



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00052-CV

IN THE INTEREST OF K.H., a Child

From the 407th Judicial District Court, Bexar County, Texas
Trial Court No. 2015PA00588
Honorable Charles E. Montemayor, Judge Presiding¹

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 29, 2016

AFFIRMED

Appellant S.D. appeals the trial court's order terminating her parental rights to her child, K.H. In her sole issue, S.D. asserts the evidence was neither legally nor factually sufficient for the trial court to find, by clear and convincing evidence, that terminating her parental rights was in K.H.'s best interest. We conclude the evidence is both legally and factually sufficient, and we affirm the trial court's order.

¹ This proceeding arises out of Cause No. 2015PA00588, styled *In the Interest of K.H., a Child*, pending in the 407th Judicial District Court, Bexar County, Texas, the Honorable Karen H. Pozza presiding. However, the termination order in this matter was signed by the Honorable Charles E. Montemayor, associate judge of the Children's Court, Bexar County, Texas

FACTUAL AND PROCEDURAL BACKGROUND

On March 16, 2015, the Texas Department of Family and Protective Services received a referral alleging physical abuse of S.D.'s newborn son, K.H. At the time of K.H.'s birth, both S.D. and K.H. tested positive for cocaine. On March 20, 2015, the Department filed its Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. On April 1, 2015, the trial court issued temporary orders appointing the Department as temporary managing conservator of K.H., and S.D. as temporary possessory conservator, with limited rights specifically set forth in an attachment to the orders.

On January 14, 2016, after several permanency hearings and a bench trial on the merits, the trial court terminated S.D.'s parental rights to K.H. based on (1) subparagraphs (M), (N), (O), (P), and (R) of section 161.001(b)(1), *see* TEX. FAM. CODE ANN. § 161.001(b)(1)(M)–(P), (R), and (2) a determination that such termination was in the child's best interest, *see id.* § 161.001(b)(2).²

² Texas Family Code sections 161.001(b)(1)(M), (N), (O), (P), and (R) provide as follows:

- (M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
- (N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
 - (i) the department has made reasonable efforts to return the child to the parent;
 - (ii) the parent has not regularly visited or maintained significant contact with the child; and
 - (iii) the parent has demonstrated an inability to provide the child with a safe environment;
- (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;
- (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
 - (i) failed to complete a court-ordered substance abuse treatment program; or
 - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
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- (R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription; . . .

TEX. FAM. CODE ANN. § 161.001(b)(1)(M)–(P), (R).

S.D. does not challenge the trial court's findings concerning the statutory grounds for involuntary termination of her parental rights. *See id.* § 161.001(b)(1); *see also In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). Instead, she argues the trial court erred because the evidence was neither legally nor factually sufficient for it to find, by clear and convincing evidence, that terminating her parental rights was in her child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *accord In re J.F.C.*, 96 S.W.3d at 261.

SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

“Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit from the parent.” *In re L.J.N.*, 329 S.W.3d 667, 671 (Tex. App.—Corpus Christi 2010, no pet.) (citing *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). As a result, appellate courts must strictly scrutinize involuntary termination proceedings in favor of the parent. *Id.* (citing *In re D.S.P.*, 210 S.W.3d 776, 778 (Tex. App.—Corpus Christi 2006, no pet.)).

An order terminating parental rights must be supported by clear and convincing evidence that (1) the parent has committed one of the grounds for involuntary termination as listed in section 161.001(b)(1) of the Family Code, and (2) terminating the parent's rights is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.F.C.*, 96 S.W.3d at 261. “There is a strong presumption that the best interest of the child is served by keeping the child with its natural parent, and the burden is on [the Department] to rebut that presumption.” *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). “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 interest of the child.” *Id.*

When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to “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.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *In re J.F.C.*, 96 S.W.3d at 266). If the court “determines [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,” the evidence is legally sufficient. *See id.* (quoting *In re J.F.C.*, 96 S.W.3d at 266).

Under a clear and convincing standard, evidence is factually sufficient if “a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *accord In re K.R.M.*, 147 S.W.3d 628, 630 (Tex. App.—San Antonio 2004, no pet.). We must 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; *accord In re C.H.*, 89 S.W.3d at 25.

Here, S.D. does not challenge the trial court’s finding that she committed one or more of the statutory grounds of involuntary termination. We, therefore, need only address the trial court’s finding that termination was in the child’s best interest.

B. Evidence Regarding the Best Interest of the Child

Before a trial court may terminate a parent’s rights to a child, the court must make a determination that such “termination is in the best interest of the child.” TEX. FAM. CODE ANN. § 161.001(b)(2); *accord In re J.F.C.*, 96 S.W.3d at 261.

Pursuant to the applicable standards of review for sufficiency of the evidence, we examine all the evidence, *see In re J.F.C.*, 96 S.W.3d at 266; *see also City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) (crediting or disregarding evidence), and recite below the evidence that especially pertains to the *Holley* factors, *see Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex.

1976). The trial court heard live testimony from five witnesses and arguments from the Department's attorney, the child's ad litem, and counsel for S.D.

The Department's investigator testified the Department became involved in K.H.'s care when the child and S.D. tested positive for cocaine at the time of K.H.'s birth. Shortly after K.H. was born, S.D. attempted to remove K.H. from the hospital by hiding him in a diaper bag. Additionally, S.D.'s behavior at the hospital required the hospital staff undertake measures to conceal K.H.'s identity out of fear for his welfare. The investigator further testified the Department previously terminated S.D.'s parental rights to two other children based on substance abuse.

The Department's supervisor testified the Department's orders provided for visitation between S.D. and K.H. three times a month. However, S.D. attended only five visits, out of a possible thirty-three visits; she missed one because it was simply too cold, and she had not seen K.H. in the two months prior to the hearing.

