Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00089-CV

IN THE INTEREST OF E.N.Q., C.A.Q., A.C.Q., and K.C.Q., Children

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA00761
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice

Delivered and Filed: June 28, 2017

AFFIRMED

This is an accelerated appeal from the trial court's order terminating appellant's parental rights to his four children. In a single issue, appellant challenges the sufficiency of the evidence in support of the trial court's finding that termination of his parental rights was in the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2016). We affirm.

BACKGROUND

Appellant is the father of two of the children who are the subject of this appeal, and the alleged father of the other two children who also are the subject of this appeal. The Department of Family and Protective Services ("the Department") filed its original petition for conservatorship

of the four children[1] and for termination of their parents' parental rights on April 12, 2016. The termination hearing commenced on February 2, 2017.

The State first called the Department caseworker, Ashley Hurtado, who testified she had been the caseworker since April 20, 2016. Hurtado stated she believed termination of appellant's parental rights was in the children's best interest because appellant is currently incarcerated and had been incarcerated the entire time she was the caseworker. Hurtado said appellant provided certificates of completion for a domestic violence class, a marriage and parenting class, individual therapy, and "spiritual Bible-type classes." She conceded appellant had engaged in the services that were available to him during his incarceration. Nevertheless, Hurtado stated "these children need permanency, so [appellant is] not an option." Because of appellant's incarceration, he could not visit his children, and does not have stable housing or employment. Hurtado also stated that because appellant was incarcerated, he was unable to provide the children with food.

Hurtado then testified about each of the children. Hurtado said all the children came into the Department's care because the mother left them alone, there was no food in the house, the children ate out of the trash, the mother could not maintain a sober lifestyle, and the children witnessed domestic violence. Even after being taken into care, C.A.Q. and K.C.Q. initially hoarded their food. The mother's boyfriend may have sexually molested A.C.Q.

All the children originally were placed with fictive kin, the paternal grandfather's girlfriend. E.N.Q. was later moved to a foster-to-adopt placement in January 2017. E.N.Q. is not taking any medication, she is doing well, adjusted quickly to her placement, has "her days," feels safe in her foster home, and has bonded with her foster parent's daughter who is about eighteen months older than E.N.Q. C.A.Q. also was moved to another foster-to-adopt placement in

[1] E.N.Q. was born on March 23, 2009; C.A.Q. was born on September 30, 2010; A.C.Q. was born on November 27, 2011; and K.C.Q. was born on January 25, 2013.

December 2016. Hurtado said she has worked with C.A.Q. since April 2016 and "this is the best [she has] ever seen him." C.A.Q. takes a medication for P.T.S.D. and anxiety, but he is now calmer and less anxious, no longer has behavioral issues at school, has integrated well into his foster family, and calls his foster parents mom and dad. Prior to his placement, C.A.Q. was aggressive and acted out to the extent the Department was concerned for the safety of other children.

The other two children, A.C.Q. and K.C.Q., are still with the fictive kin who is in the process of becoming licensed for the purpose of adopting the two children. A.C.Q. and K.C.Q. are not taking any medication, they "go back and forth with their behaviors" and have good days and bad days, but they appear calmer now that they are the only two children in the household. However, recently A.C.Q. told a teacher, "No. I don't want to do this," and she has been "emotional" and cries "a lot about things." K.C.Q., who is in daycare, gets into trouble and has some behavioral issues.

Although the children are in different placements, the caregivers are willing to maintain contact among the siblings. Despite placing the children in other homes, Hurtado conceded the children's paternal grandmother wanted to keep all the children with her, and no final home study had been done on the grandmother to establish whether that was a possibility. However, Hurtado said a preliminary home study indicated other children had been removed from the paternal grandfather's care because of problems with the paternal grandfather (she did not elaborate), and the grandmother had a criminal history (resisting arrest, drug possession, and theft).

As to appellant, he was already incarcerated when the Department removed the children from their mother. Hurtado stated, "there's been statements that when he was out [of incarceration], things were — were better." However, according to Hurtado, appellant made choices that did not put his children first. She did not explain what she meant by these "choices." Because of his incarceration, appellant has not been able to provide the children with stability or a

different life. Hurtado and appellant have exchanged letters and, in his last letter, appellant told her he would be up for parole in six to eight months. According to Hurtado, E.N.Q. said she loves her father, "things were better when he was out," and she worries about what terminating her father's parental rights will mean. Hurtado stated the children thought their mother was "bad," but they had fond memories of their father.

The next witness, the Department's removing investigator, Anita Chavarria, testified the children were initially referred to the Department in November 2015 because the children were left with multiple caregivers and the mother used drugs. Chavarria said the mother's home was "gutted," some areas had no walls and wiring was exposed, there was no water, food, or electricity, and C.A.Q. and K.C.Q. were soiled with urine and feces. At the time, the other two children, E.N.Q. and A.C.Q., were with their paternal great-grandmother. When Chavarria spoke with E.N.Q. and A.C.Q., they told her they "were being hit with a paddle and with whips from the tree outside," the family knew about the mother's drug use but allowed them to visit with their mother, and a live-in cousin smoked marijuana. Chavarria said she looked into the children's paternal family as possible placements, but none were appropriate.

