Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00297-CV

In the Interest of **A.S.G.**, a Child

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-PA-00416
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Karen Angelini, Justice

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

Delivered and Filed: October 25, 2017

AFFIRMED

This appeal is from a judgment terminating L.G. ("the father") and A.H.'s ("the mother") parental rights to A.S.G. ("the child"). Both the father and the attorney/guardian ad litem for the child appealed. The mother did not appeal. We affirm.

BACKGROUND

On February 25, 2016, the Texas Department of Family and Protective Services filed an original petition seeking protection and conservatorship of the child and termination of parental rights. At the time, the child was only three weeks old. The trial court appointed the Department as the child's temporary managing conservator, and the Department placed the child in a foster home. The Department prepared a family service plan and informed the child's parents of the contents of the plan. Eventually, the Department decided to proceed to terminate parental rights.

In January and February 2017, the trial court held a trial on the Department's termination pleadings. The evidence showed that the child was born drug-positive and remained in the hospital for about three weeks after her birth. The child was still suffering from the effects of being born drug-positive. The father and the mother, who remained together after the child's birth, had only visited the child about ten times. In fact, the father and the mother had not visited the child in the nine months immediately prior to trial. The father had engaged in domestic violence against the child's mother, but had failed to attend court-ordered domestic violence classes. Additionally, the father had failed to attend court-ordered drug classes. The father, who was a drug user, had participated in court-ordered drug testing for about two months and then had stopped. The father had not contacted the Department caseworker in the nine months immediately prior to the trial and the caseworker did not know where the father was. Finally, charges were pending against the father for possession of a controlled substance. The father did not appear in person at trial.

The trial court found by clear and convincing evidence that the father (1) had knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered her physical or emotional well-being; (2) had engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered her physical or emotional well-being; (3) had contumaciously refused to submit to a reasonable and lawful order of the court; (4) had constructively abandoned the child; (5) had failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of the child; (6) had used a controlled substance in a manner that endangered the health and safety of the child; and (7) had been the cause of the child being born addicted to a controlled substance. The trial court also found by clear and convincing evidence that termination of the father's parental rights was in the child's best interest. Therefore, the trial court terminated the father's parental rights. This appeal ensued.

FATHER'S APPEAL

In a single issue, the father argues the evidence was legally and factually insufficient to support the trial court's finding that termination of his parental rights was in the child's best interest.

Applicable Law and Standards of Review

Termination of parental rights under section 161.001 of the Texas Family Code requires proof by clear and convincing evidence of at least one of the grounds 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) (West Supp. 2016). 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). "To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that 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*. 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*.

When a parent challenges the factual sufficiency of the evidence on appeal, we look at all the evidence, including disputed or conflicting evidence. *In the Interest of J.O.A.*, 283 S.W.3d 336,

345 (Tex. 2009). 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 have formed a firm belief or conviction, then the evidence is factually insufficient. *Id*.

In evaluating the best interest of a child, courts 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*.

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).

Discussion

The father argues that the evidence was legally or factually insufficient to support the trial court's best interest finding against him because many of the *Holley* factors were ignored by the trial court. We reject this argument for two reasons. First, the Department was not required to present evidence on all of the *Holley* factors. *In the Interest of D.M.*, 452 S.W.3d 462, 473 (Tex. App.—San Antonio 2014, no pet.) (citing *C.H.*, 89 S.W.3d at 27). Under some circumstances, evidence of even one *Holley* factor may be sufficient to establish the best interest of the child. *Id*.

(citing *Jordan v. Dossey*, 323 S.W.3d 700, 729 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)). Second, the record shows that evidence of many of the *Holley* factors was presented at trial. We now consider the evidence as it relates to the *Holley* factors.

Physical and Emotional Needs of the Child

As to the child's physical and emotional needs now and in the future, a Department caseworker testified that the child was born drug-positive and had remained in the hospital for several weeks after her birth. Upon being discharged from the hospital, the child was still experiencing drug withdrawal symptoms, including tremors, an inability to sleep, and constant crying. The child was placed with a foster family that was able to meet her physical and emotional needs. The child, who was a year old at the time of trial, was not yet able to eat solid foods. The child was not having the same types of medical issues that she had when she was born, but she still required aggressive, ongoing treatment because of the severity of her health problems at birth. The child was receiving physical therapy, occupational therapy, and speech therapy.

