



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-21-00138-CV

IN THE INTEREST OF Z.F., A CHILD

On Appeal from the County Court at Law No. 3
Lubbock County, Texas
Trial Court No. 2019-537,171, Honorable Kelley Tesch, Associate Judge Presiding

December 6, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

In this accelerated appeal, appellant, Mother, seeks reversal of the trial court's judgment terminating her parental rights to her son, Z.F.¹ By her appeal, Mother raises two issues. In her first issue, Mother contends that the trial court abused its discretion in refusing to grant a continuance. In her second issue, Mother challenges the sufficiency of the evidence to support the trial court's best interest finding. We affirm the judgment of the trial court.

¹ To protect the privacy of the parties involved, we will refer to the appellant as "Mother," and to the children by initials. See TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b). Father's parental rights were also terminated in this proceeding. Father does not appeal.

Background

Mother has been involved with the Texas Department of Family and Protective Services since 2015. Mother has five children ranging in age from nine years to eight months. The child the subject of this appeal is twenty-one-month-old Z.F.

In 2015, the Department investigated allegations of neglectful supervision of J.P. due to Mother's drug use and concerns of domestic violence between Mother and her boyfriend. The Department's involvement in that case concluded with termination of Mother's parental rights to J.P. In July of 2016, the Department received another referral of neglectful supervision concerning M.P. and a physical altercation involving Mother and M.P. at a McDonald's restaurant. In September of 2018, the Department investigated new allegations of neglectful supervision of M.P. and K.P. when Mother and her newborn, K.P., tested positive for marijuana. Mother admitted to using methamphetamine and marijuana during her pregnancy with K.P. M.P. and K.P. were removed from Mother's care and the Department developed a service plan to address Mother's substance abuse issues. Mother completed some of the services offered by the Department, but she continued to abuse methamphetamine and marijuana. She became pregnant with Z.F. while the 2018 case was pending. In September of 2019, the Department opened another investigation when Z.F. was born because Mother tested positive for methamphetamine and marijuana during her pregnancy.

In September of 2019, the Department filed its petition for protection, conservatorship, and termination of parental rights. Following an adversary hearing, the Department was appointed temporary managing conservator of Z.F., and he was placed in the home of a paternal aunt and uncle.

The Department developed a family service plan for Mother.² The service plan set out several tasks and services for Mother to complete before reunification with Z.F. could occur. These tasks and services included the following: attend parenting classes; obtain and maintain stable housing that is appropriate and safe for the child; locate and maintain income sufficient for her family's needs; maintain contact with the caseworker; submit to random drug screens; participate in a substance abuse assessment; attend NA/AA meetings; attend individual counseling; and attend visitation.

The trial court conducted a bench trial through Zoom videoconferencing on June 4, 2021,³ fifteen days before the statutory deadline was to expire on June 19, 2021.⁴ At the outset of the trial, the trial court considered Mother's request for a continuance based on Mother's incarceration in a Correctional Rehabilitation and Treatment Center (CRTC) and the inability of her counsel to properly prepare for trial. The Department opposed the continuance because the final hearing had been reset multiple times, and a previous extension set an automatic dismissal date for June 19, 2021. Father and the attorney and guardian ad litem for Z.F. also opposed the continuance. The trial court denied the motion for continuance.

At trial, the Department caseworker testified that Mother completed some of her service plan requirements. She completed a substance abuse assessment, parenting

² At the time this service plan was developed, Mother was also subject to a service plan involving M.P. and K.P.'s case.

³ In response to the threat presented by the COVID-19 pandemic, the Texas Supreme Court issued numerous emergency orders authorizing "anyone involved in any hearing . . . to participate remotely, such as by videoconferencing." See TEX. GOV'T CODE ANN. § 22.0035(b). One such order was effective as of the date of this hearing.

⁴ See TEX. FAM. CODE ANN. § 263.401 (providing for dismissal after one year and requirements to obtain extension of time).

classes, and two counseling sessions. Mother did not attend NA/AA and did not complete her counseling. One of Mother's required services in M.P. and K.P.'s case was participation in an outpatient drug treatment program.⁵ Mother completed this treatment program during Z.F.'s case, but she resumed her use of marijuana shortly after her discharge from the program. According to Mother, the last time she used methamphetamine was in August of 2020.

In October of 2020, the Department received another report alleging neglectful supervision by Mother and her newborn, S.F. That report alleged that Mother had used methamphetamine during her pregnancy. Mother admitted to using methamphetamine and marijuana in March, July, and August of 2020 while Z.F. was in the Department's care, and drug testing confirmed her use of the controlled substances. Mother did not submit to drug testing as requested in January, June, October, and November of 2020.

