In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00025-CV

IN THE INTEREST OF S.F., A CHILD

On Appeal from the County Court at Law No. 1
Gregg County, Texas
Trial Court No. 2016-244-CCL1

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

On February 6, 2016, Leslie's infant daughter, Samantha, was removed from her care under the emergency provisions of the Texas Family Code.[1] *See* TEX. FAM. CODE ANN. § 262.104 (West Supp. 2016). In a bench trial, the County Court at Law No. 1 of Gregg County found that grounds existed to terminate the parental rights of Leslie and the child's father, Otto, and entered an order terminating Leslie's and Otto's parental rights to Samantha. Only Otto appeals the trial court's order terminating his parental rights.

On appeal, Otto contends that the evidence is legally and factually insufficient to support the trial court's findings that grounds for the termination of his rights existed under grounds (D), (E), (N), or (O) of Section 161.001(b)(1) of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O) (West Supp. 2016).[2] Otto also contends that the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2016). We affirm the trial court's judgment because we find (1) that the trial court's unchallenged finding under ground (P) supports termination of Otto's parental rights and (2) that sufficient evidence supports the trial court's finding that termination of Otto's parental rights was in the best interest of the child.

[1]We refer to the child, her parents, and her other relatives by fictitious names to protect the privacy of the child. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014).

[2]The trial court's order terminated Otto's rights based on grounds (D), (E), (N), (O), and (P) of Section 161.001(b)(1) of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O), (P).

I. Evidence at Trial

The evidence showed that Leslie's and Otto's first child, Kenny, had been placed in the care of the Texas Department of Family and Protective Services (the Department) while Leslie was pregnant with Samantha. Jessica Galindo, an investigator for Child Protective Services (CPS), which is a division of the Department, testified that Leslie had continued to use marihuana and cocaine during the pendency of Kenny's case and had several positive drug tests, including a positive test one month before Samantha's birth. In addition, Galindo testified that during the investigation, Leslie lied about being employed, represented that she had completed her services in Kenny's case when she had not, and initially lied about living with her aunt, who was not considered a protective placement by the Department. As a result, Samantha was removed from Leslie's care on February 6, 2016.

Galindo also testified that the medical records showed that Otto was present at Samantha's birth and that Otto was at the hearing where his service plan was outlined. She stated that she talked with Otto after that hearing and explained that he had not completed his service plan in Kenny's case and that he would be given the opportunity to complete a service plan in Samantha's case. She told him that if he was willing to make some changes in his life and provide a safe environment for the children, he should be able to have his children returned. Galindo testified that Otto assured her that he was changing his life and that he would be able to work his service plan.

Dionne Jordan, a caseworker for the Department, testified that the main concern with Otto was with his history with illegal drugs. Although he would not admit to using them, she said that

he admitted to manufacturing illegal drugs to support his children and himself. The Department was also concerned about Otto's incarcerations because he would be unable to provide for his child physically, financially, and emotionally. Jordan testified that she had an appointment with Otto on March 8, 2016, to go over his service plan, but that Otto did not come. He also left her a voicemail in April saying that he was going to complete a treatment program called Beginnings, but she did not hear anything else from him. She also testified that every time she called him, she left voice messages, but he never returned her telephone calls.

Jordan also testified that completion of Beginnings was one of the requirements of Otto's service plan. He was also required to take parenting classes, have individual counseling, take random drug tests, obtain employment, and provide a safe and stable home. Jordan stated that although he could have begun and completed most of these requirements before his arrest on May 6, 2016, Otto did not do any of them. She also testified that Otto had not regularly visited or maintained contact with Samantha since she had been in the care of the Department.

Jordan said that Otto expressed no interest in seeing Samantha before his incarceration and that he had not attended any visitations with her. She stated that Otto was aware of the terms of his service plan, but had not complied with any of the terms. She was also aware that Otto had admitted to using illegal substances during the pendency of the case. To her knowledge, Otto had not completed any type of substance abuse program. Jordan testified that Otto had not shown he could provide a safe environment for Samantha.

Jordan went on to testify that in her opinion, children who are in unstable environments develop insecurities, as well as emotional and behavioral problems. After Samantha was removed

a few weeks after birth, she was eventually placed with Kathleen, Leslie's maternal cousin. Jordan testified that in looking for a placement, the Department looks for stability in the home, whether the caregiver is employed and for how long, and whether they are taking care of themselves. She said that Kathleen initially agreed to the placement to help Leslie, but eventually expressed that she wanted to adopt Samantha. Jordan testified that the Department believes it is in Samantha's best interest to terminate the rights of her parents and for Kathleen to adopt her.