The child's foster mother testified that when she brought the child home from the hospital she was going through opiate withdrawals. The child experienced some tremors and an uncontrollable, "painful" crying, not typical newborn crying. The crying was severe for the first two months of the child's life. The child's health was improving, but she was still delayed in a couple of areas. The child's occupational therapy focused on the tightness in her hips, neck, and shoulders and her core strength. The tightness was caused by the child's previous exposure to drugs. The child also had several "oral aversions," meaning she gagged easily, was not able to perform a chewing motion, and would not eat anything from a spoon. The child was receiving therapy to learn to chew properly. The child had recently learned to suck through a straw, which was a big milestone. Although a year old, the child was still relying primarily on bottle-feeding and her solid food consumption was on par with an eight-month-old.

In sum, the evidence showed that the child's physical and emotional needs were substantial and that she would continue to require a heightened level of care in the future.

Physical and Emotional Danger to the Child

As to the physical and emotional danger to the child now and in the future, a Department caseworker testified that she felt that returning the child to her father and mother would place her in physical and emotional danger. The caseworker said the father and the mother had not demonstrated that they were taking this case seriously; they did not engage in the services she had arranged for them and they had stopped participating in drug testing and continued to use drugs. The child's father and mother had not shown a change in their behavior.

Parental Abilities

Some evidence was presented concerning the father's parental abilities. The Child Advocates San Antonio (CASA) volunteer assigned to the case testified that she had observed the parents' visits with the child and she characterized the majority of these visits as "good." According to the CASA volunteer, the parents cared for the child and attended to her during the visits. However, the CASA volunteer said that two of the visits were "bad" because the child cried the whole time and the parents could not comfort her.

Additionally, a Department caseworker testified that she had received a certificate showing that the father had completed a parenting class.

Acts or Omissions of the Parents and any Excuses

Some evidence was presented concerning the father's acts and omissions indicating that the parent-child relationship was not a proper one.

A Department caseworker testified that the father had not completed all of the services required in this case. The caseworker had reviewed the service plan with the father and made referrals to parenting classes, drug classes, and domestic violence classes. The caseworker set up

these services so that they were convenient for the father in terms of location and time. The caseworker also obtained a bus pass for the father. Nevertheless, the father failed to participate in the required drug classes. The father participated in drug testing for about two months and then stopped. The mother had alleged that the father was the perpetrator of domestic violence, but the father denied these allegations. The father also failed to participate in domestic violence classes. Finally, the father had charges pending against him for possession of a controlled substance.

The CASA volunteer testified that the father and mother had not shown any interest in raising the child or in doing what they needed to do to complete their service plans. The CASA volunteer noted that the father and the mother had not visited the child regularly or maintained significant contact with her; she felt that the parents' drug use was the main reason for this. In fact, some of the scheduled visits had to be cancelled because the father and mother had not shown up for their drug testing or had tested positive for drugs. The CASA volunteer believed that the father and the mother had not shown that they cared enough about the child. In addition, the CASA volunteer felt that the father and the mother had not demonstrated an ability to provide the child with a safe environment. The father and mother had never asked the CASA volunteer to come see their home or told the CASA volunteer that they had a safe home for the child.

Finally, the foster mother testified that the father and the mother only attended about half of the scheduled visits with the child. She estimated that the total time the father spent visiting the child was about ten and a half hours and the total time the mother spent visiting the child was about ten hours and forty-five minutes.

No evidence was presented as to any excuses for the father's acts and omissions.

Programs Available/Plans/Stability of the Home

The caseworker testified that the foster parents were meeting all of the child's needs and she was doing very well with them. The child had faced some very serious medical issues since

her birth, but was recovering well. The child was still receiving physical therapy, occupational therapy, and speech therapy. The foster parents were the only parents the child had known. The caseworker had observed the interaction between the child and the foster parents on many occasions. The child had bonded with her foster parents and her foster siblings. The foster parents' home was safe. If the court decided to terminate the parents' parental rights, the foster parents were planning to seek adoption of the child. The caseworker said that the Department believed that adoption by the foster parents was in the child's best interest.

The CASA volunteer had visited the child in the foster parents' home and the child was doing very well there. The foster parents had the ability to care for the child now and in the future.

To further support his argument that the best interest evidence was legally and factually insufficient, the father points to evidence showing that most of his visits with the child were "good." Based on this evidence, the father argues that we should "assume" he had a bond with the child. The father also points to evidence showing that he had completed a parenting class and asserts that the evidence did not show that he and the mother had done any specific harm to the child.

In performing a legal sufficiency review, we must 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. *J.F.C.*, 96 S.W.3d at 266. The evidence in this case showed that the father's visits were limited in duration and number, that he was unable to maintain a consistent visitation schedule with the child, and that he failed to perform important components of his service plan, namely completing drug and domestic violence classes. Furthermore, we disagree with the father's assertion that the evidence did not show that he and the mother had done any specific harm to the child. The evidence showed that the child was born drug-

positive and that the father was unable to maintain a consistent visitation schedule so that he could have an ongoing relationship with the child.

