**Affirmed and Memorandum Opinion filed April 26, 2016.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-16-00070-CV**

**IN THE INTEREST OF A.J.–A., A CHILD**

**On Appeal from the 314th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2015-00723J**

## M E M O R A N D U M  O P I N I O N

Appellant J.P. ("Father") appeals the trial court's final decree terminating his parental rights, and appointing the Department of Family and Protective Services (the "Department") as sole managing conservator of A.J.-A. ("the Child"). On appeal appellant challenges the legal and factual sufficiency of the evidence to support (1) the predicate grounds under which his parental rights were terminated, and (2) that termination was in the best interest of the Child. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Pretrial Removal Affidavit

On February 2, 2015, the Department received a referral based on physical abuse of the Child when she was one day old. A subsequent investigation did not reveal physical abuse of the Child, but revealed that the Child's mother had a previous history with Child Protective Services[1] in which another of her children died from physical abuse. The mother did not report her pregnancy with the Child to her caseworker at the Department. At the time of the earlier child's death the Department removed two other children from the mother. The mother's rights to those two children were terminated on endangerment grounds. *See* Tex. Fam. Code Ann. § 161.001(1)(E) (West 2014). In this case, the Department sought removal of the Child primarily due to the death of the mother's previous child and the mother's denial of her boyfriend's role in that child's death.

At the time of the Child's removal the Department was unable to locate Father due to the short duration of his relationship with the Child's mother and the mother's lack of contact information for Father.

On February 4, 2015, the Department filed an original petition for protection of the Child and termination of both parents' rights. In its petition the Department alleged termination of Father's rights was warranted because Father, among other things:

- voluntarily, and with knowledge of the pregnancy, abandoned the mother of the Child beginning at a time during her pregnancy with the Child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the

[1] Child Protective Services is a division of the Department that investigates reports of abuse or neglect of children.

Child, and remained apart from the Child or failed to support the Child since the birth, pursuant to §161.001(1)(H), Texas Family Code; and

- failed to comply with the provisions of a court order that specifically established the actions necessary for Father to obtain the return of the Child who has been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the Child's removal from the parent under Chapter 262 for the abuse or neglect of the Child, pursuant to §161.001(1)(O), Texas Family Code.

Prior to trial, the Department attempted to re-unite the Child with Father. A family service plan was prepared, translated into Spanish, and explained to Father. Father visited the Child once a month for two hours each visit.

**B. Trial Testimony**

Prior to the introduction of testimony the Department introduced into evidence the return of citation for both parents, the removal affidavit, temporary orders, a status hearing order, the family service plans, reports on both parents from the Children's Crisis Care Center ("4C's"), the Child's medical records, Father's criminal record reflecting an assault on a family member, the mother's drug test results, and the decree of the prior termination of the mother's rights.

Ashley Chamblee, the caseworker, testified that a family service plan had been developed for Father. The service plan was translated into Spanish, explained to Father in Spanish, and signed by him. Chamblee testified that Father had not completed the services required by his service plan. Father complied with random drug tests and attended all visits, court hearings, and meetings with the Department. Father also completed his psychosocial assessment.

Chamblee testified that Father did not complete counseling recommended by the assessment, or parenting classes. At the time of trial Father was living in a

mobile home with several other men on the grounds of an automotive repair shop. Father was informed that this residence was not conducive for a child and did not comply with the service plan's requirement that he maintain a safe and stable home.

The 4C's report on Father was admitted into evidence. In that report Father reported that the Child's mother called him "a couple of months" after they had separated and told him she was pregnant. Father also reported that the Child's mother called him the next day "and told him she was just kidding." Father then heard from the mother, who reported that she was having twins, and that he was the father. Father remarked, "I did not know what to believe and whether I could trust her since I never really got to know her well." On the day the Child was born, the Child's mother called Father and told him he was the Child's father. Father reported a desire to gain custody of the Child and care for her. Father had been arrested for soliciting a prostitute and assault. He was released on the prostitution charge after 24 hours; he pleaded guilty to the assault charge and served 14 days in jail.

The 4C's report recommended that Father participate in individual counseling to address: (1) his role and responsibility in providing stability and safety to the Child; (2) assess his level of commitment to the Child and the adjustments and changes he is likely to encounter as a single parent to a newborn; (3) how he will reestablish contact and his commitment to his three-year-old daughter who resides in California; (4) his plans to secure reliable, stable child care for the Child; (5) expanding his support system and reaching out to community services for support; and (6) his emotional needs and expectations in relationships and what constitutes an emotionally healthy relationship. The report further recommended that Father complete parenting classes, maintain safe and stable

housing, and have regular visitation with the Child.

