Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00350-CV

IN THE INTEREST OF A.E.-V., a Child

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-PA-01940
Honorable Richard Garcia, Associate Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: November 30, 2016

AFFIRMED

Appellant K.E.-V. ("Mother") appeals the trial court's order terminating her parental rights to her daughter, A.E.-V. Mother contends the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interest of the child. We affirm the trial court's judgment.

BACKGROUND

The Texas Department of Family and Protective Services filed a petition seeking protection of A.E.-V. on September 17, 2015, after A.E.-V. tested positive for opiates and "benzoids" at her birth on September 11, 2015. The Department was named temporary managing conservator of A.E.-V. and A.E.-V. was placed in a foster home after she was released from the hospital. The Department prepared a service plan for Mother with a stated goal of reunification. The trial court

held the statutorily-required status and permanency hearings. Ultimately, the Department moved to terminate Mother's parental rights. The case proceeded to a final hearing on May 11, 2016 and was continued on May 18, 2016, at which time Mother appeared telephonically with counsel. At the conclusion of the hearing, the trial court determined Mother's parental rights to A.E.-V. should be terminated. The trial court found Mother: (1) knowingly placed the child or allowed the child to remain in conditions that endangered her physical or emotional well-being; (2) engaged in conduct or knowingly placed the child with someone who engaged in conduct that endangered her physical or emotional well-being; (3) constructively abandoned the child who had been in the temporary managing conservatorship of the Department for not less than six months; (4) failed to comply with the provisions of a court order that established the actions necessary for her to obtain the return of the child; and (5) caused the child to be born addicted to a controlled substance. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O), (R) (West Supp. 2016). The trial court further found termination of Mother's parental rights would be in the child's best interests. *See id.* § 161.001(b)(2). Accordingly, the trial court rendered an order terminating Mother's parental rights to A.E.-V.

ANALYSIS

On appeal, Mother does not challenge the evidence with regard to the trial court's findings under section 161.001(b)(1) of the Texas Family Code. *See id.* § 161.001(b)(1)(D), (E), (N), (O), (R). Rather, Mother contends the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interest of the child. *See id.* § 161.001(b)(2).

Standard of Review

The Family Code provides that a parent's right to her child may be terminated upon proof by clear and convincing evidence that: (1) the parent committed an act prohibited by section 161.001(b)(1) of the Family Code; and (2) termination is in the best interest of the child. *Id.*

§ 161.001(b)(1), (2); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *In re B.R.*, 456 S.W.3d 612, 615 (Tex. App.—San Antonio 2015, no pet.). "Clear and convincing evidence" is "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 2008); *see J.O.A.*, 283 S.W.3d at 344; *B.R.*, 456 S.W.3d at 615. Termination of parental rights results in permanent and irreversible changes for both parent and child. *In re E.A.G.*, 373 S.W.3d 129, 140 (Tex. App.—San Antonio 2012, pet. denied). Accordingly, we have held due process is implicated, requiring that we use the heightened clear and convincing standard of review. *Id*. We must therefore determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction that termination was in the best interest of the child. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (citing *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)).

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.*

Applicable Law

There is a strong presumption that maintaining the parent-child relationship is in a child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, we also presume that permanently placing a child in a safe environment in a timely manner is in the child's best interest. *B.R.*, 456 S.W.3d at 615; *see* TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016). In determining whether a parent is willing and able to provide the child with a safe environment, courts should consider the factors set out in section 263.307(b) of the Family Code, which include: (1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of the harm to the child; (4) whether the child has been the victim of repeated harm after the initial report and intervention by the Department or other agency; (5) whether the child is fearful of living in, or returning to, the child's home; (6) 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; (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (9) whether the perpetrator of the harm to the child is identified; (10) 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; (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the child's family demonstrates adequate parenting skills; and (13) whether an adequate social support system consisting of an extended family and friends is available to the child. TEX. FAM. CODE ANN. § 263.307(b); *see In re A.S.*, No. 04-14-00505-CV, 2014 WL 5839256, at *2 (Tex. App.—San Antonio Nov. 12, 2014, pet. denied) (mem. op.); *B.R.*, 456 S.W.3d at 615.

