NO. 12-16-00200-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF J. K. S.,	***§***	***APPEAL FROM THE 349TH***
	§	***JUDICIAL DISTRICT COURT***
A CHILD	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

S.S. appeals the termination of her parental rights. In two issues, she challenges the legal and factual sufficiency of the evidence to support the trial court's termination order. We affirm.

BACKGROUND

S.S. is the mother of J.K.S.[1] On January 27, 2015, the Department of Family and Protective Services (the Department) filed an original petition for protection of J.K.S., for conservatorship, and for termination of S.S.'s parental rights. The Department was appointed temporary managing conservator of the child, and S.S. was appointed temporary possessory conservator with limited rights and duties.

At the conclusion of the trial on the merits, the jury found, by clear and convincing evidence, that S.S.'s parental rights should be terminated. Thereafter, the trial court found, by clear and convincing evidence, that S.S. had engaged in one or more of the acts or omissions necessary to support termination of her parental rights under subsections (D), (E), (N), (O), and (P) of Texas Family Code Section 161.001(b)(1). The trial court also found that termination of the parent-child relationship between S.S. and J.K.S. was in the child's best interest. Based on

[1] The trial court ordered that J.R.B. is, and hereby adjudicated to be, the father of J.K.S. The father's parental rights were not terminated in this proceeding. In the order of termination as to the mother and final order in suit affecting the parent-child relationship, the trial court appointed the Department as sole permanent managing conservator of the child. J.R.B. was appointed as possessory conservator of the child.

these findings, the trial court ordered that the parent-child relationship between S.S. and J.K.S. be terminated. This appeal followed.

TERMINATION OF PARENTAL RIGHTS

Involuntary termination of parental rights embodies fundamental constitutional rights. ***Vela v. Marywood***, 17 S.W.3d 750, 759 (Tex. App.–Austin 2000), *pet. denied per curiam*, 53 S.W.3d 684 (Tex. 2001); ***In re J.J.***, 911 S.W.2d 437, 439 (Tex. App.–Texarkana 1995, writ denied). Because a termination action "permanently sunders" the bonds between a parent and child, the proceedings must be strictly scrutinized. ***Wiley v. Spratlan***, 543 S.W.2d 349, 352 (Tex. 1976); ***In re Shaw***, 966 S.W.2d 174, 179 (Tex. App.–El Paso 1998, no pet.).

Section 161.001 of the family code permits a court to order termination of parental rights if two elements are established. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); ***In re J.M.T.***, 39 S.W.3d 234, 237 (Tex. App.–Waco 1999, no pet.). First, the parent must have engaged in any one of the acts or omissions itemized in the second subsection of the statute. TEX. FAM. CODE ANN. § 161.001(b)(1) (West Supp. 2016); ***Green v. Tex. Dep't of Protective & Regulatory Servs.***, 25 S.W.3d 213, 219 (Tex. App.–El Paso 2000, no pet.); ***In re J.M.T.***, 39 S.W.3d at 237. Second, termination must be in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2016); ***In re J.M.T.***, 39 S.W.3d at 237. Both elements must be established by clear and convincing evidence, and proof of one element does not alleviate the petitioner's burden of proving the other. TEX. FAM. CODE ANN. § 161.001; ***Wiley***, 543 S.W.2d at 351; ***In re J.M.T.***, 39 S.W.3d at 237.

The clear and convincing standard for termination of parental rights is both constitutionally and statutorily mandated. TEX. FAM. CODE ANN. § 161.001; ***In re J.J.***, 911 S.W.2d at 439. 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 (West 2014). The burden of proof is upon the party seeking the deprivation of parental rights. ***In re J.M.T.***, 39 S.W.3d at 240.

STANDARD OF REVIEW

When confronted with both a legal and factual sufficiency challenge, an appellate court must first review the legal sufficiency of the evidence. ***Glover v. Tex. Gen. Indem. Co.***, 619

S.W.2d 400, 401 (Tex. 1981); ***In re M.D.S.***, 1 S.W.3d 190, 197 (Tex. App.–Amarillo 1999, no pet.). In conducting a legal sufficiency review, we 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 findings were true. ***In re J.F.C.***, 96 S.W.3d 256, 266 (Tex. 2002). We must assume that the fact finder settled disputed facts in favor of its finding if a reasonable fact finder could do so and disregard all evidence that a reasonable fact finder could have disbelieved or found incredible. ***Id***.