Kathleen testified that she is Leslie's second cousin and that by the time of trial, Samantha had been in her care for ten months. She stated that Samantha was one year old, was running, and was doing great. She said that she has a mother-daughter relationship with Samantha and that Samantha looks at Kathleen's children as her brother and sister. She said that Samantha loves her twelve-year-old daughter and is always on her hip. Samantha fights with her ten-year-old son, but loves him. Kathleen testified that her children love Samantha and want to get her out of daycare as soon as they get off the bus.

Kathleen also testified that she originally wanted Leslie to complete her requirements so that Samantha could be returned to her. However, over the course of the case, Kathleen and Jordan had been lied to by Leslie, and now Kathleen thinks it is in Samantha's best interest to remain with her. Kathleen intends to adopt and raise Samantha, is employed, and can financially support her. Kathleen testified that she believes it is in Samantha's best interest to terminate Leslie's parental rights to Samantha and allow Kathleen to adopt her.

Otto was twenty-nine years old at the time of trial. He testified that he was arrested on various charges on July 27, 2015, and that he had stipulated in the criminal proceedings that he

had possessed methamphetamine. He admitted that he received deferred adjudication community supervision, and that the conditions of his community supervision required him to seek drug treatment from the Beginnings program and to not possess any other illegal drugs. He also testified that on June 16, 2016, his community supervision was modified and that he was sent to the DEAR unit. During the community supervision modification proceeding, he admitted that on May 5, 2016, he used the controlled substance ecstasy.

Otto testified that he did not complete the drug treatment program at the DEAR unit as ordered by the criminal court because he was expelled from the program. As a result, Otto's possession of a controlled substance charge was adjudicated, and he was sentenced to twenty months' confinement in a state jail facility. Otto testified that if he received his good-time credit, he had 153 days remaining on his sentence at the time of trial. He opined that he was entitled to good-time credit because he had completed the educational program, was in Celebrate Recovery, and was on the waiting list for the Changes class. Yet, he was not sure if the Celebrate Recovery course satisfied his drug-counseling requirements.

Otto also testified that he appeared before the trial court in the present case on February 16, 2016, and that the court entered temporary orders. He also testified that he had reviewed his service plan in this case. He admitted that although the service plan required him to complete the Beginnings program, he had not done so. Although he claimed that he could not do any of the services because of his incarceration, he admitted that he had not been incarcerated between February 16, when the temporary orders were entered, and May 6, when he was incarcerated.

He also admitted that although the temporary orders required him to take the Beginnings program, go to parenting classes, and pay child support, he had not done any of those things. He further admitted that he knew the Department would pay for these services and that they were made available so he could be reunited with his child. Finally, Otto admitted that although he knew he could have one hour a week visitation with his daughter, he did not visit her while he was not incarcerated.

Otto also maintained that he had tried to get into the Beginnings program while he was not incarcerated, but that he had been put on a waiting list. He admitted, however, that he had told his community supervision officer that he did not think he had a drug problem, even though he smoked marihuana monthly, used ecstasy and alcohol weekly, and used cocaine and codeine syrup occasionally. He agreed that his drug use may have been the reason why he had to wait to get into the Beginnings program.

In addition, Otto testified that he had obtained his GED while in state jail and that he had been in Changes for over six weeks. He maintained that he had done all he could to complete his services while incarcerated. He also testified that no one from the Department had come to see him while he was in the Gregg County Jail or in a state jail facility. Otto said that when he is released, he plans to go to community college, get a job, and have a stable place to live. He testified that he now understands he has to live for his children and that he wants to remain Samantha's parent.

II. Standard of Review

"The natural right existing between parents and their children is of constitutional dimensions." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Indeed, parents have a fundamental right to make decisions concerning "the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Since the termination of parental rights implicates these fundamental interests, a higher standard of proof, i.e., clear and convincing evidence, is required. *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014). In our review, we "engage in an exacting review of the entire record to determine if the evidence is . . . sufficient to support the termination of parental rights." *Id*. at 500. We construe involuntary termination statutes strictly in favor of the parent. *In re S.K.A.*, 236 S.W.3d 875, 900 (Tex. App.—Texarkana 2007, pet. denied) (citing *Holick*, 685 S.W.2d at 20).

In order to terminate parental rights, the trier of fact must find, by clear and convincing evidence, that the parent has engaged in at least one statutory ground for termination and that termination is in the child's best interest. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); *In re E.N.C.*, 384 S.W.3d 796, 798 (Tex. 2012). "Clear and convincing evidence" is that "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 (West 2014); *see In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). This standard of proof necessarily affects our review of the evidence.