Courts also may apply the non-exhaustive *Holley* factors to shape their analysis. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The factors include: (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 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*. A court need not find evidence of each and every *Holley* factor before terminating the parent-child relationship. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child." *Id.*

We note that although proof of acts or omissions under section 161.001(b)(1) of the Family Code does not relieve the Department from proving the best interest prong, the same evidence may be probative of both issues. *Id.* at 28 (citing *Holley*, 544 S.W.2d at 370; *Wiley v. Spratlan*, 543 S.W.2d 349, 351 (Tex. 1976)); *B.R.*, 456 S.W.3d at 615. In conducting a best interest analysis, courts may consider circumstantial evidence, subjective factors, and the totality of the evidence, in addition to direct evidence. *B.R.*, 456 S.W.3d at 616 (citing *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied)). Additionally, a 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. *Id.*

The Evidence

At the final hearing, the Department called one witness, Sarah Bloom, the legal caseworker. Bloom testified A.E.-V. came into the Department's care in September 2015 after she tested positive at birth for opiates and "benzoids." Since birth, A.E.-V. has been in a foster home. The child was doing "very well" in foster care and receives physical therapy four times a month. She is no longer having drug withdrawals, and is on target with all other developmental indicators. According to Bloom, Mother had not engaged in services despite signing a service plan prepared by the Department. Bloom had not had contact with Mother since February 2016 when Mother was arrested for prostitution. Mother was currently incarcerated in the Bexar County jail and it was unknown when she would be released. Bloom stated she believed it was in the child's best interest to terminate Mother's parental rights because Mother's actions had resulted in her imprisonment which had led to her noninvolvement in her child's life. The child's attorney ad litem stated the child was doing well in her foster-to-adopt placement and termination was in the best interest of the child.

Mother testified she had not seen her child since she was a week old in the hospital's NICU. Mother asked the court to give her more time to complete her service plan. She stated she had suffered from post-partum depression and "wasn't thinking straight" and that "the drug use wasn't helping any," but she had now been sober for several months. Mother admitted she used heroin during her pregnancy. Mother conceded she had not worked on her service plan, but stated she turned herself in to detox treatment three days after giving birth. Mother stated she had not used drugs since completing detox.

Application

In reviewing the evidence in this case, we have considered the *Holley* factors and the statutory factors in section 263.307(b) of the Family Code. *See* TEX. FAM. CODE ANN.

§ 263.307(b); *Holley*, 544 S.W.2d at 371-72. We have also considered the Mother's acts or omissions as found by the trial court under section 161.001(b)(1) of the Family Code,[1] as well as the circumstantial evidence, subjective factors, and the totality of the evidence. *See In re R.S.D.*, 446 S.W.3d 816, 820 (Tex. App.—San Antonio 2014, no pet.). While the Department presented only one witness at trial, there was uncontroverted evidence that Mother used heroin while pregnant with A.E.-V. and caused A.E.-V. to be born addicted to a controlled substance. A.E.-V. had since made progress toward recovery and was thriving in her foster placement. Mother had made no effort to complete her family service plan during the eight months that the case was pending, and was incarcerated at the time of trial.

Having reviewed the record, we hold the evidence is legally and factually sufficient to have permitted the trial court, in its discretion, to find termination was in the best interest of A.E.-V. *See J.P.B.*, 180 S.W.3d at 573.

CONCLUSION

We overrule Mother's sufficiency complaints, and affirm the trial court's termination order.

Rebeca C. Martinez, Justice

[1] Mother has not challenged the trial court's findings that she: (1) knowingly placed the child or allowed the child to remain in conditions that endangered her physical or emotional well-being; (2) engaged in conduct or knowingly placed the child with someone who engaged in conduct that endangered her physical or emotional well-being; (3) constructively abandoned the child for not less than six months; (4) failed to comply with the provisions of a court order that established the actions necessary for her to obtain the return of the child; and (5) caused the child to be born addicted to a controlled substance. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (N), (O), (R). Although this does not relieve the Department from proving termination is in the best interest of A.E.-V., the termination grounds are probative on the issue of the child's best interest. *See C.H.*, 89 S.W.3d at 28; *B.R.*, 456 S.W.3d at 615.