The Department also produced evidence that Mother pled guilty in July of 2017 to a third-degree felony offense of fraudulent possession of identifying information of an elderly person and was placed on a ten-year deferred adjudication probation. As a part of her probation, Mother was to abstain from the use of illegal substances and refrain from committing another criminal offense. While on probation, Mother failed multiple drug tests. In 2018, Mother's probation was modified to intensive supervision due to her drug use. When Mother continued to violate her probation by testing positive for drugs, she was adjudicated on her felony charge and incarcerated in a CRTC in San Angelo.

⁵ Mother's parental rights to M.P. and K.P. were terminated and the case was on appeal when Z.F.'s case was brought to trial in June of 2021.

At the time of trial, Mother was incarcerated in the CRTC with an expected release date of July 23, 2021. Mother admitted that she has had a substance abuse problem since 2015. She also acknowledged that she used marijuana and methamphetamine while she was pregnant in 2018 and that she used marijuana during her pregnancies in 2019 and 2020. Mother disputed the caseworker's testimony that she tested positive for methamphetamine when S.F. was born in October of 2020. Mother admitted that using drugs while she was pregnant was harmful to her children.

At the time of the final hearing, Mother was employed at the Best Western hotel while she was in the CRTC. She testified that her mother was paying rent for Mother's two-bedroom apartment, and Z.F. has his own room. Z.F.'s room is furnished with a crib, twin bed, and diapers. Mother has not had a visit with Z.F. since December of 2020. Mother acknowledged that she is unable to have Z.F. live with her while she is incarcerated at the CRTC.

Z.F. was placed with his paternal aunt and uncle when he was three days old. He is doing well in his placement, and they provide a safe and stable home environment for Z.F. According to the paternal aunt, Z.F. is a happy baby; he is "lovable" and "very outgoing." The paternal aunt and uncle have also been diligent in taking care of Z.F.'s medical needs. Z.F. is bonded with his paternal aunt and uncle and their extended family, and they would like to adopt Z.F. if parental rights are terminated.

The trial court terminated Mother's parental rights to Z.F. on the grounds of endangering conditions, endangerment, and failure to comply with a court order that established actions necessary to retain custody of the child. See TEX. FAM. CODE ANN.

§ 161.001(b)(1)(D), (E), (O).⁶ The trial court also found that termination was in the best interest of Z.F. See § 161.001(b)(2).

Applicable Law

A parent's right to the "companionship, care, custody, and management" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); see *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Consequently, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). However, "the rights of natural parents are not absolute" and "[t]he rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (citing *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1993)). Recognizing that a parent may forfeit his or her parental rights by his or her acts or omissions, the primary focus of a termination suit is protection of the child's best interests. See *id.*

In a case to terminate parental rights under section 161.001 of the Family Code, the petitioner must establish, 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. § 161.001(b). 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." § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Both elements must be

⁶ Further references to provisions of the Texas Family Code will be by reference to "section ____" or "§ ____."

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); *In re K.C.B.*, 280 S.W.3d 888, 894 (Tex. App.—Amarillo 2009, pet. denied). “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 at 362. We will affirm the termination order if the evidence is both legally and factually sufficient to support any alleged statutory ground the trial court relied upon in terminating the parental rights if the evidence also establishes that termination is in the child’s best interest. *In re K.C.B.*, 280 S.W.3d at 894-95.

The clear and convincing evidence standard does not mean the evidence must negate all reasonable doubt or that the evidence must be uncontroverted. *In re R.D.S.*, 902 S.W.2d 714, 716 (Tex. App.—Amarillo 1995, no writ). The reviewing court must recall that the trier of fact has the authority to weigh the evidence, draw reasonable inferences therefrom, and choose between conflicting inferences. *Id.* The factfinder also enjoys the right to resolve credibility issues and conflicts within the evidence and may freely choose to believe all, part, or none of the testimony espoused by any witness. *Id.* Where conflicting evidence is present, the factfinder’s determination on such matters is generally regarded as conclusive. *In re B.R.*, 950 S.W.2d 113, 121 (Tex. App.—El Paso 1997, no writ).

The appellate court cannot weigh witness credibility issues that depend on demeanor and appearance as the witnesses are not present. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Even when credibility issues are reflected in the written transcript,

the appellate court must defer to the factfinder's determinations, if those determinations are not themselves unreasonable. *Id.*

Motion for Continuance

In her first issue, Mother contends that the trial court abused its discretion in denying her motion for continuance.

