anxiety, and child neglect. M.H. was diagnosed with child neglect, adjustment disorder with mixed disturbance of emotions and conduct, and developmental disorder of speech and language. L.H. was too young for mental health assessments. Individual counseling and family therapy was recommended for J.H., I.H., and E.H., and speech therapy and medical treatment for the symptoms of ADHD were additionally recommended for I.H. Occupational therapy, as well as individual play and behavioral therapy speech evaluation were recommended for M.H. Nelson testified the children’s counseling sessions had proved helpful and continued therapy was necessary for the children. Father, however, opined there was nothing wrong with the children prior to the Department’s involvement and affirmed he did not believe the children needed counseling or therapy.

Father testified he worked in construction for various sub-contractors, but did not work that much. As a result, Father’s hours and pay were not consistent. Father additionally testified he had been living with his mother in a four-bedroom home for approximately four months. Father’s

mother testified Father could take the children home to her house that day. Father's mother further testified that together she and Father could provide for the children. Fewell, however, testified she was not able to locate the home's address supplied by Father and his mother, and further, the address could not be found on Google maps.

Emotional and Physical Danger

“As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child.” *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied). A factfinder may consider a parent's history with other children when considering the risks or threats of a parent's environment. *In re E.A.F.*, 424 S.W.3d 742, 751 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

The record shows that apart from the current Department involvement, Father has a prior history with the Department resulting from referrals for neglectful supervision. In 2009, and twice in 2010, the Department received referrals alleging neglectful supervision. Each referral was verified and designated “reason to believe.”

Father's history of domestic violence is also significant. The record reflects Father has been abusive toward Mother for many years. H.A. testified she first met Mother when J.H. was enrolled in the school at which H.A. is the principal. At the time, Father was incarcerated. According to H.A., upon Father's release, Mother began appearing for work with unexplained injuries, including a swollen nose, bruising on her arms and legs, and blackened eyes. H.A. testified Mother informed her that Mother and Father had altercations. Mother avoided going home when Father drank. Mother testified, verifying H.A.'s testimony that on one occasion Father destroyed her belongings, including a sofa, television, and personal care items and wrote obscenities on the apartment wall.

The children witnessed Father's abuse of Mother. H.A. testified M.H. related he saw Father hit Mother, but that Father said he was sorry and wouldn't do it again. H.A. also recalled a specific occasion when she witnessed Father yank M.H. off the ground by his arm and spank the child. H.A. additionally testified about a conversation in which I.H. told H.A. she overheard Father tell Mother he should have put an arrow through Mother's stomach during her pregnancy so that I.H. would not have been born.

Unfortunately, the abuse and criminal activity did not end with the pendency of the current case. Officer Dean testified that on June 15, 2015, Mother reported criminal mischief at her home, telling police that Father went to Mother's home. Mother stated she did not let Father into the home as he wanted, and after Father left she discovered her car tires were flattened. Officer Dean additionally testified Father was issued a citation for shooting fireworks within the city limits on December 1, 2015. The record reflects Father failed to appear to answer the citation and was ultimately jailed for two days.

Officer Gonzalez testified she came into contact with Mother on December 8, 2015. Officer Gonzalez described Mother as having scratches on her left arm, a swollen hand, and redness next to her eye. Mother told Officer Gonzalez Father punched her and threw various household items at her. Officer Gonzalez testified she escorted Mother to her home and noticed the appearance of the home matched Mother's story. Although Mother later recanted her story, Officer Gonzalez confirmed it is common for domestic violence victims to recant their statements. Kathka also noted Mother's injuries at her December 2015 meeting with Mother and Father. At the case hearing in February 2016, Mother again had a black eye.

Parent's Acts or Omissions

When Father voluntarily underwent assessment at Teddy Buerger Center, he was diagnosed with severe alcohol use disorder, moderate amphetamine use disorder, and bipolar

disorder. Cox, Father's counselor, testified Father was referred to the intensive outpatient program, which he described as one step down from the inpatient program. Father was discharged from the program for lack of attendance. Cox offered his opinion that the most common reason individuals stop attending counseling is because they are using drugs again. According to Cox, Father was displaying odd behavior when he did attend counseling sessions. Father acted erratically, fell asleep, and wore sunglasses indoors. Cox testified Father also mentioned having slip-ups with drinking. Cox identified alcohol as Father's drug of choice and opined alcohol use had previously led to Father making worse choices such as methamphetamine use and violence. When questioned about Father's testimony that Father had never had a substance abuse problem, Cox answered he would consider that to be a regression rather than a slip-up.

Father testified he "didn't do a thing to get us here today." Father denied ever striking Mother, ever having a positive test for methamphetamine, and claimed he had no problems with drugs. Father further testified he used alcohol only and stated he "doesn't recall" using methamphetamine. Finally, Father testified he did nothing to cause the children to go into foster care.

Plans for the Children

Kathka testified the short term goal was for the foster parents to take over permanent managing conservatorship with Mother maintaining possessory conservatorship. Kathka described the arrangement as Mother having the sort of a visitation plan that was given to non-custodial parents in divorce cases. Kathka testified the long-term plan, while terminating Father's parental rights, was for Mother to stair-step to reunification. Kathka stated Mother has been completing services as required and has been working with the Department toward this goal.

Conclusion

After evaluating the evidence and testimony in light of the *Holley* factors and viewing the evidence in the light most favorable to the jury's finding, we conclude the jury could reasonably have formed a firm conviction that termination of Father's parental rights is in the children's best interest. Thus, the evidence is legally sufficient to support this finding. Based upon the same evidence and conclusions, the evidence is also factually sufficient to support the trial court's finding that termination was in the children's best interest.

CONCLUSION

Based on the foregoing reasons, we overrule Father's sole issue on appeal in which he challenges the legal and factual sufficiency of the evidence to support the jury's finding that termination of his parental rights is in the best interest of the children. We affirm the trial court's order terminating Father's parental rights.

Irene Rios, Justice