The appropriate standard for reviewing a factual sufficiency challenge to the termination findings is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the petitioner's allegations. ***In re C.H.***, 89 S.W.3d 17, 25 (Tex. 2002). In determining whether the fact finder has met this standard, an appellate court considers all the evidence in the record, both that in support of and contrary to the trial court's findings. ***Id***. at 27-29. Further, an appellate court should consider whether disputed evidence is such that a reasonable fact finder could not have reconciled that disputed evidence in favor of its finding. ***In re J.F.C.***, 96 S.W.3d at 266. The trier of fact is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. ***Nordstrom v. Nordstrom***, 965 S.W.2d 575, 580 (Tex. App.–Houston [1st Dist.] 1997, pet. denied).

BEST INTEREST OF THE CHILDREN

In her first and second issues, S.S. contends the evidence is legally and factually insufficient to support a finding that termination of her parental rights is in the child's best interest. In determining the best interest of the child, a number of factors have been considered, including (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. ***Holley v. Adams***, 544 S.W.2d 367, 371-72 (Tex. 1976).

The family code also provides a list of factors that we will consider in conjunction with the above-mentioned ***Holley*** factors. *See* TEX. FAM. CODE ANN. § 263.307(b) (West Supp.

2016). These include (1) the child's age and physical and mental vulnerabilities; (2) the magnitude, frequency, and circumstances of the harm to the child; (3) 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; (4) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (5) 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; (6) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (7) whether the child's family demonstrates adequate parenting skills; and (8) whether an adequate social support system consisting of an extended family and friends is available to the child. *See* ***id.*** § 263.307(b)(1), (3), (6), (8), (10), (11), (12), (13).

The evidence need not prove all statutory or ***Holley*** factors in order to show that termination of parental rights is in a child's best interest. *See* ***Holley***, 544 S.W.2d at 372; ***In re J.I.T.P.***, 99 S.W.3d 841, 848 (Tex. App.—Houston [14th Dist.] 2003, no pet.). In other words, the best interest of the child does not require proof of any unique set of factors nor limit proof to any specific factors. ***In re D.M.***, 58 S.W.3d 801, 814 (Tex. App.—Fort Worth 2001, no pet.). Undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the child's best interest. ***In re M.R.J.M.***, 280 S.W.3d 494, 507 (Tex, App.—Fort Worth 2009, no pet.). But the presence of scant evidence relevant to each factor will not support such a finding. ***Id.*** Evidence supporting termination of parental rights is also probative in determining whether termination is in the best interest of the child. *See* ***In re C.H.***, 89 S.W.3d at 28-29. We apply the statutory and ***Holley*** factors below.

The Evidence

This case began while S.S. was in the hospital after giving birth to J.K.S. A labor and delivery nurse testified S.S. left the hospital building to smoke, but did not inform any of the nurses that she was leaving her room. The nurse stated that J.K.S. was left unattended, that S.S.'s behavior was "highly unusual," and that J.K.S. could have aspirated and choked to death while alone. The nurse also stated that S.S. did not appear to be bonding with J.K.S. On one occasion, she brought the baby to the nurse's station and his diaper had not been changed recently.

Brenda Snyder, a Department investigator, testified that she received a report that S.S. was not bonding with J.K.S., was asking for more pain medication than she needed, and was using drugs. Snyder stated that S.S.'s hospital discharge summary indicated that she had a positive drug screen for cocaine during her prenatal care. She also noted that S.S. had a history with the Department regarding the same allegations as to another child. After a few days of attempting to contact S.S., Snyder met her and discussed the allegations. S.S. admitted that she drank a little before she discovered that she was pregnant, but did not know why cocaine was in her system. Snyder asked S.S. to submit to a drug test. S.S.'s urine test was negative, but her hair follicle test was positive for cocaine, showing drug use within the past ninety days. Snyder concluded that S.S. had used cocaine during her third trimester with J.K.S. She also said that S.S. was living with her mother. Snyder bought S.S. a pack-and-play after discovering that she did not have a separate place for the baby to sleep.

S.S.'s service plan

S.S. did not complete, or substantially comply, with her service plan. Laura Wendt, the Department's family based safety services case worker, stated that she created a service plan for S.S. in November 2014. That service plan required that S.S. attend individual counseling, submit to random drug testing, obtain employment and housing, and provide for her child. However, Wendt stated that S.S. did not begin services, did not attend counseling, did not look for employment, housing, or transportation, and did not attend random drug testing within the required time frame. She was concerned that S.S. could not provide for her child because the Department provided S.S., at her request, with diapers, formula, and wipes on numerous occasions. S.S. stated that she ran out of formula because J.K.S. ate "a lot."