A motion for continuance shall not be granted except for sufficient good cause supported by an affidavit, consent of the parties, or by operation of law. TEX. R. CIV. P. 251. A trial court's ruling on a motion for continuance will not be disturbed unless the trial court clearly abused its discretion. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)). A trial court abuses its discretion when its ruling is arbitrary or unreasonable or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

The record before us shows Mother's counsel filed a motion for continuance two days before the trial date.⁷ In her motion, Mother's counsel alleged that he was unable to adequately prepare for trial due to Mother's incarceration and "it has been near impossible to visit or confer on matters in this case." Mother had previously sought and received a continuance of the trial from August 21, 2020, to December 4, 2020. On December 2, 2020, the trial court granted the Department's request to retain the case for six months and to set a new dismissal date to June 19, 2021. See § 263.401(b) (trial

⁷ After briefing was filed, the clerk submitted a supplemental record that contained the motion for continuance filed by Mother's counsel and the order of the trial court denying the motion.

court may grant an extension of up to 180 days if it finds that “extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the [D]epartment and that continuing the appointment of the [D]epartment as temporary managing conservator is in the best interest of the child.”). As a result of the extension, the trial date was reset to March 26, 2021. The permanency hearing order filed on April 8, 2021, reset the trial date to June 11, 2021.⁸

At the hearing on the motion, the Department pointed out that the trial had been reset multiple times, there was nothing in Mother’s motion requesting an extension due to the COVID-19 pandemic, and the court had previously granted a six-month extension. The trial court denied the motion, noting the mandatory dismissal date of June 19, three earlier requests for a continuance had already been granted, and the current trial date was set in April.

As noted above, the dismissal date for the suit as mandated by statute was only fifteen days away (June 19) from the date of the final hearing. Mother’s motion for continuance did not specify how much time she needed or what she hoped to prove with additional time. “[G]eneral allegations that an attorney has had insufficient time to prepare are not necessarily sufficient cause for granting a continuance.” *In re K.S.*, No. 09-12-00425-CV, 2013 Tex. App. LEXIS 2694, at *7-8 (Tex. App.—Beaumont Mar. 14, 2013, no pet.) (mem. op.); *In re Z.J.C.*, 440 S.W.3d 42, 47 (Tex. App.—Waco 2009, no pet.) (no error shown in denying mother’s motion for continuance because there was no showing of how much time was needed or what the mother hoped to prove with additional time). Given the impending dismissal date and the lack of specificity in Mother’s motion, we

⁸ The trial occurred on June 4, 2021.

cannot conclude the trial court abused its discretion in denying the continuance. We overrule Mother's first issue.

Best Interest

In her remaining issue, Mother challenges the factual and legal sufficiency of the evidence to support the best interest finding made under section 161.001(b)(2). She does not contest the predicate grounds for termination under section 161.001(b)(1).

When reviewing the legal sufficiency of the evidence in a termination case, the appellate court should look at all the evidence in the light most favorable to the trial court's 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. To give appropriate deference to the factfinder's conclusions, we must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved or found to have been not credible, but we do not disregard undisputed facts. *Id.* Even evidence that does more than raise surmise or suspicion is not sufficient unless that evidence can produce a firm belief or conviction that the allegation is true. *In re K.M.L.*, 443 S.W.3d 101, 113 (Tex. 2014). If, after conducting a legal sufficiency review, we determine that no reasonable factfinder could have formed a firm belief or conviction that the matter that must be proven was true, then the evidence is legally insufficient, and we must reverse. *Id.* (citing *In re J.F.C.*, 96 S.W.3d at 266).

In a factual sufficiency review, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266. We must determine whether the evidence is such that a factfinder could

reasonably form a firm belief or conviction about the truth of the petitioner's allegations. *Id.* We must also consider whether disputed evidence is such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding. *Id.* If, considering 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.*

A determination of best interest necessitates a focus on the child, not the parent. *In re B.C.S.*, 479 S.W.3d 918, 927 (Tex. App.—El Paso 2015, no pet.). Appellate courts examine the entire record to decide what is in the best interest of the child. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). There is a strong presumption that it is in the child's best interest to preserve the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006).

In assessing whether termination is in a child's best interest, the courts are guided by the non-exclusive list of factors in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These factors include: (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 that may indicate that the existing parent-child relationship is not proper, and (9) any excuse for the acts or omissions of the parent. *Id.* “[T]he State need not prove all of the factors as a condition precedent to parental termination, ‘particularly if the evidence were

undisputed that the parental relationship endangered the safety of the child.” *In re C.T.E.*, 95 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (quoting *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002)). Evidence that supports one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child’s best interest. See *In re E.C.R.*, 402 S.W.3d at 249. The best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as direct evidence. *In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). We must also bear in mind that a child’s need for permanence through the establishment of a stable, permanent home has been recognized as the paramount consideration in determining best interest. See *In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