When asked about K.H.'s health, the Department supervisor testified that although K.H. did not immediately experience withdrawal symptoms at birth, he was placed in a medical foster home based on his being excessively lethargic as a result of S.D.'s drug use. Additionally, the caseworker explained that the Department could not approve any of S.D.'s recommendations for potential relative placements, and the foster parents were not only providing a stable and happy environment for K.H., but also hoped to adopt K.H.

The Department's supervisor and caseworker both testified that termination of S.D.'s parental rights was in K.H.'s best interest. Although S.D. had stable employment and had contributed to child support payments, there were numerous reasons supporting termination:

- (1) S.D.'s continuous and ongoing illegal drug use;
- (2) the Department's removal and termination of S.D.'s parental rights of two other children based on S.D.'s drug use;

- (3) the lack of proof submitted to the Department that S.D. completed any of the programs she asserts she completed;
- (4) S.D.'s failure to attend regular visitation or create a bond with K.H.; and
- (5) S.D.'s failure to place K.H.'s needs above her own.

S.D. acknowledged using drugs since 2001 and her parental rights were terminated as to two other children. She further admitted testing positive three times during the year preceding the hearing and, had she been tested on the day of the hearing, she would have tested positive for marijuana. Contrary to her testimony that the Department had not attempted to help her with her drug addiction, S.D. acknowledged failing to show up for a drug assessment on April 10, 2015, and two outpatient referrals on April 17, 2015 and June 23, 2015. Additionally, S.D. admitted that, on November 23, 2015, she became aggressive during a second drug assessment when the provider requested she turn off her phone. Although S.D. asserted she completed several services on her service plan, she failed to provide any documentation to the Department or to her caseworker.

C. Analysis of the Child's Best Interest

The trial court is the sole judge of the weight and credibility of the evidence, including the testimony of the Department's witness. *See In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam) (requiring appellate deference to the fact-finder's findings); *City of Keller*, 168 S.W.3d at 819. The factors used to ascertain the best interest of the child were set forth in *Holley*, 544 S.W.2d at 371–72; *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors). The *Holley* court warned that “[t]his listing is by no means exhaustive, but does indicate a number of considerations which either have been or would appear to be pertinent.” *Holley*, 544 S.W.2d at 372; *accord In re E.N.C.*, 389 S.W.3d at 807 (describing the *Holley* factors as nonexclusive).

K.H. was only ten months old at the time of the termination hearing. Although K.H. was too young to testify, his attorney ad litem expressed deep resolve in termination being in K.H.'s

best interest. The evidence shows K.H. is a happy, healthy little boy doing well in the foster parents' residence and they hope to adopt him. *See In re T.G.R.-M.*, 404 S.W.3d 7, 16 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (finding that two-year-old child was too young to testify about his desire regarding termination).

The evidence further indicates S.D. was unable to successfully address her illegal drug use or provide a nurturing and safe environment for her children. *See In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.) (concluding trial court permitted to consider parent's past conduct in best interest determination). S.D.'s attempts to remove K.H., a child in need of medical attention, from the hospital while hidden in a diaper bag, exhibits S.D.'s failure to exercise good judgment. In addition to several episodes where S.D. exhibited aggressive behavior towards K.H.'s caregivers and drug counselors, S.D. also exhibited an inability to attend the necessary counseling or to seek help for her substance abuse. S.D. further failed to take responsibility for her continuous use of illegal drugs and instead placed blame on the Department claiming that "nobody tried to help me," and "I'm like a scapegoat."

Based on the evidence presented, the trial court—as the sole judge of the weight and credibility of the evidence—could have reasonably concluded that S.D. lacked the decision-making skills and parental abilities to provide for and parent K.H. in a healthy and safe manner. *See In re H.R.M.*, 209 S.W.3d at 108; *City of Keller*, 168 S.W.3d at 819.

The trial court's determination regarding S.D.'s termination under section 161.001(b)(1) may also be considered in its 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(b)(1) grounds and best interest). The record supports S.D. was unable to effect the necessary changes within a reasonable time. The trial court found, and S.D. does not challenge on appeal, that S.D.:

- (1) “had [her] parent-child relationship terminated with respect to another child based on a finding that the parent’s conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;”
- (2) constructively abandoned K.H.;
- (3) failed to comply with the court mandated service plan;
- (4) used a controlled substance and failed to complete a court-ordered substance abuse program; and
- (5) was the “cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription,”

See TEX. FAM. CODE ANN. § 161.001(b)(1)(M), (N), (O), (P), and (R).

Reviewing the evidence under the two sufficiency standards, and giving due consideration to evidence that the trial court could have reasonably found to be clear and convincing, we conclude the trial court could have formed a firm belief or conviction that terminating S.D.’s parental rights to K.H. was in the child’s best interest. *See In re J.F.C.*, 96 S.W.3d at 266; *see also In re H.R.M.*, 209 S.W.3d at 108. Therefore, the evidence is legally and factually sufficient to support the trial court’s order. *See In re J.F.C.*, 96 S.W.3d at 266; *see also In re H.R.M.*, 209 S.W.3d at 108.

CONCLUSION

The trial court found S.D. committed the statutory grounds supporting termination of her parental rights and that termination of S.D.’s parental rights was in K.H.’s best interest. S.D. only appealed the best interest of the child finding.

Having reviewed the evidence, we conclude it was legally and factually sufficient to support the trial court’s finding, by clear and convincing evidence, that termination of S.D.’s parental rights to K.H., was in the child’s best interest.

Accordingly, we overrule S.D.’s sole issue on appeal and affirm the trial court’s order.

Patricia O. Alvarez, Justice