The Child's mother testified that she informed Father she was pregnant "from the first month on." Father did not provide support during the pregnancy or appear at the hospital for the Child's birth.

Father testified that he did not attend individual counseling or parenting classes because he did not have the addresses where the counseling and classes were scheduled. On cross-examination, the Department's attorney showed Father that Father's family service plan listed names, addresses, and phone numbers of places where Father could obtain counseling and attend classes.

Following argument of counsel the trial court found Father's parental rights should be terminated based on the predicate findings under Family Code sections 161.001(1)(H) and (O), and that termination of Father's rights was in the best interest of the Child. The trial court also terminated the Child's mother's parental rights based on the predicate finding under Family Code section 161.001(1)(M) due to the previous termination of parental rights to other children on endangerment grounds. The Child's mother has not appealed.

## II. ANALYSIS

### A. Predicate Termination Grounds

In his first two issues Father argues the evidence is legally and factually insufficient to support the termination of his parental rights under Texas Family Code sections 161.001(1)(H) and (O). Parental rights can be terminated upon proof by clear and convincing evidence that (1) the parent has committed an act prohibited by section 161.001(1) of the Family Code; and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(1), (2) (West 2014); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009).

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re D.R.A.*, 374 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Although parental rights are of constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002) ("Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.").

Due to the severity and permanency of the termination of parental rights, the burden of proof is heightened to the clear-and-convincing-evidence standard. *See* Tex. Fam. Code Ann. § 161.001; *In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002). "Clear and convincing evidence" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007 (West 2014); *In re J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *In re C.M.C.*, 273 S.W.3d 862, 873 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

In reviewing legal sufficiency of the evidence in a parental termination case, we must consider all evidence in the light most favorable to the finding to determine whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. *In re J.O.A.*, 283 S.W.3d at 336. We assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence that a reasonable fact finder could have disbelieved. *Id.*; *In re G.M.G.*, 444 S.W.3d 46, 52 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In reviewing the factual sufficiency of the evidence, we consider and weigh

all of the evidence, including disputed or conflicting evidence. *In re J.O.A.*, 283 S.W.3d at 345. "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." *Id*. We give due deference to the fact finder's findings and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109.

Relevant to this issue, section 161.001(1) provides that termination is warranted if the trial court finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has:

> (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

Tex. Fam. Code Ann. § 161.001(1)(O).

Father does not challenge the fact that the Child was removed under Chapter 262 for abuse or neglect, or that the Child was in the Department's conservatorship for the requisite period of time. Father admits he did not fully comply with the court-ordered family service plan, but argues he complied with portions of the plan and bonded with the Child.

The record reflects that the court approved Father's service plan and ordered compliance with its terms. *See* Tex. Fam. Code Ann. §§ 161.001(l)(O); 263.101–106. Father's family service plan was admitted into evidence at trial. The plan

required Father to:

- Submit to DNA comparison for the purpose of establishing paternity;
- Maintain stable employment, providing the caseworker with monthly income statements;
- Participate in parenting classes in person;
- Provide support for the Child while in the Child was in CPS care if ordered to do so by the court;
- Demonstrate cooperation with the Department by maintaining contact with the caseworker;
- Acquire and maintain stable housing for more than six months;
- Fully participate in a psychosocial assessment to address Father's mental and emotional health needs;
- Attend and participate in all court hearings, permanency conferences, scheduled visitations, and meetings requested by the Department or the courts; and
- Submit to random urine analysis.

The record reflects that Father complied with random drug tests and attended all visits, court hearings, and meetings with the Department. Father also completed his psychosocial assessment. However, Father did not participate in parenting classes, or acquire and maintain stable housing.

Father testified that he did not attend classes or counseling because he did not know where to go. The service plan, however, lists names, addresses, and phone numbers of four resources for parenting classes. A parent's reasons or excuses for failing to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child are not material to the sufficiency of the evidence to support a finding under section 161.001(1)(O). *See In re M.C.G.*, 329 S.W.3d 674, 675–76 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Reviewing the evidence under the appropriate standards, we conclude that the trial court could have formed a firm belief or conviction that termination of Father's rights was warranted under section 161.001(1)(O). Because there is legally and factually sufficient evidence to support the trial court's finding under this section, we need not address his argument that the evidence is insufficient to support the trial court's finding under section 161.001(1)(H). *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) ("Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."). We overrule Father's second issue.

**B. Best Interest of the Child**

In his fourth issue Father challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination is in the best interest of the Child.

A strong presumption exists that the best interest of the child is served by keeping the child with her natural parent, and the burden is on the Department to rebut that presumption. *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Evidence supporting termination under section 161.001(1)(O) supports a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d at 28. ("While it is true that proof of acts or omissions under section 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues.").

