



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00374-CV

IN THE INTEREST OF E.K.H. and K.L.H., Children

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2015PA01156
Honorable Richard Garcia, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: November 9, 2016

AFFIRMED

C.H. appeals the trial court's order terminating her parental rights to her children E.K.H. and K.L.H. In her sole issue on appeal, C.H. asserts the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the children's best interest. We affirm the trial court's order.

BACKGROUND

The Texas Department of Family and Protective Services filed an original petition to terminate C.H.'s parental rights on June 4, 2015. At that time, E.K.H. was two years old, and K.L.H. was four months old. The case was called for trial on June 10, 2016.

The Department's caseworker assigned to C.H.'s first referral testified the Department opened its first investigation based on allegations of drug use by C.H. C.H. was referred to drug

court, where C.H. was asked to undergo inpatient treatment as part of a drug court program. C.H. did not want to undergo inpatient treatment, but she agreed to participate in outpatient drug treatment until she obtained a job. After she obtained a job in January of 2015, C.H. could no longer participate in the program so she withdrew; however, she was still required to continue with services. She was offered outpatient drug treatment, parenting classes, and domestic violence classes. C.H. successfully completed those services. While she participated in the drug court program, C.H. visited the children, and the caseworker who supervised the visits never reported any concerns.

In May of 2015, the Department's caseworker testified the Department received a re-referral alleging domestic violence and drug use, and a new investigation was opened. When C.H. was interviewed, she admitted to relapsing on methamphetamines and using drugs while the children were present. She also stated her husband had assaulted her while the children were present. During the interview, C.H. stated bugs were always crawling on her and the kids, but no bugs were visible. C.H.'s comment raised concerns about possible mental health issues.

C.H. testified the Department took custody of the children when she informed her father that her husband was hitting her, and her husband told her father she was using methamphetamines to divert her father's attention. When C.H.'s father told C.H.'s mother about the drug use, C.H. testified her mother called the Department even though she had entered a drug treatment program. C.H. stated she stopped using drugs when she discovered she was pregnant with K.L.H., but she admitted relapsing in May of 2015, when K.L.H. was three months old. C.H. admitted she used drugs while the children were in her care.

After the re-referral, C.H. testified she received a plan of service from the Department and was informed she needed to complete all of the services on the plan, including a psychological assessment, attending parenting class and drug treatment, undergoing random drug screenings,

visiting with the children, staying employed, having a stable home, and staying in contact with her caseworker. C.H. admitted she did not stay in constant contact with the caseworker when she did not have anything to report, did not complete the drug treatment requirements, did not continuously visit her children, and did not complete domestic violence classes. C.H. stated she would be completing the parenting class the following week. C.H. testified she had not seen her children in over a month. Although C.H. had recently completed a psychological assessment, she had not started the recommended counseling.

On cross-examination, C.H. testified she completed parenting classes, domestic violence classes, and outpatient drug counseling while enrolled in the drug court program. During that time, she also visited with her children at least twice a week. C.H. was not employed on the date of trial and was residing at a homeless shelter. C.H. testified she is a good parent aside from her drug use and had divorced her husband who was a negative force in her life. C.H. stated she was able to complete the drug court program services because she had a car and was employed; however, she was unable to complete the services under the current plan because her car and her identification were stolen and she was unemployed. C.H. testified she no longer uses drugs and a drug test taken the prior month was negative. C.H. walks four hours to and from the parenting class. Because she has to walk to the location of the services, she has been unable to complete them all. C.H. is attempting to obtain the materials necessary to obtain a new identification card so she can find employment.

The Department's caseworker assigned after C.H.'s re-referral testified she reviewed C.H.'s service plan with her. The caseworker testified C.H. completed a psychological assessment but did not complete the recommended counseling. The caseworker further testified C.H. was off and on with drug treatment. Because C.H.'s phone was disconnected, the caseworker was not able to contact C.H. in March and April of 2016, to send her for drug testing. The caseworker testified

C.H.'s visitation with the children was sporadic, and C.H.'s last visit with her children was March 4, 2016. C.H. never started domestic violence classes. C.H. only started the parenting class in May of 2016, and she has no stable employment or home. C.H. was drug tested over twenty times. She tested positive three times, with the last positive test in December of 2015. The last drug test on May 18, 2016 was negative.

The caseworker testified the children were three and one on the date of trial and had been placed with their maternal grandmother Myra. The children are bonded to Myra who is providing them with a safe and stable environment and wants to adopt them.

Myra testified she wants to adopt the children and did not believe the children would be safe if returned to C.H. because of her history with drugs. While the case was pending, C.H. came to Myra's home unannounced on two occasions informing Myra people were looking for her to kill her, people were poisoning her, and people are looking for her, Myra, and the children and told C.H. they are going to stab and kill the children. C.H. also told Myra she was in a hotel and heard Myra and E.K.H. crying in the next room. Myra stated these encounters made her concerned for C.H.'s mental state.

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* TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); *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.

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.*

PREDICATE FINDINGS

C.H. does not challenge the sufficiency of the evidence to support the predicate statutory grounds for terminating her parental rights. Evidence that proves one or more statutory grounds for termination may constitute evidence illustrating that termination is in the child’s best interest. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). The trial court found by clear and convincing evidence that C.H. failed to comply with the provisions of a court order specifically establishing the actions necessary for her to obtain the return of the children who had been in the temporary managing conservatorship of the Department for not less than nine months as a result of their removal from C.H. for abuse or neglect.

BEST INTEREST FINDING

There is a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, when the court considers factors related to the best interest of the child, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016). In determining whether a child's parent is willing and able to provide the child with a safe environment, the court should consider: (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; (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. *Id.* at § 263.307(b).

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). 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 of 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 at 27. “A best-interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence.” *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). “A trier of fact may measure a parent’s future conduct by his past conduct [in] determin[ing] whether termination of parental rights is in the child’s best interest.” *Id.*

At the time of trial, E.K.H. was three years old, and K.L.H. was one, making them physically and mentally vulnerable. Although the children were too young to express their desires, they had not seen C.H. in two months and were bonded with Myra. E.K.H. and K.L.H. were two years old and four months old when they were removed from C.H.’s care and placed with Myra. Although C.H. consistently visited with the children after their initial removal, her visitation after the re-referral was described as sporadic.

The children were very young and had already been exposed to C.H.’s drug use and had witnessed domestic abuse. The caseworker was unable to call C.H. in March or April to send her for drug testing. Although C.H. successfully completed a drug court program, she subsequently relapsed and returned to using methamphetamines. Although C.H. testified she no longer uses

drugs, she admitted she did not have stable employment and was living in a homeless shelter. In addition, C.H. did not complete her service plan or take advantage of the programs available to assist her. Finally, C.H.'s comments to the caseworker about bugs and to her mother raised concerns about her mental state which would affect her ability to parent the children. Although C.H. completed a psychological assessment, she had not engaged in the recommended counseling. The caseworker expressed concerns that C.H. may not follow through with medical care for the children or provide for their basic needs.

Myra provided the children a safe and stable home and wants to adopt them. The children refer to Myra as mom, and Myra has a son who also provides a support system for the children.

Having reviewed the record, we hold the evidence is sufficient to support the trial court's finding that termination was in the children's best interest.

CONCLUSION

The trial court's order is affirmed.

Jason Pulliam, Justice