In our legal sufficiency review, we consider all the evidence in the light most favorable to the findings to determine whether the fact-finder reasonably could have formed a firm belief or

conviction that the grounds for termination were proven. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam); *In re J.L.B.*, 349 S.W.3d 836, 846 (Tex. App.—Texarkana 2011, no pet.). We assume the jury resolved disputed facts in favor of the finding, if a reasonable jury could do so, and disregarded evidence that the jury could have reasonably disbelieved or the credibility of which reasonably could be doubted. *J.P.B.*, 180 S.W.3d at 573.

In our review of factual sufficiency, we give due consideration to evidence the jury could have reasonably found to be clear and convincing. *In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006) (per curiam). We consider only that evidence the fact-finder reasonably could have found to be clear and convincing and determine "whether the evidence is such that a fact[-]finder could reasonably form a firm belief or conviction about the truth of the . . . allegations." *Id.* (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)); *In re J.F.C.*, 96 S.W.3d 256, 264, 266 (Tex. 2002). "If, in light of the entire record, the disputed evidence that a reasonable fact[-]finder could not have credited in favor of the finding is so significant that a fact[-]finder 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 our deliberations, we make "an exacting review of the entire record with a healthy regard for the constitutional interests at stake." *A.B.*, 437 S.W.3d at 503 (quoting *C.H.*, 89 S.W.3d at 26). Nevertheless, we maintain our deference for the constitutional role of the fact-finder. *C.H.*, 89 S.W.3d at 26. In this case, the trial court, as the fact-finder, is the sole arbiter of a witness' demeanor and credibility, and it may believe all, part, or none of a witness' testimony. *H.R.M.*, 209 S.W.3d at 109.

Despite the profound constitutional interests at stake in a proceeding to terminate parental rights, "the rights of natural parents are not absolute; protection of the child is paramount." *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (quoting *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994)); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). "A child's emotional and physical interests must not be sacrificed merely to preserve parental rights." *In re C.A.J.*, 459 S.W.3d 175, 179 (Tex. App.—Texarkana 2015, no pet.) (citing *C.H.*, 89 S.W.3d at 26).

III. Unchallenged Predicate Ground

In his first point of error, Otto challenges the legal and factual sufficiency of the evidence supporting the termination of his parental rights under grounds (D), (E), (N), and (O) of Section 161.001(b)(1). The trial court terminated his parental rights under grounds (D), (E), (N), (O), and (P) of Section 161.001(b)(1). "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 O.R.F.*, 417 S.W.3d 24, 37 (Tex. App.—Texarkana 2013, pet. denied) (quoting *A.V.*, 113 S.W.3d at 362); *In re K.W.*, 335 S.W.3d 767, 769 (Tex. App.—Texarkana 2011, no pet.)). When the trial court finds multiple predicate grounds, we will affirm if any one ground is supported by sufficient evidence. *In re K.W.*, 335 S.W.3d 767, 769 (Tex. App.—Texarkana 2013, pet. denied). Here, Otto does not challenge the trial court's finding under ground (P). Since this ground can support the trial court's termination order, we need not "review legal and factual sufficiency arguments as to the other grounds." *In re J.F.G., III*, 500 S.W.3d 554, 560 (Tex. App.—Texarkana 2016, no pet.) (citing *K.W.*, 335 S.W.3d at 769; *In re D.P.R.V.*, No. 04-09-00644-CV, 2010 WL 2102989, at *1 (Tex. App.—San Antonio May 26, 2010, no

pet.) (mem. op.) (citing *A.V.*, 113 S.W.3d at 362); *In re D.S.*, 333 S.W.3d 379, 388–89 (Tex. App.—Amarillo 2011, no pet.) (appellate court bound by unchallenged findings supporting termination); *In re S.N.*, 272 S.W.3d 45, 49 (Tex. App.—Waco 2008, no pet.)). We overrule this point of error.

IV. Best Interest

Otto also challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination of his parental rights was in the best interest of the child. There is a strong presumption that it is in the child's best interest to remain with her parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam); *In re E.W.*, 494 S.W.3d 287, 300 (Tex. App.—Texarkana 2015, no pet.). "Termination 'can never be justified without the most solid and substantial reasons.'" *E.W.*, 494 S.W.3d at 300 (quoting *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.) (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976))).

In determining the best interests of the child, we consider the following *Holley* factors:

> (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, (6) the plans for the child by these individuals, (7) the stability of the home, (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent.

In re N.L.D., 412 S.W.3d 810, 818–19 (Tex. App.—Texarkana 2013, no pet. (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)); *see E.N.C.*, 384 S.W.3d at 807; *see also* TEX. FAM. CODE ANN. § 263.307(b) (West Supp. 2016).

