Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00190-CV

IN THE INTEREST OF T.T.B., a Child

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA00764
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: August 9, 2017

AFFIRMED

D.S. appeals the trial court's order terminating her parental rights to T.T.B. D.S. contends the evidence is insufficient to support the trial court's finding that termination of her parental rights was in T.T.B's best interest. We affirm the trial court's order.

BACKGROUND

The Texas Department of Family and Protective Services filed its original petition to terminate D.S.'s parental rights on April 13, 2016. A bench trial on the merits was held on March 9, 2017. At that time, T.T.B. was almost one. D.S. was not present at trial but was represented by appointed counsel.

Olivia Stephens, the Department's legal worker, testified T.T.B. was placed in the Department's care because D.S. used drugs throughout her pregnancy. Although D.S. denied

using any drugs other than marijuana, there was reason to believe she was using other drugs. Upon birth, T.T.B. began to experience withdrawals. Stephens observed T.T.B. had trouble breathing and had tremors for the first few months of his life.

After the Department removed T.T.B. from D.S.'s care, Stephens discussed D.S.'s service plan with her; however, D.S. did not complete the plan. Stephens testified she called or texted D.S. every week regarding services; however, D.S. did not respond. During a hearing in January, D.S. announced that she was going to attend drug treatment. Stephens scheduled and rescheduled for D.S. to be admitted to drug treatment on January 23, 2017, February 2, 2017, February 6, 2017, and February 17, 2016; however, D.S. did not show up on any of those dates.

D.S. was scheduled to have court-ordered visitation with T.T.B. three times a month contingent on negative drug test results. Stephens testified D.S. tested positive for methamphetamines and marijuana in May of 2016 and positive for methamphetamines in September of 2016. In addition, Stephens stated D.S. had not visited with T.T.B. since June 6, 2016.

D.S. was living in a home owned by a relative. Because D.S. had not demonstrated she has rehabilitated herself with regard to her drug issues, Stephens did not believe D.S.'s home was safe and stable.

Stephens believed termination of D.S.'s parental rights was in T.T.B.'s best interest. T.T.B. did not have any bond with D.S. because she had not visited him since June. T.T.B. had been diagnosed as developmentally delayed because of his exposure to drugs. Stephens testified D.S. did not understand T.T.B.'s needs, explaining D.S. believed T.T.B.'s tremors were because he was cold.

T.T.B. calls his maternal grandparents "mama' and "dadda, papa." The Department's long-term goal is for T.T.B. to be adopted by his maternal grandparents who have a bond with him and

have demonstrated they can provide him with a safe and stable home. They understand T.T.B's needs and are undertaking efforts to provide him with additional assistance throughout his life because of his developmental delays.

After hearing Stephens's testimony, the trial court rendered judgment terminating D.S.'s parental rights. D.S. appeals.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the 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 conducting a factual sufficiency review of a trial court's order terminating parental rights, we "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). "In reviewing

termination findings for factual sufficiency, a court of appeals must give due deference to a [factfinder's] factfindings and should not supplant the [factfinder's] judgment with its own." *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (internal citations omitted). The evidence is only factually insufficient if "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" about the truth of the State's allegations. *In re J.F.C.*, 96 S.W.3d at 266. "The trial court is the sole judge of the weight and credibility of the evidence, including the testimony of the Department's witnesses." *In re F.M.*, No. 04-16-00516-CV, 2017 WL 393610, at *4 (Tex. App.—San Antonio Jan. 30, 2017, no pet.) (mem. op.).

PREDICATE FINDINGS

D.S. 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 D.S.:

> (1) engaged in conduct or knowingly placed T.T.B. with persons who engaged in conduct which endangered the physical or emotional well-being of T.T.B.;
>
> (2) was the cause of T.T.B. being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;
>
> (3) constructively abandoned T.T.B. who has been in the permanent or temporary managing conservatorship of the Department for not less than six months and: (a) the Department has made reasonable efforts to return T.T.B. to D.S.; (b) D.S. has not regularly visited or maintained significant contact with T.T.B.; and (c) D.S. has demonstrated an inability to provide T.T.B. with a safe environment;
>
> (4) failed to comply with the provisions of a court order specifically establishing the actions necessary for her to obtain the return of T.T.B.; and

> (5) used a controlled substance in a manner that endangered the health or safety of T.T.B., and (a) failed to complete a court-ordered substance abuse treatment program; or (b) after completion of a court-ordered substance abuse treatment program continued to abuse a controlled substance.

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 the best interest of a child, courts 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*.

D.S. used drugs throughout her pregnancy endangering T.T.B. even before his birth. After his birth, T.T.B. experienced withdrawal and will have developmental delays his entire life. D.S. has not demonstrated any ability to meet T.T.B.'s needs and poses a future danger to him by failing to attend drug treatment. *See In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (noting parent's drug use supports a finding that termination is in best interest of the child); *In re K.C.*, 219 S.W.3d 924, 927 (Tex. App.—Dallas 2007, no pet.) (noting "great weight" can be given to the "significant factor" of drug-related conduct in determining the child's best interest). D.S. failed to complete her service plan and had not visited with T.T.B. in nine months. *See In re J.A.W.*, No. 06-09-00068-CV, 2010 WL 1236432, at *5 (Tex. App.—Texarkana Apr. 1, 2010, pet. denied)) (mem. op.) (relying on parent's failure to visit children for six months before trial as evidence to support best interest finding); *In re S.B.*, 207 S.W.3d 877, 887-88 (Tex. App.—Fort Worth 2006, no pet.) (noting failure to comply with family service plan supports a finding that termination is in the best interest of the child). Because she has not addressed her drug issues, D.S. is unable to provide a stable home for T.T.B. *See In re S.B.*, 207 S.W.3d at 887-88 (noting parent's inability to provide a stable home supports a finding that termination is in the best interest of the child).

T.T.B. is in the care of his maternal grandparents who he considers to be his parents. They understand his needs and make additional efforts to meet those needs. The Department's plan is for T.T.B.'s maternal grandparents to adopt him. *See In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (noting "[s]tability and permanence are paramount in the upbringing of a child").

Having reviewed the record, we hold the evidence is sufficient to support the trial court's finding that termination of D.S.'s parental rights was in T.T.B.'s best interest.

CONCLUSION

The trial court's order is affirmed.

Rebeca C. Martinez, Justice