Opinion issued April 12, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00892-CV

IN THE INTEREST OF T. B. V. J., III AND I. D. M., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2016-05913J

MEMORANDUM OPINION

In this accelerated appeal,[1] N.U.V. ("Mother") challenges the trial court's decree terminating her parental rights to her two minor children, T.B.V.J., III ("Titus") and I.D.M. ("Isaac").[2] Titus and Isaac were placed in the temporary

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1 *See* TEX. R. APP. P. 28.1, 28.4; *see also* TEX. FAM. CODE § 109.002(a–1).

2 Appellant, her children, and all other parties will be referred to by pseudonyms, both to protect their privacy and for ease of reading.

managing conservatorship of the Texas Department of Family and Protective Services after Mother was observed acting violently toward them, apparently under the influence of an unknown illicit drug. Over the following year, Mother failed to visit Titus and Isaac, submit to court-ordered drug tests, or comply with other terms of her family service plan, and she continued to exhibit erratic behavior suggestive of untreated mental illness and continuing illicit drug use, all of which resulted in the termination of Mother's parental rights. In her sole issue, Mother contends that the evidence is factually insufficient to support the trial court's finding that termination of her parental rights was in the children's best interest.[3] We affirm.

Background

In 2007, Mother loses custody of her two oldest sons

Mother has four children: Cyrus, Barnabas, Titus, and Isaac. In May 2007, before Titus and Isaac were born, the Department received a referral accusing Mother of neglectful supervision of her two oldest sons, Cyrus and Barnabas. The referral alleged that Mother was caring for them while under the influence of illicit drugs. The Department conducted an investigation and filed a petition to terminate Mother's parental rights. The petition was ultimately granted, and Cyrus and

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[3] *See* TEX. FAM. CODE § 161.001(b)(2).

Barnabas were adopted by their maternal aunt. Mother has not had any contact with either son since they were removed from her care in 2007.

In 2016, the Department receives a referral accusing Mother of neglectful supervision of Titus and Isaac

After Mother lost custody of Cyrus and Barnabas, she gave birth to two more sons, who are the subject of the present suit: Titus, who was born in 2011, and Isaac, who was born in 2012.

In October 2016, the Department received a referral accusing Mother of physically abusing Titus and Isaac. At the time of the referral, Titus was five, and Isaac was four. The referral alleged that Mother was addicted to "kush,"[4] which caused her to become "very violent" and "to beat her children." The referral further alleged that, when Mother is "out looking for drugs, the children run around [their apartment] complex outside totally alone" without any shoes or supervision.

When a caseworker arrived at Mother's home to investigate the allegations, Mother "appeared to be under the influence of an unknown substance, sweating profusely, exhibited erratic behavior and was yelling and screaming." The

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[4] *See A.R. v. Tex. Dep't of Family & Protective Servs.*, No. 03-15-00185-CV, 2015 WL 4909908, at *4 n.4 (Tex. App.—Austin Aug. 12, 2015, no pet.) (mem. op.) (citing presentation explaining that "kush" is "mixture of herbs and spices that is typically sprayed with synthetic compounds that mimic the effects of controlled substances like ecstasy and meth"); *see also* TEX. HEALTH & SAFETY CODE § 481.1031 (designating certain synthetic chemical cannabinoids as controlled substances).

caseworker observed Mother "aggressively pulling both minor children from a car and dragging them on the pavement." Mother refused to cooperate with the caseworker, and the caseworker "called 911 out of concern for the children and their safety." The caseworker spoke with several of Mother's neighbors, who said that Mother "was yelling and screaming and slamming doors all night long." "One neighbor said that she slammed the door so hard the night before that she broke their window as well as [Mother]'s window."

Due to concerns for the children's safety, the Department requested that Titus and Isaac be immediately removed from Mother's custody.

The Department petitions to terminate Mother's parental rights

After the Department completed its preliminary investigation, it filed a petition to terminate Mother's parental rights to Titus and Isaac, and the trial court appointed the Department temporary managing conservator of the two boys. The trial court later signed an order approving and requiring Mother to follow a family service plan prepared for her by the Department.