The State also admitted into evidence three judgments. The first judgment indicated appellant pled nolo contendere to a robbery that occurred on or about January 7, 2009—a date less than three months before his eldest child, E.N.Q., was born. During the course of the robbery, appellant hit the complainant with his hand. He was sentenced on July 10, 2009, and placed on community supervision for six years. The second judgment indicated appellant pled nolo contendere to possession of a controlled substance, an offense that occurred on or about September 17, 2014—a date by which time all four children were born. He was sentenced on March 17, 2015 to five years' confinement. The third judgment indicates that, also on March 17, 2015, appellant's

community supervision was revoked and his five-year sentence would run concurrently with the sentence in his possession of a controlled substance offense.

The final witness was appellant, who testified telephonically. Appellant stated he is the father of all four children. Appellant is named as the father on C.A.Q.'s and A.C.Q.'s birth certificates. He is not named on K.C.Q.'s birth certificate because he was at work when the paperwork was completed, and he is not on E.N.Q.'s birth certificate because he was incarcerated when she was born. Appellant testified he is eligible for parole in July 2017. If he is not paroled, his release date is October 16, 2019. Although he and the Department caseworker have not spoken, he communicated with her by letter. He said he began working on his family service plan as soon as he received it, and has done everything asked of him. Appellant did not want his paternal rights terminated, he wanted the Department to give him additional time until his parole, and, if his rights were terminated, he wanted the children placed together with his mother. His mother has been a part of the children's lives since they were born, she lived with the family, and cared for the children until his incarceration. He knew his mother was arrested for drug use during this time, but he said he was out of town when she was arrested. He did not know that during this same period of time, his mother was also arrested for prostitution and resisting arrest.

Appellant is a member of the carpenters' union in San Antonio, and plans to return to work upon his release, as well as obtain his own housing. Before his incarceration, he spent every day with his children, took his daughter to school in the morning, brought C.A.Q. everywhere with him, including to his place of employment, he took the children to the park, to movies and to the rodeo. Appellant admitted he is incarcerated for selling cocaine, he was also arrested for robbing a woman, and arrested once on a family violence charge that was later dismissed. The robbery occurred before the children were born, the children were with their grandmother on the day of the alleged family violence, and the children were at home asleep when he was arrested for selling

drugs. He believed the mother's parental rights should be terminated because she was unwilling to change her lifestyle. He said the mother did not use drugs in his presence, and she started using drugs when she met her current boyfriend.

Finally, appellant's mother testified. After the children were removed from their home, she tried, but was not allowed, to visit the children. She admitted she was arrested for theft by check, but she later paid the check. She was not convicted on the drug charge, and pled guilty to resisting arrest. She said the prostitution charge was dismissed. After appellant was incarcerated, she tried to visit the children, but the mother refused her access.

BEST INTEREST

A trial court may order termination of the parent-child relationship only if the court finds by clear and convincing evidence one or more statutory grounds for termination and that termination is in the child's best interest. TEX. FAM. CODE §§ 161.001(b)(1),(2); 161.206(a) (West 2014). 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 § 263.307(a). In determining whether a child's parent is willing and able to provide the child with a safe environment, we consider the factors set forth in Family Code section 263.307(b).

We also apply the non-exhaustive *Holley* factors to our analysis. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). Finally, 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) (holding same evidence may be probative of both section 161.001(1) grounds and best interest, but such evidence does not relieve the State of its burden to prove best interest). 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 her past conduct and determine whether termination of parental rights is in the child's best interest. *Id.*

When reviewing the sufficiency of the evidence, we apply the well-established standard of review. *See* TEX. FAM. CODE §§ 101.007, 161.206(a); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (factual sufficiency).

One of the grounds on which the trial court terminated appellant's parental rights was that he "knowingly engaged in criminal conduct that has resulted in [his] (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition." TEX. FAM. CODE ANN. § 161.001(b)(1)(Q). "Terminating parental rights under subsection Q requires that the parent be both incarcerated or confined and unable to care for the child for at least two years from the date the termination petition is filed." *In re H.R.M.*, 209 S.W.3d 105, 110 (Tex. 2006). Here, the Department filed its petition on April 12, 2016. If appellant is not paroled, he will be released on or about October 16, 2019. Appellant stated he could be released on parole as early as July 2017. But, parole decisions are inherently speculative and rest entirely within the parole board's discretion. *Id.* at 109. Appellant presented no evidence he provided any support to his children during his incarceration, and his ability to care for his children and provide them with a safe environment upon his release is speculative.

The children expressed fond memories of their father, and their life was, according to E.N.Q., better when he was around. Appellant engaged in the services available to him during his incarceration and he testified about the time he spent with his children before his incarceration. However, although there was no evidence appellant ever harmed the children, and appellant denied any knowledge of the children's living conditions after his incarceration and he said the mother

did not use drugs when he was with her, the trial court was in the best position to judge appellant's credibility. Also, the trial court had before it evidence that appellant continued to engage in criminal activity during his community supervision following the robbery. Although the record reveals very little information about the children's care-givers, the two older children have bonded with their foster families who plan to adopt them. All the children have some behavioral issues, which were being addressed by their current care-givers. The only assistance appellant might receive to care for his children upon his release would be from his mother, who has her own criminal history.

Considering all the evidence in the light most favorable to the best-interest finding, we conclude the trial court reasonably could have formed a firm belief or conviction that termination of appellant's parental rights was in the children's best interest.

CONCLUSION

We overrule appellant's issue on appeal and affirm the trial court's Order of Termination.

Sandee Bryan Marion, Chief Justice