In January 2015, Wendt stated that S.S. had a positive urine and hair follicle test for cocaine. At that point, J.K.S. was removed from the home and placed in a foster home. S.S.'s new case worker, Ashley Day, stated that she created a service plan for S.S. that included submitting to random drug tests, not associating with known criminals, completing parenting classes, participating in a psychological evaluation and counseling, obtaining and maintaining legal employment and housing, attending all meetings or court hearings, communicating with the case worker, and participating in regular visitations. Day stated that S.S. did not comply with any of these services.

S.S.'s courtesy worker attempted to set up counseling, parenting classes, and random drug tests after S.S. moved out of the county. She was never able to contact S.S. at a home where she was possibly living, and never conclusively established where S.S. actually was living. Nor was the courtesy worker ever able to successfully set up services for S.S. Jessica Walker, the Department's conservatorship supervisor, testified that S.S. was not able to communicate with any of her case workers, did not consistently attend meetings with her case workers, and did not attend all of her court hearings. None of the case workers could contact S.S. consistently from February 2015 until the trial date. According to Day, S.S.'s telephone number changed frequently and she was unable to visit S.S. at any of the addresses where she resided. Walker stated that S.S. did not complete a psychological evaluation or counseling. S.S. testified that she did not know an evaluation had been scheduled. Although several case workers discussed S.S.'s need for transportation, S.S. never mentioned that she lacked transportation until after she missed appointments or meetings.

Drug use

The record shows that S.S. had positive hair follicle tests for cocaine on October 8, 2014, December 18, 2014, and January 20, 2015. She also had a positive urine test for cocaine on January 20, 2015. S.S. could not recall testing positive for drugs even though she admitted using drugs while pregnant with J.K.S. She denied using cocaine after J.K.S. was removed. Further, S.S. either refused to submit to drug testing or failed to do so within the required time. The Department considered these refusals as positive drug test results.

Carolyn Eslinger, a licensed chemical dependency counselor at the Alcohol and Drug Abuse Counsel of Deep East Texas, testified that she conducted a screening on S.S. in December 2014. Eslinger recommended S.S. attend outpatient treatment and Alcoholics and Narcotics Anonymous meetings. She believed that S.S. had a cocaine dependency. S.S. could not recall being advised to attend meetings or outpatient treatment.

S.S.'s boyfriend

At trial, S.S. testified that she lived with her boyfriend for the past four months before trial. She described herself as "somewhat" engaged to him. S.S. did not inform the Department that she was living with her boyfriend because it was not their business. She admitted that he drank and was unemployed. According to Walker, S.S.'s boyfriend had an extensive criminal history with multiple arrests for assault causing bodily injury, robbery, cruelty to non-livestock

animals, and dog fighting. S.S.'s boyfriend had been sentenced to five years imprisonment for assault of a family member by impeding breath or circulation, and was currently on parole for that offense. Walker considered S.S.'s boyfriend to be a current threat to a child's safety.

Counseling

Bonnie McBride, a licensed clinical social worker, testified that S.S. attended a total of three counseling sessions. S.S. presented problems with illegal drug use, failure to prioritize her children over her addiction, a lack of employment, and a lack of housing. McBride stated that S.S. denied needing mental health treatment or substance abuse counseling. She described S.S. as a "rolling stone," never knowing exactly where she would be living. According to McBride, S.S. blamed other people for her problems and expected others to provide her with food, housing, and transportation. S.S. admitted that she was not successfully discharged from counseling.

S.S.'s employment and housing

S.S. did not have stable employment or housing. According to S.S., she had never had a job and had no income. She did not recall that she was supposed to maintain stable employment. S.S. was offered a job during the case, but needed a state identification in order to attend orientation. At trial, she admitted that she had not obtained the identification or reapplied for the job. A CASA supervisor stated that a volunteer offered S.S. a job, but she was not interested. However, S.S. testified that if J.K.S. were returned to her, she would obtain a job and a house.

According to S.S., she knew that she was supposed to maintain stable housing. She did not recall if she lived at any residence for at least six months. S.S. stated that she lived with her parents, two of her sisters, and her new boyfriend. She lived at approximately six different addresses during the pendency of the case. S.S. did not believe it mattered if she moved frequently because J.K.S. was not living with her.