Among other things, the plan required Mother to (1) maintain stable housing and employment; (2) display appropriate and encouraging behavior during all visits; (3) participate in family therapy; (4) participate in individual therapy, anger management, and parenting classes; (5) undergo a psychological evaluation and

follow all recommendations; and (6) submit to random drug tests, with the understanding that failure to do so would be treated as an automatic positive result.

The plan included the statutorily-required admonishment that failure to comply could result in the termination of Mother's parental rights.[5] Although Mother refused to sign the plan, the trial court found that Mother had reviewed it and understood its terms.

The trial court terminates Mother's parental rights

About a year after the Department filed its petition, the case was tried to the bench. Mother did not appear at trial. Mother's counsel explained that she had arrived at the courthouse but refused to attend the trial and "was downstairs sitting outside protesting."

The Department proffered a number of exhibits, which the trial court admitted without objection. The exhibits included:

- Mother's criminal records, which showed, among other things, that when Titus was two and Isaac was one, Mother spent three days in county jail for a conviction for possession of marijuana;

- Father's criminal records, which showed, among other things, that when Titus was nine months and Mother was pregnant Isaac, Father was convicted of misdemeanor assault of Mother;[6]

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5 *See* TEX. FAM. CODE § 263.102(b).

6 Father was identified through paternity testing.

- Mother's drug test results, which showed that, during the pendency of the case, she twice left drug tests without providing a sample, resulting in both tests being deemed positive; and

- various text messages sent by Mother to the caseworker throughout the pendency of the case.

The text messages Mother sent to the caseworker were incoherent, profane, and somewhat threatening. They included the following:

- "My son [Titus] qualifies for a study but y'all got him in a system like he don't have s*** I HATE YOU HOES SAVE THIS FOR THE JUDGE LET HIM KNOW MY LIL N**** BE GETTING PAID WHEN HE WITH HIS MAMMA WE AINT WORRIED ABOUT S*** CPS SAY GOD GOT US"

- "And if yo got so much power why don't you terminate my rights if I'm such a F***** up mom but you can't cause GOD AINT SLEEP"

- "I'm glad I don't have to talk to your stupid a** no more you did not help with any thing GOOD RIDDANCE YOU JUST MAD THAT MS LIZ TOLD YOU I WAS A GREAT MOM AND YOU DONT KNOW s*** about me . . . THE TRUTH WILL COME OUT AND GOD GONE PUNISH ALL YALL A****"

- "I Pray to God that hurricane Harvey make landfall and wipe you and everything you love off . . . ."

After the trial court admitted the Department's exhibits, two witnesses testified: the Department's caseworker, L. Owens, and a Child Advocates' volunteer, A. Stamps.

Owens testified that the case arose from allegations that Mother was consuming illicit drugs and physically abusing Titus and Isaac. Thereafter, Mother failed to fulfill at least four requirements of her family service plan. First, although

Mother had stable housing, she did not have stable employment. According to Owens, Mother said she had been unable to find a job because CPS had "kicked in her door." Second, although Mother had completed a psychosocial evaluation, a substance abuse assessment, and a psychological assessment, she had failed to follow any of the assessments' recommendations. Third, Mother had failed to participate in counseling or parenting class. Finally, Mother had failed to submit to random drugs tests.

Owens testified that, during the pendency of the case, Mother had only visited the boys once, shortly after the Department removed them from her care over a year ago. Mother "refused to visit the children at the CPS office because she said it made her feel sad." When Mother learned that her children had been placed with their maternal aunt, Mother told Owens that she wanted to start seeing them again, but she changed her mind when Owens informed her that the visits would still have to occur at the CPS office. Owens further testified that Mother had lost custody of her two older sons in 2007.

Owens testified that she and Mother had texted each other throughout the pendency of the case and that Mother never inquired about the children's wellbeing. The messages she did receive from Mother were often profane and incoherent, suggestive of mental instability.