In this case, Mother has a six-year history with the Department involving all five of her children due to her ongoing substance abuse. Z.F. came into care due to Mother’s drug use while she was pregnant with him, and she gave birth to another child, S.F., who was also exposed to illegal substances during the pendency of this case. After Z.F. was removed from Mother’s care, she continued to use methamphetamine and marijuana. Mother tested positive for methamphetamine in March, July, and August of 2020, and she also had positive tests for marijuana. Additionally, Mother was not compliant with the random drug tests required under the service plan and failed to appear for multiple drug tests requested by the Department. Those failures are considered positive results under her service plan. *In re T.R.L.*, No. 10-14-00290-CV, 2015 Tex. App. LEXIS 2178, at *14 (Tex. App.—Waco Mar. 5, 2015, no pet.) (mem. op.) (“A factfinder may reasonably infer from a parent’s refusal to take a drug test that the parent was using drugs.”); *In re C.R.*, 263 S.W.3d 368, 374 (Tex. App.—Dallas 2008, no pet.) (trial court could reasonably infer

parent avoided taking drug tests because she was using drugs). A parent's drug use supports a finding that termination of parental rights is in the best interest of the child. *In re D.M.M.*, No. 14-16-00664-CV, 2017 Tex. App. LEXIS 47, at *13 (Tex. App.—Houston [14th Dist.] Jan. 5, 2017, pet. denied) (mem. op.).

The trial court was allowed to consider evidence in support of the predicate grounds in making the best interest determination and Mother does not challenge those findings on appeal. That evidence established that Mother relapsed after she completed an outpatient drug rehabilitation program in 2019, and she continued to abuse methamphetamine and marijuana until her incarceration in December of 2020. Mother also acknowledged she failed to complete her service plan, she had a history of drug use since 2015, and her substance abuse during her pregnancies was harmful to her children. The trial court's unchallenged predicate grounds are probative in the best interest determination. *In re E.A.F.*, 424 S.W.3d 742, 750 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (citing, *inter alia*, *In re C.H.*, 89 S.W.3d at 28). A parent's drug use demonstrates an inability to provide a stable environment for the children and an inability to provide for the children's emotional and physical needs. *In re E.M.*, 494 S.W.3d 209, 222-23 (Tex. App.—Waco 2015, pet. denied). The unchallenged statutory grounds for termination are significant in our review of the best interest finding.

Although the evidence showed that Mother completed some of the service plan's requirements, she did not comply with significant portions of her plan, including random drug testing, attending visitation, and maintaining employment. The factfinder can infer from a parent's failure to take the initiative to utilize the available programs that the parent did not have the ability to motivate herself in the future. *In re S.P.*, 509 S.W.3d 552, 558

(Tex. App.—El Paso 2016, no pet.). A trial court is permitted to consider a parent’s drug use and failure to comply with a family plan of service in its best interest determination. *In re S.B.*, 207 S.W.3d 877, 887-88 (Tex. App.—Fort Worth 2006, no pet.). This evidence weighs heavily in favor of the best interest finding.

Stability and permanence are paramount in the upbringing of children. *In re J.D.*, 436 S.W.3d 105, 120 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The factfinder may compare the parent’s and the Department’s plans for the child and determine whether the plans and expectations of each party are realistic or weak and ill-defined. *Id.* at 119-20. Although Mother testified that she could provide a safe and stable environment for Z.F., she acknowledged that she would not be discharged from the CRTIC for another six weeks. She did not articulate any clear plans for Z.F. in the interim. In contrast, the Department’s plan for Z.F. was permanence. The trial court heard testimony from the caseworker that twenty-one-month-old Z.F. is bonded with the paternal aunt and uncle. At the time of placement with the paternal aunt and uncle, Z.F. was three days old. Z.F. is doing well in the home and the aunt and uncle plan to adopt Z.F. According to the caseworker, Z.F. is thriving in the home of his paternal aunt and uncle and he is well cared for in this placement. He is getting help with a speech delay, and all his physical and emotional needs are being met. When children are too young to express their desires, the factfinder may consider whether the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent. *In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Further, the Department’s plan for Z.F.’s adoption provides permanence and stability for Z.F. and weighs heavily in favor of the trial court’s conclusion that termination of Mother’s parental rights is in the best interest of Z.F.

We conclude the evidence is legally and factually sufficient to establish a firm conviction in the mind of the trial court that termination of Mother's parental rights is in the best interest of Z.F. We overrule Mother's second issue challenging the best interest determination.

Conclusion

Having overruled both of Mother's issues, we affirm the judgment of the trial court terminating Mother's parental rights.

Judy C. Parker
Justice