Supervising other children

S.S.'s service plan prohibited her from supervising other children. However, S.S. admitted that she babysat her sister's children, and she knew this violated her service plan. Moreover, S.S. admitted at trial that she had custody or possession of her two-year old child. She had never reported to the Department that she had possession of that child. Walker testified to being "floored" by this admission. She had "grave concerns" about a child residing with S.S. and S.S.'s boyfriend.

J.K.S.

J.K.S.'s foster mother stated that he had resided with her since he was three months old. At trial, J.K.S. was eighteen months old. The foster mother stated that he was smart, "rule[d] the house," mimicked his foster father, and enjoyed playing with his foster siblings. He had a consistent physician and regularly scheduled checkups. Day stated that J.K.S. was a "happy" little guy and loved his foster parents. Victoria Miranda, a Department conservatorship worker, described J.K.S. as an active cute baby.

J.K.S. had asthma and received treatment for it. He also had a hernia and, before his removal, had been scheduled for a doctor's appointment to discuss treatment. S.S. stated that J.K.S. would have eventually been treated for his hernia even though she did not recall missing the appointment. J.K.S.'s foster mother stated that he had been successfully treated for the hernia. She said that J.K.S. cried a lot and appeared to be in pain before being treated for the hernia. After his hernia surgery, J.K.S. began to settle down, play, and smile.

Visitations with J.K.S.

According to Day, S.S. was required to obtain two consecutive negative drug tests before the Department would schedule visitations with J.K.S. S.S. could not recall missing random drug tests on five occasions between March and August of 2015. According to the case workers, S.S. either refused to submit to drug testing, or failed to do so within the required time. Day and Walker stated that S.S. knew refusing to submit to drug testing would be considered a positive result. Day testified that S.S. was unable to visit her child until June 2015 because she did not obtain two consecutive negative drug tests until that time.

In June 2015, S.S. visited J.K.S. for the first time since his removal. According to Day, J.K.S. regarded S.S. as a stranger. She said that S.S. did not appear to be able to take care of her child. Miranda testified that S.S. and J.K.S. did not appear to be bonded and that S.S. did not know how to soothe the baby. The Department's case workers testified that S.S. attended three visitations, but missed the remaining scheduled visitations. S.S. admitted that she had seen J.K.S. a total of three hours since he had been removed.

Best interest

Day, Walker, and the CASA supervisor believed that termination of S.S.'s parental rights was in the best interest of J.K.S. Walker characterized S.S. as making "extremely little effort" to get her life together for her child. She stated that S.S. could not ensure J.K.S.'s safety or well

being, and had not shown a sincere interest in providing him with attention, security, comfort, water, shelter, or clothing. Moreover, S.S. had not demonstrated the ability to take care of herself. According to S.S., she planned to get a job, income, vehicle, and a house if J.K.S. were returned to her. She stated that J.K.S. would be safe with her. According to S.S., none of the classes or counseling that she missed affected her ability to care for J.K.S. S.S. blamed the Department for preventing her from appearing for her random drug tests, meeting her service plan obligations, and obtaining employment and housing.

Conclusion

Viewing the above evidence relating to the statutory and ***Holley*** factors in the light most favorable to the trial court's findings, we hold that a reasonable fact finder could have formed a firm belief or conviction that termination of S.S.'s parental rights is in the best interest of the child. *See* ***In re J.F.C.***, 96 S.W.3d at 266. S.S. argues, however, that there was no evidence, or insufficient evidence, that J.K.S. was harmed while living with S.S. or that S.S. currently used drugs. Moreover, she contends that her two-year old child resides with her, she has joint managing conservatorship of her six-year old child, and she was showing a desire to complete her service plan. But this evidence is not so significant that a reasonable trier of fact could not have reconciled the evidence in favor of its finding and formed a firm belief or conviction that termination of S.S.'s parental rights is in the best interest of the child. *See* ***id.*** Therefore, we hold that the evidence is legally and factually sufficient to support the trial court's finding that termination of S.S.'s parental rights is in the child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we overrule S.S.'s first and second issues.

DISPOSITION

Having overruled S.S.'s first and second issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered December 30, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

DECEMBER 30, 2016

NO. 12-16-00200-CV

IN THE INTEREST OF J. K. S., A CHILD

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 15-0012)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.