Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00277-CV

IN THE INTEREST OF A.B., Jr. and M.J.B., Children

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA00396
Honorable Charles Montemayor, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 4, 2017

AFFIRMED

A.B., the father of A.B., Jr. and M.J.B., appeals the trial court's order terminating his parental rights. The only issue A.B. presents is a challenge to the sufficiency of the evidence to support the trial court's finding that termination of his parental rights was in the children's best interest. We affirm the trial court's order.

BACKGROUND

On February 23, 2016, the Department filed its petition to terminate A.B.'s parental rights. A bench trial was held on April 18, 2017. On the date of the trial, A.B., Jr. was nine, and M.J.B. was seven.

When the case was called for trial, A.B.'s attorney announced ready but requested additional time since no permanency plan was in place for the children and A.B. wanted to try to

reunite with his children when he is released from jail. The Department's attorney argued the case should proceed given that A.B. had been incarcerated more than one time while the case was pending. The Department's attorney further argued that terminating the parents' rights would provide more flexibility in finding the children a safe, stable, and permanent home. The children's ad litem also argued the parents had plenty of time to "get it together" but were both currently incarcerated. The attorneys also reminded the trial court that a placement review was pending on a paternal relative in North Carolina which could provide a permanent placement. The trial court decided the case should proceed noting permanent placements become more remote as children get older, the pendency of the case affects the mental and emotional health of the children, the parents had been in and out of jail during the pendency of the proceedings, and little progress had been made on the service plans.

A.B. was the first witness to testify. A.B. was incarcerated on a motion to revoke his probation, but he testified he should be out of jail in a few days when he is able to "get a lawyer and come up with the rest of the money to pay him." A.B. was placed on probation for possession of a controlled substance and family violence. A.B. denied he also had been arrested for resisting arrest and theft in December of 2016, explaining he was arrested for shoplifting because the person he was with was stealing. A.B. also denied he was in possession of drugs when the children were removed by the Department in February of 2016 and further denied he engaged in domestic violence with another woman who was his friend. A.B. testified he was told A.B., Jr. reported that A.B. and his friend engaged in physical altercations with weapons, but A.B. denied any such events occurred. With regard to his service plan, A.B. testified he completed all of his services except counseling. A.B. also testified he had a house with room for the children.

The children's mother, E.B., testified domestic violence was an issue between her and A.B. when they lived together. E.B. stated the domestic violence consisted of physical altercations; however, she stated the children did not witness the altercations.

Sherrell Gibbs, the Department's legal worker, testified the children made outcries of abuse and neglect. For example, A.B., Jr. told Gibbs he was at the children's shelter because A.B. choked his girlfriend causing blood to come out of her nose, and she grabbed a knife and chased him. M.J.B. told Gibbs A.B. had a knife and was chasing his girlfriend. When Gibbs questioned A.B. about the children's removal, A.B. stated the police pushed him to the ground and found drugs at his foot when they arrived in response to a call regarding an argument he was having with his girlfriend. Although Gibbs testified A.B. completed anger management, a parenting course, and an alcohol recovery program, she stated he had not demonstrated he can lead a drug-free stable life outside of jail. When A.B. was not incarcerated, he reported to Gibbs that he was staying with friends "here and there." A.B. also was unable to demonstrate his ability to parent the children because he only attended fifteen visits during the pendency of the case.

After being removed from A.B.'s care, the children were placed on psychotropic medications. A.B. did not ask about the medications and has not demonstrated an understanding of the need for the medications. In addition, A.B. allowed the children to curse and told them it was okay to fight in school. Gibbs testified that the children were very guarded, aggressive, and used a lot of profanity when initially removed, but their behavior was improving. Gibbs stated the paternal relative being considered as a potential placement was committed to being a permanent placement for the children.

At the conclusion of the evidence, the trial court terminated A.B.'s parental rights, and A.B. 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

A.B. does not challenge the sufficiency of the evidence to support the predicate statutory grounds for terminating his 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 A.B.: (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being; (3) constructively abandoned the children and failed to regularly visit or maintain significant contact with the children despite the Department's reasonable efforts to return the children to A.B., and demonstrated an inability to provide the children with a safe environment; and (4) failed to comply with the provisions of a court order specifically establishing the actions necessary for A.B. to obtain the return of the children.[1]

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

[1] The trial court verbally pronounced A.B.'s parental rights were being terminated on the first, third, and fourth grounds but also included the second ground in its written order.

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*.

A.B. had been incarcerated twice during the pendency of the case, and he was incarcerated at the time of trial on a pending motion to revoke his probation. *In re S.R.*, 452 S.W.3d 351, 370 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (relying on periods of parent's incarceration while proceedings were pending as evidence to support best interest finding). A.B. was on probation for drug possession and family violence. *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). The children reported witnessing physical altercations between A.B. and his girlfriend involving knives. *See In re T.L.B. Jr.*, No. 01–16–00806–CV, 2017 WL 1019520, at *11 (Tex. App.—Houston [1st Dist.] Mar. 16, 2017, no pet.) (mem. op.) (noting evidence of domestic violence in the home even if not directed at the child is supportive of a trial court's best-interest finding). A.B. had not demonstrated an ability to parent the children or to provide them with a stable home. *See In re S.B.*, 207 S.W.3d 877, 887-88 (Tex. App.—Fort Worth 2006, no pet.) (noting parent's inability to provide a stable home supports a finding that termination is in the best interest of the child). A.B. also had not completed his service plan. *See id.* (noting failure to comply with family service plan supports a finding that termination is in the best interest of the child). Finally, the children's behavior improved after being removed from A.B.'s care, and the Department was exploring a possible permanent placement with a paternal relative. *See In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (relying on evidence of children's improvement in foster care to support best interest finding).

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

CONCLUSION

The order of the trial court is affirmed.

Sandee Bryan Marion, Chief Justice