Owens testified that she did not believe that Mother was "mentally capable" of caring for her boys. Mother told her that she had been prescribed medication for bipolar disorder but refused to take it:

> She said bipolar is the white man's diagnosis and she was prescribed Seroquel and Zoloft and she said that it's the white man's medication and she flushed it down the drain.

According to Owens, Titus and Isaac were doing well in their current placement with their maternal aunt. The boys were initially placed into foster care, but neither of them adjusted well. Titus had a particularly difficult time, especially at school. He would fight with other boys and was disrespectful to his teachers. Then the boys were placed with their maternal aunt, who already had custody of their two older brothers, Cyrus and Barnabas. Since placement with their aunt, their behavior had improved significantly. Titus, in fact, had undergone a complete "turn around" and was receiving "excellent conduct grades in school."

Before their placement with their aunt, the boys did not have a relationship with their older brothers. But since then, the boys had bonded with their older brothers, who helped take care of them and helped them adjust to their new living arrangement. Owens testified that placement with the boys' aunt was "very, very good for them" because they had developed a "good relationship" with their older brothers and become "bonded" with the aunt and because the arrangement provided them with "stability." Owens also testified that the boys' placement with

their aunt provided them with a "permanent, stable, and nurturing environment." According to Owens, the boys' aunt wanted to adopt them and placement with their aunt was "the absolute best permanency plan" available to them.

Stamps provided similar testimony. She said that the boys were "doing excellent" with their aunt. She opined that the boys should stay with their aunt and that Mother's parental rights should be terminated. Stamps explained:

> The mother has not proven that she can provide a safe and stable home for the boys. She [has] not, until recently[,] expressed a desire to even see the boys. She hasn't provided any type of support since the children have been in care. She has not completed any of the services. And at this time we don't feel that being placed with her would be in the children's best interest.

Stamps also testified about Mother's erratic behavior:

> She talks to the air. She curses. She's had to be asked by the bailiffs several times to be quiet. She's exhibited inappropriate behavior here in front of the Judge. She's just not stable.

After the hearing, the trial court granted the Department's petition, terminated Mother's parental rights to Titus and Isaac, and appointed the Department permanent managing conservator of both boys. Mother appeals.[7]

Sufficiency of Evidence

In her sole issue, Mother contends that the evidence is factually insufficient to support the trial court's finding that termination of her parental rights was in her children's best interest.

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[7] Father's rights were also terminated. There is no appeal of that termination.

A. Applicable law and standard of review

Under Section 161.001 of the Family Code, the Department may petition a trial court to terminate a parent-child relationship. The trial court may grant the petition if the Department proves, 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 child's best interest. TEX. FAM. CODE § 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." *Id.* § 101.007; *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

Section 161.001 of the Family Code lists 21 acts and omissions justifying termination of the parent-child relationship. TEX. FAM. CODE § 161.001(b)(1). Under Section 161.001, termination is justified if, among other acts and omissions, the parent:

- knowingly places or knowingly allows the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child, *id.* § 161.001(b)(1)(D);

- engages in conduct or knowingly places the child with people who engage in conduct that endangers the physical or emotional well-being of the child, *id.* § 161.001(b)(1)(E);

- constructively abandons the child while in the Department's conservatorship, *id.* § 161.001(b)(1)(N); or

- fails to comply with the provisions of a court order that specifically establishes the actions necessary for the parent to obtain the return of the child, *id.* § 161.001(b)(1)(O).

In determining whether termination is in the child's best interest, courts consider the nine nonexclusive factors listed by the Texas Supreme Court in *Holley v. Adams*: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions that may indicate the existing parent-child relationship is not a proper one; and (9) any excuse for the parent's acts or omissions. 544 S.W.2d 367, 372 (Tex. 1976).