The factors the trier of fact may use to determine the best interest of the child include: (1) the desires of the child; (2) the present and future physical and emotional needs of the child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the persons seeking custody; (5) the

programs available to assist those persons seeking custody in promoting the best interest of the child; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and (9) any excuse for the parents' acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re U.P.*, 105 S.W.3d at 230; *see also* Tex. Fam. Code Ann. § 263.307(b) (West 2014) (listing factors to consider in evaluating parent's willingness and ability to provide the child with a safe environment).

There is a strong presumption that the best interest of a child is served by keeping the child with her natural parent. *In re D.R.A.*, 374 S.W.3d at 533. Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a). Father contends that the presumption in his favor is not rebutted because he has maintained stable employment, attended all visits and hearings, and has bonded with the Child.

**1. Present and Future Physical and Emotional Danger to the Child**

We begin our analysis by noting that evidence supporting termination under one of the grounds listed in section 161.001(1) can also be considered in support of a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d at 27 (holding the same evidence may be probative of both section 161.001(1) grounds and best interest).

Evidence at trial reflects that Father knew the Child's mother was pregnant, but abandoned the mother and failed to provide support for the Child. The record further reflects Father had a previous conviction for assault of a family member. Father's conviction for domestic violence supports the trial court's best-interest finding. *See In re S.R.*, 452 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.]

2014, pet. denied).

**2. Stability of Parent's Home**

A child's need for permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in a best-interest determination. *See In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.). Evidence of a parent's unstable lifestyle also can support a fact finder's conclusion that termination of parental rights is in the child's best interest. *In re S.B.*, 207 S.W.3d 877, 887 (Tex. App.—Fort Worth 2006, no pet.). Lack of stability, including a stable home, supports a finding that the parent is unable to provide for a child's emotional and physical needs. *See In re G.M.G.*, 444 S.W.3d 46, 59–60 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also Doyle v. Tex. Dep't of Protective & Regulatory Servs.*, 16 S.W.3d 390, 398 (Tex. App.—El Paso 2000, pet. denied) (holding that a parent's failure to provide a stable home and provide for a child's needs contributes to a finding that termination of parental rights is in the child's best interest).

The Department visited Father's home and noted that he was living in a mobile home with several other men. Father was informed that his home was not conducive to raising a child. Father acknowledged the criticism but indicated an unwillingness to change his living situation until provided with proof that the Child was actually his. Father's paternity was then confirmed. Father's family service plan required him to maintain a safe and stable home to obtain the return of the Child. Father remained in the unsuitable housing despite being informed that it was not conducive to raising a child. Moreover, record evidence reflects that Father moved to Houston shortly before he met the Child's mother and has no family in Houston. The lack of a safe and stable home supports the trial court's finding that termination is in the best interest of the Child.

### 3. Compliance with Family Service Plan

In determining the best interest of the child in proceedings for termination of parental rights, the trial court may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) ("Many of the reasons supporting termination under subsection O also support the trial court's best interest finding.").

Father admits he did not complete the tasks contained in the court-ordered family service plan. Father did not attend counseling sessions or parenting classes. Father's failure to comply with court-ordered tasks and failure to provide a safe and stable environment for the Child support the trial court's finding that termination is in the best interest of the Child.

### 4. Parenting Abilities and Family Support

We also may consider a parent's past performance as a parent in evaluating the parent's fitness to provide for the Child and the trial court's determination that termination would be in the Child's best interest. *See In re C.H.*, 89 S.W.3d at 28. The record supports a finding that Father abandoned another child in California and did not provide support for a child from a previous relationship. Although evidence of past misconduct or neglect alone may not be sufficient to show present unfitness, a fact finder may measure a parent's future conduct by the parent's past conduct and determine that it is in a child's best interest to terminate parental rights. *In Interest of T.L.R.*, No. 14-14-00812-CV, 2015 WL 1544796, at *12 (Tex. App.—Houston [14th Dist.] Apr. 2, 2015, no pet.) (mem. op.).

Based on the evidence presented, the trial court reasonably could have formed a firm belief or conviction that terminating Father's parental rights was in

the Child's best interest so that she could achieve permanency promptly through adoption by a foster family. *See In re T.G.R.-M.*, 404 S.W.3d 7, 17 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Applying the applicable *Holley* factors to the evidence, we conclude that legally and factually sufficient evidence supports the trial court's finding that termination of Father's rights is in the best interest of the Child. We overrule Father's third issue.

## CONCLUSION

We have determined that legally and factually sufficient evidence supports the trial court's finding of at least one predicate ground for termination and that termination of Father's parental rights is in the best interest of the Child. Having overruled Father's appellate challenges, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Chief Justice Frost and Justices McCally and Brown.