In performing a factual sufficiency review, we consider whether the disputed evidence that a reasonable factfinder could not have credited in favor of the finding was so significant that a factfinder could not have formed a firm belief or conviction that termination of the father's parental rights was in the child's best interest. *See J.O.A.*, 283 S.W.3d at 345. We cannot say that the disputed evidence in this case was so significant that a reasonable factfinder could not have formed a firm belief or conviction that termination of the father's parental rights was in the child's best interest.

After reviewing the evidence under the proper standards of review, we conclude that the evidence was legally and factually sufficient to support trial court's finding that termination of the father's parental rights was in the child's best interest. The father's issue is overruled.

ATTORNEY/GUARDIAN AD LITEM FOR THE CHILD'S APPEAL

In a single issue, the attorney/guardian ad litem for the child argues the trial court abused its discretion by excluding evidence that she claims was relevant to the child's best interest. The attorney/guardian ad litem argues that the trial court "routinely thwarted" her "attempts to delve into the 263.307 factors" and, as a result, the evidence was legally and factually insufficient to support the trial court's findings that termination of the parents' parental rights was in the child's best interest.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In the Interest of J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A trial court abuses its discretion if it acts without reference to any guiding rules or principles or if its actions are arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Section 263.307(a) provides that the prompt and permanent placement of a 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). Section 263.307(b) lists the factors courts consider in determining if a parent is willing and able to provide a child with a safe environment. These factors include: (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).

Here, the record shows that during trial the attorney/guardian ad litem for the child attempted to question a caseworker about the Department's obligations to locate relatives and a maternal relative about the bond she had formed with the child. In both instances, the trial court sustained relevance objections and excluded the evidence.

On appeal, the attorney/guardian ad litem for the child argues that the trial court abused its discretion in sustaining the relevance objections because the evidence she sought to elicit was relevant to the child's best interest, citing section 263.307(b) of the Texas Family Code. However, the attorney/guardian ad litem for the child misconstrues section 263.307(b). Section 263.307(b) lists the factors courts consider in determining if a *parent* is willing and able to provide a child with a safe environment; the section 263.307(b) factors do not pertain to the issue of relative placement. Furthermore, the record does not show that the attorney/guardian ad litem for the child was attempting to elicit the evidence in question to show that the parents were willing and able to provide the child with a safe environment. To the contrary, the record shows that the attorney/guardian ad litem for the child was attempting to elicit the evidence in question to advance her argument that the Department had failed to adequately pursue a relative placement for the child. In fact, in responding to one of the relevance objections the attorney/guardian ad litem for the child stated, "[T]here are relatives, and I believe the [D]epartment is obligated to seek out relative placements and that's where I'm going with this line of questioning." Additionally, the record indicates that the trial court had previously held a hearing on the attorney/guardian ad litem for the child's motion to place the child with relatives and had denied the motion.

On this record, we cannot say that the trial court acted without reference to any guiding rules and principles or that its actions were arbitrary or unreasonable. We conclude that the trial court did not abuse its discretion in sustaining the relevance objections.

To the extent the attorney/guardian ad litem for the child's brief could be construed as arguing that the evidence admitted at trial was legally and factually insufficient to support the trial court's best interest findings as to both parents, we also address this argument. We have already evaluated the best interest evidence as it relates to the father. As to the child's mother, the best interest evidence showed that the mother gave birth to a drug-positive child, which as the

caseworker explained in her testimony constituted physical abuse of the child. The mother never offered any explanation for her drug use during pregnancy. The mother's service plan required her to complete drug classes, parenting classes, and domestic violence classes. The caseworker reviewed the service plan with the mother and set up referrals for the mother to participate in these services. Nevertheless, the mother failed to complete any of these services. Additionally, the mother had not visited the child in the nine months immediately prior to trial and had only visited the child ten times in the span of a year. During one of these visits, the child cried the whole time and the mother could not comfort her and was very distraught. The caseworker never asked the mother about her plans for the child; however, the mother had stopped communicating with the caseworker and responding to her calls so they never reached the point where a discussion about the mother's plans for the child was necessary. The mother did talk to the caseworker several weeks before trial; however, during this conversation the mother did not ask about the child. No excuses were provided for the mother's acts and omissions.

After reviewing the evidence under the proper standards of review, we conclude that the evidence was legally and factually sufficient to support the trial court's findings that the termination of both parents' parental rights was in the child's best interest. The issue presented by the attorney/guardian ad litem for the child is overruled.

CONCLUSION

The trial court's termination judgment is affirmed.

Karen Angelini, Justice