Further, "the same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) may be probative in determining the best interests of the child." *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

In a factual sufficiency review in a parental-rights-termination case, the appellate standard for reviewing termination findings is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the

truth of the Department's allegations. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). By focusing on whether a reasonable factfinder could form a firm conviction or belief, the appellate court maintains the required deference for the factfinder's role. *Id.* at 26. "An appellate court's review must not be so rigorous that the only factfindings that could withstand review are those established beyond a reasonable doubt." *Id.* We should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. "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.*

B. Factual sufficiency of best-interest finding

We now consider whether there was factually sufficient evidence that termination was in the children's best interest.

The evidence shows that, when Mother had custody of Titus and Isaac, she consumed the drug "kush," which caused her to become violent toward the boys and to neglect caring for them. After the boys were removed, Mother refused to submit to court-ordered drug tests, indicating that she continued to use illicit drugs even though she had been warned that doing so could result in the termination of her parental rights.

Mother's "pattern of illegal drug use suggests [she] was not willing and able to provide the [children] with a safe environment—a primary consideration in determining the [children]'s best interest." *In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Mother's continual drug use weighs against Mother under the third and eighth *Holley* factors, which consider the present and future danger to the children and any actions indicating an improper parent-child relationship. *In re A.C.*, 394 S.W.3d at 642 (past and ongoing drug use supports finding that termination is in child's best interest); *In re G.A.*, No. 01-11-00565-CV, 2012 WL 1068630, at *6 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, pet. denied) (mem. op.) ("A parent's history of drug use or criminal conduct can show a pattern of conduct that subjects a child to an uncertain and unstable life, endangering the child's physical and emotional well-being."); *see Holley*, 554 S.W.2d at 372.

Mother visited Titus and Isaac only once during the year they were under the Department's conservatorship, and she never inquired about their wellbeing. Mother refused to follow the recommendations of her psychosocial evaluation, substance abuse assessment, and psychological assessment, and she failed to participate in counseling or parenting class. Likewise, Mother refused to take medication or receive treatment for her disclosed bipolar disorder, and she continued to exhibit erratic behavior throughout the pendency of the case, such as

sending profane, incoherent text messages to the caseworker and yelling during her court hearings. This evidence weighs against Mother under the third, fourth, and eighth *Holley* factors. 544 S.W.2d at 372.

Mother is unemployed, and there is no indication that she is seeking employment. This evidence weighs against Mother under the second, fourth, and seventh *Holley* factors, which consider the children's needs, Mother's ability to satisfy those needs, and the stability of Mother's home. *Id.*

Evidence of these acts or omissions proscribed by Section 161.001 "may be probative in determining the best interests of the children." *In re L.M.*, 104 S.W.3d at 647. The trial court found that Mother committed four such acts or omissions. Specifically, the trial court found that Mother:

- knowingly placed or knowingly allowed Titus and Isaac to remain in conditions or surroundings that endangered their physical or emotional well-being;
- engaged in conduct that endangered Titus and Isaac's physical or emotional well-being;
- constructively abandoned Titus and Isaac; and
- failed to comply with the provisions of the family service plan—a court order that specifically established the actions necessary for Mother to obtain the return of her children.

TEX. FAM. CODE § 161.001(b)(1)(D), (E), (N), (O).

The evidence shows that Titus and Isaac were doing well with their maternal aunt. The caseworker and child advocate both testified that the boys' aunt was

meeting their needs and providing them with a stable and nurturing environment. They further testified that Titus and Isaac had bonded with their older brothers and aunt and that their aunt planned on adopting them. This evidence weighs against Mother under the second, fourth, sixth, and seventh *Holley* factors, considering the children's present and future needs, Mother's and their aunt's respective parental abilities and plans for raising them, and the stability of the respective homes. *Holley*, 544 S.W.2d at 372.

Mother did not testify at trial or otherwise rebut the evidence presented by the Department.

We hold that a reasonable factfinder could have formed a firm conviction or belief that termination of Mother's parental rights was in the best interests of Titus and Isaac. We overrule Mother's sole issue.

Conclusion

We affirm the trial court's decree.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.