It is not necessary to prove all of these factors as a condition precedent to parental-rights termination. *C.H.*, 89 S.W.3d at 27; *N.L.D.*, 412 S.W.3d at 819. Evidence relating to a single factor may suffice in a particular situation to support a finding that termination is in the best interests of the child. *In re K.S.*, 420 S.W.3d 852, 855 (Tex. App.—Texarkana 2014, no pet.) (citing *In re J.O.C.*, 47 S.W.3d 108, 115 (Tex. App.—Waco 2001, no pet.), *overruled on other grounds by J.F.C.*, 96 S.W.3d at 267 n.39). When considering the child's best interest, we may take into account that a parent is unable to provide adequate care for a child, lacks parenting skills, or exercises poor judgment. *In re C.A.J.*, 122 S.W.3d 888, 893 (Tex. App.—Fort Worth 2003, no pet.). Also, we may consider parental drug abuse when determining the child's best interest since it reflects poor judgment. *In re M.C.*, 482 S.W.3d 675, 688 (Tex. App.—Texarkana 2016, pet. denied) (citing *In re M.R.*, 243 S.W.3d 807, 820 (Tex. App.—Fort Worth 2007, no pet.)). Other relevant considerations are "the amount of contact between the parent and child, the parent's failure to provide financial and emotional support, continuing criminal history and past performance as a parent." *Id.* (citing *C.H.*, 89 S.W.3d at 28). We will discuss the relevant *Holley* factors.

Although Samantha was too young to express her desires, the trial court could consider whether she was bonded with and well-cared for by her foster family and whether she spent only minimal time with her parents. *See In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). There was evidence that Samantha was bonded to Kathleen and her children and was well cared for by them. The evidence also showed that Otto had no contact with

Samantha for at least eleven of the twelve months of her life. This factor weighs in favor of termination.

The evidence showed that during the three months Otto was not incarcerated, he made no effort to visit or have any contact with Samantha or to take advantage of the services offered through the Department that would have addressed his parental deficiencies. In addition, Otto admitted that although some of the services were available to him while in state jail, at the time of trial, he had not begun any of them. Further, Otto admitted that he had not financially provided for Samantha and that because of his continued use of illegal drugs after the case began, he was incarcerated during most of the pendency of the case. As a result, he has been unable to provide a stable and safe home for Samantha or to have any contact with her.

A parent is unable to provide for a child's emotional and physical needs when he is unable to provide for her financially or provide her with a stable and safe home. *In re H.B.C.*, 482 S.W.3d 696, 704 (Tex. App.—Texarkana 2016, no pet.); *In re Z.M.*, 456 S.W.3d 677, 689 (Tex. App.—Texarkana 2015, no pet.). It is undisputed that Samantha is now in a safe and stable home with a caring family that is providing for her emotional and physical needs. Based on this evidence, the trial court could reasonably form a firm conviction that Otto would not meet the future emotional and physical needs of Samantha or provide her with a safe and stable home environment and that returning her to his care would endanger her emotional and physical well-being. The second, third, fourth, and seventh *Holley* factors weigh in favor of termination.

The Department plans to place Samantha for adoption by Kathleen. The evidence showed that Kathleen and her children are able to meet the physical and emotional needs of Samantha and

provide her a safe and stable home and that they have bonded with Samantha. Otto admitted that he was not able to provide Samantha with a stable home and that he would not be released from state jail for at least 153 days. Although he maintained that he had plans to go to community college, get a job, and be a good father, the trial court, as trier of fact, could reasonably discount that testimony based on Otto's admitted lack of contact with Samantha, his continued drug use, and his non-participation in the services that were available to him to address his parental deficiencies. The trial court could reasonably form a firm conviction that the Department's plans for adoption by Kathleen assured Samantha of a safe and stable home environment. The sixth *Holley* factor weighs in favor of termination.

Otto's unexcused absence from Samantha's life while he was not incarcerated, his continued drug use while on community supervision coupled with his failure to complete a drug treatment program, his failure to start and complete parenting classes and his other services, and his lack of financial support for Samantha indicate that the parent-child relationship is not a proper one. Although Otto blamed his failure to complete, or even start, his services on his incarceration, he had no explanation for why he had not started any of his services in the three months before his incarceration. The eighth and ninth *Holley* factors weigh in favor of termination.

Considering the *Holley* factors, and in light of all of the evidence, we find that the trial court reasonably could have formed a firm belief or conviction that termination of Otto's parental rights was in the best interest of Samantha. Therefore, we find that the evidence was factually and legally sufficient to support the trial court's best-interest finding. We overrule this point of error.

For the reasons stated above, we affirm the judgment of the trial court.

Ralph K. Burgess
Justice

Date Submitted: May 24, 2017
Date Decided: June 7, 2017