Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00632-CV

In the Interest of **M.M.**, a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-PA-02539
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Karen Angelini, Justice

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

Delivered and Filed: January 18, 2017

REVERSED AND RENDERED IN PART; AFFIRMED IN PART

In a single issue, V.R. challenges the legal and factual sufficiency of the evidence to support the trial court's finding that the termination of her parental rights to M.M. was in the child's best interest. We conclude the evidence was legally insufficient to support the trial court's best interest finding, and therefore, we reverse the portion of the trial court's judgment terminating V.R.'s parental rights.[1]

DISCUSSION

The Texas Department of Family and Protective Services filed an original petition for protection of M.M., for conservatorship, and for termination of V.R.'s parental rights. At trial, only three witnesses testified—V.R., the child's father, and a Department caseworker. Their

[1]The trial court also terminated the parental rights of M.M.'s father but he did not appeal.

testimony was very brief. Prior to trial, V.R. had signed an affidavit relinquishing her parental rights to M.M., which was admitted into evidence. The trial court terminated V.R.'s parental rights on the ground that she had executed an unrevoked or irrevocable affidavit of relinquishment of parental rights. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(K) (West Supp. 2016). The trial court also found that termination of V.R.'s parental rights was in M.M.'s best interest.

Termination of parental rights under section 161.001 of the Texas Family Code requires proof by clear and convincing evidence that the parent committed one of the acts or omissions listed in section 161.001(b)(1)(A)-(T) and that termination is in the child's best interest. TEX. FAM. CODE ANN. § 161.001(b)(1),(2). 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 in a parental termination case, we consider all of the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a strong belief or conviction that its finding was true. *In the Interest of J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). If we conclude that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude the evidence is legally insufficient. *Id*.

There is a strong presumption that a child's best interest is served by keeping the child with a parent. *In the Interest of R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, the prompt and permanent placement of a child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016). Courts consider multiple factors when determining if a parent is willing and able to provide a child with a safe environment. *Id*. § 263.307(b). Among these factors are (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 harm to the child has been 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.* § 263.307(b).

In evaluating a child's best interest, courts also consider the factors articulated in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These 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.* Additionally, evidence proving acts or omissions under section 161.001(b)(1) of the Texas Family Code may be probative of the child's best interest. *In the*

Interest of C.H., 89 S.W.3d 17, 28 (Tex. 2002). A best-interest analysis may consider direct and circumstantial evidence, subjective factors, and the totality of the evidence. *In the Interest of E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

Our disposition of this case is controlled by our decisions in *In the Interest of K.S.L.*, 499 S.W.3d 109, 113 (Tex. App.—San Antonio 2016, pet. filed), and *In the Interest of A.H.*, 414 S.W.3d 802, 807 (Tex. App.—San Antonio 2013, no pet.). In *K.S.L.*, no evidence was presented concerning the section 263.307 factors, the *Holley* factors, or other considerations relevant to the child's best interest. *Id*. at 112. Instead, the Department relied on the parents' affidavits of relinquishment of parental rights to support the trial court's best interest finding. *Id*. We held that the Department was not relieved of its burden to prove best interest merely because a parent has executed a voluntary and irrevocable affidavit of relinquishment of parental rights. *Id*. at 113. We reversed and rendered judgment denying the Department's petition for termination of parental rights. *K.S.L.*, 499 S.W.3d at 114.

Similarly, in *A.H.*, we held the evidence was legally insufficient to support the trial court's best interest finding when the only evidence of best interest was the conclusory testimony of a caseworker and the parent's affidavit of voluntary relinquishment of parental rights. *A.H.*, 414 S.W.3d 806-07. We recognized that a parent's relinquishment affidavit is relevant to the best interest inquiry, but it is not *ipso facto* evidence that termination is in the child's best interest. *Id*. at 806. We stated that "[t]o hold otherwise would subsume the requirement of proving best interest by clear and convincing evidence into the requirement of proving an act or omission listed in section 161.001 by clear and convincing evidence." *Id*.

In the present case, the only witness who provided testimony relevant to the child's best interest was the caseworker. The caseworker testified that M.M. was removed from V.R.'s care because of a neglectful supervision report, and that since her removal M.M. had been living in a

safe environment and was doing well. In addition, the caseworker testified that services were made available to M.M. to assist her in maintaining her parental rights, but V.R. was not able to comply with and complete those services. Finally, the caseworker testified that the Department was asking the court to terminate V.R.'s parental rights on the sole ground that V.R. had voluntarily relinquished her parental rights. As even the Department acknowledges in its brief, the caseworker's testimony was not enough to establish that termination was in M.M.'s best interest. The caseworker's testimony did not rise to the level of clear and convincing evidence that would produce in the mind of the trier of fact a firm belief or conviction that termination of V.R.'s parental rights was in M.M.'s best interest. *See K.S.L.*, 499 S.W.3d at 114 (concluding caseworker's meager and conclusory testimony was insufficient to support a best interest finding); *A.H.*, 414 S.W.3d at 807 (concluding caseworker's conclusory testimony on child's best interest failed to meet the clear and convincing standard of proof). Given the paucity of evidence concerning M.M.'s best interest, we conclude that no reasonable trier of fact could have formed a strong belief or conviction that the trial court's best interest finding was true. Consistent with our holdings in *K.S.L.* and *A.H.*, we hold that the evidence in this case is legally insufficient to support the trial court's best interest finding. *See K.S.L.*, 499 S.W.3d at 114; *A.H.*, 414 S.W.3d at 807.

When there is legally insufficient evidence to support a termination judgment, rendition of judgment in favor of the parent is generally required. *J.F.C.*, 96 S.W.3d at 266. Nevertheless, the Department asks us to remand this case to the trial court. The Department argues that the parties were clearly relying on the relinquishment affidavit to be dispositive of the child's best interest, and that remand is the appropriate remedy here because the record can and should be more fully developed on the issue of the child's best interest. Although we have the discretion to remand in the interest of justice, we decline to exercise this discretion in the present case. In both *K.S.L.* and *A.H.*, which presented circumstances almost identical to this case, we reversed and rendered

judgment in favor of the parent. *K.S.L.*, 499 S.W.3d at 114; *A.H.*, 414 S.W.3d at 807. Our decision in *K.S.L.* issued approximately two months before the trial in this case and our decision in *A.H.* issued three years before the trial in this case. Therefore, the Department and the trial court had adequate warning that a parent's relinquishment affidavit could not support a finding that termination was in M.M.'s best interest.

The trial court's judgment also appoints the Department as permanent managing conservator of M.M. This part of the judgment is unchallenged on appeal. We, therefore, affirm the trial court's appointment of the Department as the managing conservator of M.M. *See In the Interest of J.A.J.*, 243 S.W.3d 611, 616-17 (Tex. 2007) (explaining that reversal of a parental termination order in a judgment does not affect a conservatorship order in the same judgment, absent a challenge to the conservatorship order).

CONCLUSION

We reverse the portion of the trial court's judgment terminating V.R.'s parental rights and render judgment denying the Department's termination petition as to V.R. We affirm the judgment in all other respects.

Karen Angelini, Justice