Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00725-CV

IN THE INTEREST OF D.N.M., a Child

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2014-PA-01778
Honorable Charles E. Montemayor,[1] Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 11, 2016

AFFIRMED

Gussie G. and David M. appeal the trial court's order terminating their parental rights to their daughter, D.N.M., arguing that the evidence is legally and factually insufficient to support the trial court's best interest finding. We affirm the trial court's order.

BACKGROUND

Together, Gussie and David are the parents of five children. Parental rights to their eldest child were terminated in October 2012. In July 2013, parental rights to three other children, including twins, were terminated. In both termination orders, a finding was made that Gussie and David placed the children in conditions that endangered the physical and emotional well-being of

[1] The Honorable Charles E. Montemayor, Associate Judge, Bexar County, Texas, signed the termination order; however, the Honorable Cathy Stryker, presiding judge of the 224th Judicial District Court, Bexar County, Texas, presided over the trial.

the children. In May 2014, D.N.M. was born. On July 25, 2014, the Texas Department of Family and Protective Services filed its Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. D.N.M. was removed and placed with a foster family when she was two months old. Gussie was awarded three supervised visits with D.N.M. per month and ordered to pay $225 per month in child support.

At the termination trial, testimony was presented regarding the couple's violent relationship. In 2010, David assaulted and choked Gussie and threatened her with a knife. The couple reconciled, and in 2011, David was charged with interference with an emergency phone call in which Gussie was the victim. In July 2014, shortly after D.N.M. was born, David assaulted Gussie again.

Gussie testified that she had a new boyfriend who does not drink alcohol, use drugs, or have any criminal history and that she would not reconcile with David. She stated that she has learned a lot from her parenting classes, domestic violence classes, and counseling, and that she wanted David's parental rights to be terminated. Gussie acknowledged that she had never paid child support for D.N.M. as ordered by the court, despite her full-time employment as a home health care worker for the two years prior to trial. Gussie has a new apartment with a room set up for D.N.M. and the Department caseworker testified that the apartment was safe and appropriate.

At the time of trial, David was incarcerated and appeared telephonically at trial; he was serving a two-year sentence for assault family violence against the mother of another of his children. He testified that he would be released from prison, at the latest, in September 2016. He was participating in parenting class, domestic violence class, alcohol abuse class, and family violence class. He stated that he is no longer in a relationship with Gussie.

The Department presented evidence that it feared Gussie would reconcile with David once he was released from prison. Gussie's therapist testified that it was hard to tell whether she had

incorporated the necessary tools to ensure that she would set boundaries and limits in a relationship in order to be protective of herself and her children. When asked whether Gussie's parental rights should be terminated, the therapist indicated he had concerns about her protective ability, but replied, "I believe she should have some contact with her child at some capacity." He later stated that it would not be in the child's best interest if the child were returned to Gussie. The Department recommended that both Gussie's and David's parental rights be terminated. The child's attorney ad litem likewise recommended that both Gussie's and David's parental rights be terminated.

The foster parents intervened in the termination suit and filed a counter-petition seeking the termination of parental rights. The foster parents conveyed a desire to adopt D.N.M. in the event parental rights were terminated. D.N.M.'s foster family had also adopted her older twin brothers. The foster parents stated that D.N.M. is thriving in their care and is bonded to everyone in the family.

At the conclusion of the two-day bench trial, the trial court terminated Gussie's parental rights pursuant to Texas Family Code section 161.001(b)(1)(D), (E), and (M). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (M) (West Supp. 2015). David's parental rights were terminated pursuant to Texas Family Code section 161.001(b)(1)(D), (E), (M), (N), and (Q). *Id.* § 161.001(b)(1)(D), (E), (M), (N), (Q). The trial court also found that termination of the parent-child relationship as to both Gussie and David was in the best interest of the child. *Id.* § 161.001(b)(2). Gussie and David now appeal, challenging the finding that termination of the parent-child relationship was in the best interest of the child.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Family Code, the Department has the burden to prove (1) one of the predicate grounds in subsection 161.001(b)(1), and (2) that termination is in the best interest of the child. *See id.* § 161.001(b)(1), (2); *In re A.V.*,

113 S.W.3d 355, 362 (Tex. 2003). The applicable burden of proof is the clear and convincing standard. TEX. FAM. CODE ANN. § 161.206(a) (West 2014); *In re J.F.C.*, 96 S.W.3d 256, 263 (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 reviewing the legal sufficiency of the evidence to support the termination of parental rights, the court 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 finding was true." *In re J.F.C.*, 96 S.W.3d at 266. "[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id.* "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.*

In reviewing the factual sufficiency of the evidence to support the termination of parental rights, a court "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id.* "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.*

BEST INTEREST

In reviewing the sufficiency of the evidence to support the best interest finding, we apply the factors set out in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). Those factors include: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future emotional and physical danger to the child; (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 held by the individuals seeking custody for the child; (7) the stability of the home of the parent and the individuals seeking custody; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* The foregoing factors are not exhaustive, and "[t]he absence of evidence about some of [the factors] would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

In challenging the sufficiency of the evidence to support the trial court's finding that termination of their parental rights was in the child's best interest, Gussie and David do not challenge the sufficiency of the evidence to support the predicate findings, which included findings that they had both: (1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered her physical or emotional well-being; (2) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered her physical and emotional well-being; and (3) had the parent-child relationship terminated with respect to another child based on a finding that their conduct was in violation of § 161.001(b)(1)(D) or (E). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (M). In addition, the trial court found that David had constructively abandoned the child and knowingly engaged in criminal conduct that resulted in David's conviction of an offense and confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition. *Id.* § 161.001(b)(1)(N), (Q).

Based upon the testimony presented at trial, the trial court could have found that David is physically abusive and that despite his abuse, Gussie repeatedly reconciles with David and allows her children to remain in an environment where they may be endangered. *See In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.) (fact finder may judge a parent's future

conduct by his or her past conduct in determining whether termination of the parent-child relationship is in the best interest of the child). In addition, David was incarcerated at the time of trial due to his violent behavior and there was no evidence that he had formed a bond with D.N.M. Although Gussie was employed and visited the child, she failed to pay child support as ordered by the court. Also, her therapist was concerned that she had not learned to set limits in a relationship in order to be protective. Given Gussie's pattern of separation and reconciliation with David, both the therapist and the caseworker stated that it was not in D.N.M.'s best interest to be returned to Gussie. Finally, there was evidence that D.N.M. had bonded with her foster family and was well-cared for by them; additionally, her biological brothers were adopted by the same foster family and D.N.M. is bonded with them. On this record, we conclude the evidence permits a reasonable factfinder to form a firm conviction or belief that termination of the parent-child relationship as to both Gussie and David was in D.N.M.'s best interest. Accordingly, we hold the evidence is legally and factually sufficient to support the trial court's best interest finding as to both parents. We affirm the trial court's termination order as to both parents.

Rebeca C. Martinez, Justice