Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00298-CV

IN THE INTEREST OF J.S.R., a Child

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-PA-00696
Honorable John D. Gabriel, Jr., Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: October 18, 2017

AFFIRMED

A.C. ("Mother") and R.J. ("Father") appeal the trial court's order terminating their parental rights to J.S.R. Both appellants contend the evidence is insufficient to support the trial court's finding that termination of their parental rights was in J.S.R.'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 Mother's and Father's parental rights on April 5, 2016. A bench trial on the merits was held on May 3, 2017. At that time, J.S.R. was approximately 18 months old. Both Mother and Father appeared with appointed counsel but announced not ready; the trial court overruled their announcements and proceeded to hear evidence.

The legal caseworker, Dietra Marquez, testified that J.S.R. was removed from the home due to domestic violence issues. Although J.S.R. was born drug-positive to marijuana, the Department did not file its petition for removal until approximately three and a half months after J.S.R.'s birth when allegations of domestic violence between Father and Mother arose.

Marquez testified that Mother completed a drug treatment program yet continued to abuse illegal substances. Just a few weeks before trial, on April 21, 2017, Mother gave birth to a child who was drug-positive; Mother admitted to using marijuana daily during the last two months of her pregnancy to help with nausea. Mother completed parenting classes and domestic violence classes but failed to complete individual counseling. As far as visitation was concerned, Mother had not been consistent in the two months prior to trial, and last saw J.S.R. in February. J.S.R. appeared to be bonded to Mother and the visits were appropriate.

As to Father, Marquez testified that his family service plan required that he complete domestic violence classes, parenting classes, individual counseling, and a psychological evaluation. Father completed the psychological evaluation and the parenting and domestic violence classes. Father was trying to work overtime and extra shifts to earn money to provide a stable house for the child, but had not yet found and maintained safe housing and stable employment. Like Mother, Father had not been consistent in his visits with J.S.R. in the two months prior to trial, and stopped visiting in February. The caseworker conceded that J.S.R. has a bond with Father.

Both parents failed to submit to random drug testing. J.S.R. was living with his maternal grandmother, with whom he had been placed at the time of removal. The caseworker testified that J.S.R. was bonded to his grandmother and that she is willing to adopt him. The caseworker testified that she believed it was in the best interest of the child that both parents' parental rights

be terminated because neither parent had adequately addressed the issues that caused J.S.R. to be removed from the home in the first place.

Father testified that he has asked for a new attorney and a new caseworker; the caseworker is not responsive to his calls and is always on sick leave or on vacation. He explained that he stopped visiting the child in February because he had automobile trouble and his apartment lease was up and he had to find a new place to live. When asked if he was able to financially support himself, Father replied, "Yes, barely." Father believed that if given additional time by the trial court, he could complete his court-ordered service plan. Father admitted that he has been serving probation for a drug charge since July 2016. Father stated that he last smoked marijuana with Mother one month prior to trial, but that he was no longer smoking. At the conclusion of the bench trial, the trial court rendered judgment terminating Mother's and Father's parental rights. Mother and Father now appeal.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Family 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 (West 2014).

In reviewing the legal sufficiency of the evidence to support the termination of parental rights, we 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." *Id.* "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

Neither parent challenges the sufficiency of the evidence to support the predicate statutory grounds for terminating their 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 Mother:

> (1) failed to comply with the provisions of a court order specifically establishing the actions necessary for her to obtain the return of J.S.R.; and
> (2) used a controlled substance in a manner that endangered the health or safety of J.S.R., 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.

TEX. FAM. CODE ANN. § 161.001(b)(1)(O), (P) (West Supp. 2016). The trial court found by clear and convincing evidence that Father:

> (1) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
> (i) the department has made reasonable efforts to return the child to the parent;
> (ii) the parent has not regularly visited or maintained significant contact with the child; and
> (iii) the parent has demonstrated an inability to provide the child with a safe environment; and
> (2) failed to comply with the provisions of a court order specifically establishing the actions necessary for him to obtain the return of J.S.R.

Id. § 161.001(b)(1)(N), (O) (West Supp. 2016).

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.*

A. Termination of Mother's Parental Rights

Mother used drugs during her pregnancy with J.S.R. and admitted that she used them in a subsequent pregnancy. Mother's continued drug use shows an unwillingness to effect change and poses a future danger to J.S.R. *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). Mother's apparent failure to address her drug issues also shows an inability to provide a stable home for J.S.R. *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). In addition, Mother failed to complete her service plan and had not visited with J.S.R. for two months prior to trial. *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 at 887-88 (noting failure to comply with family service plan supports a finding that termination is in the best interest of the child).

J.S.R. is in the care of his maternal grandmother to whom he is bonded. The Department's plan is for the maternal grandmother to adopt J.S.R. *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 Mother's parental rights was in J.S.R.'s best interest.

B. Termination of Father's Parental Rights

Father admitted that he had not completed his service plan and that he stopped visiting J.S.R. two months prior to trial. *See In re J.A.W.*, 2010 WL 1236432, at *5; *In re S.B.*, 207 S.W.3d at 887-88. Although Father blamed the missed visits on car trouble, the trial court could have found this excuse unavailing. *See In re K.A.S.*, 131 S.W.3d 215, 229-30 (Tex. App.—Fort Worth 2004, pet. denied) (fact finder has discretion to determine weight and credibility of witness's testimony); *In re H.R.M.*, 209 S.W.3d at 108 (we may not disturb fact finder's resolution of credibility issues on appeal). In addition, Father admitted to using marijuana one month prior to trial. *See In re L.G.R.*, 498 S.W.3d at 204; *In re K.C.*, 219 S.W.3d at 927. Father had not demonstrated that he had stable housing for the child. *See In re S.B.*, 207 S.W.3d at 887-88. Conversely, J.S.R.'s current placement with his maternal grandmother was stable and she planned to adopt him. In light of the evidence in the record before us, we hold the evidence is sufficient to support the trial court's finding that termination of Father's parental rights was in J.S.R.'s best interest.

CONCLUSION

The trial court's order is affirmed.

Rebeca C. Martinez, Justice