Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00314-CV

IN THE INTEREST OF R.C.M., a Child

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-PA-00978
Honorable John D. Gabriel, Jr., Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: November 8, 2017

AFFIRMED

C.M. appeals the trial court's order terminating his parental rights to R.C.M. C.M. contends the evidence is insufficient to support the trial court's finding that termination of his parental rights was in R.C.M.'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 C.M.'s parental rights on May 6, 2016. A bench trial on the merits was held on May 3, 2017. At that time, R.C.M. had just turned one.

Sheronda Davis, the Department's legal caseworker, testified that R.C.M. was placed in the Department's care on May 17, 2016, because both C.M. and R.C.M.'s mother were using drugs throughout the pregnancy. At birth, R.C.M. tested positive for amphetamines, benzodiazepines,

and opiates and experienced withdrawals. Davis testified that when she discussed the reason for the removal of the child with C.M. and R.C.M.'s mother, both admitted to using drugs prior to the birth despite knowing that it was not in the best interest of R.C.M. After the Department removed R.C.M. from C.M.'s care, Davis discussed C.M.'s service plan with him; however, C.M. did not complete any items on the plan despite Davis setting up referrals and appointments for C.M. to attend parenting classes, a psychosocial evaluation, and drug treatment.

C.M. was scheduled to have weekly court-ordered visitation with R.C.M. contingent on negative drug test results. Davis testified that C.M. had not visited with R.C.M. since his removal and, as a result, Davis was unable to say whether there was a bond between C.M. and R.C.M. Davis testified that C.M. did not demonstrate an ability to give R.C.M. a safe home environment, to effectively and positively change his environment, or give R.C.M. the attention he needed due to his age and vulnerability. Additionally, there were no other family members who wanted to be considered for placement of R.C.M. Davis believed termination of C.M.'s parental rights was in R.C.M.'s best interest.

C.M. testified telephonically. He stated that he was currently incarcerated for credit card fraud after violating the terms of his probation. He believed he would be released in 2020, or perhaps sooner if he were paroled. He testified that he was aware of the family service plan, but had not actually received it. He stated that he completed a full month of Drug Court and passed a urinalysis test, but still was not allowed to see R.C.M. He had been imprisoned since October of 2016. C.M. admitted to not having a plan for how he would be able to provide for R.C.M. during his incarceration.

The Department's long-term goal is for R.C.M. to be adopted by the foster family with whom he currently resides. Davis testified that the foster family is stable, prepared to adopt

R.C.M., and able to care for R.C.M. R.C.M.'s attorney ad litem also recommended that termination of C.M.'s parental rights was in the best interest of R.C.M.

After hearing the above testimony, the trial court rendered judgment terminating C.M.'s parental rights. C.M. timely appealed.

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 clear and convincing standard is the applicable burden of proof in termination cases. 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). This heightened standard stems from the unalterable changes and permanency that termination of a parent-child relationship causes both the child and the parent. *In re D.M.*, 452 S.W.3d 462, 469 (Tex. App.—San Antonio 2014, no pet.). Consequently, termination proceedings are strictly scrutinized and "involuntary termination statutes are strictly construed in favor of the parent." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

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." *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) (per curiam) (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.

PREDICATE FINDINGS

C.M. 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 C.M.:

(1) engaged in conduct or knowingly placed R.C.M. with persons who engaged in conduct which endangered the physical or emotional well-being of R.C.M.;

(2) constructively abandoned R.C.M. who had been in the permanent or temporary managing conservatorship of the Department for not less than six months and: (a) the Department had made reasonable efforts to return R.C.M. to C.M.; (b) C.M. had not regularly visited or maintained significant contact with R.C.M.; and (c) C.M. had demonstrated an inability to provide R.C.M. with a safe environment;

(3) failed to comply with the provisions of a court order specifically establishing the actions necessary for him to obtain the return of R.C.M.; and

(4) knowingly engaged in criminal conduct that has resulted in C.M.'s conviction of an offense and imprisonment and inability to care for R.C.M. for not less than two years from the date of filing the petition.

See TEX. FAM. CODE ANN. §§ 161.001(b)(1)(E), (N), (O), (Q).

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) (per curiam). 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. § 236.307(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.*

R.C.M. tested positive for Diazepam, methamphetamines, marijuana, and three different types of opiates when he was born on April 18, 2016. Both parents tested positive for amphetamines, Benzodiazepines, and opiates at the time of delivery. C.M. has not demonstrated an ability to provide for R.C.M.'s needs because he is currently incarcerated and poses a future danger to him by continuing to use drugs and 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 the best interest of the child); *In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.) (noting that a trial court may consider incarceration as a best-interest factor). Further, C.M.'s mother, whom he was going to rely on to care for R.C.M. during his incarceration, withdrew her name for placement consideration. C.M. failed to complete any portion of his service plan and had not visited with R.C.M. since he was removed from his care. *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 C.M. is currently incarcerated with a projected release date in 2020 and has not addressed his drug issues, C.M. is unable to provide a stable home for R.C.M. *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).

R.C.M. is in the care of foster parents who understand his needs and have made efforts to meet those needs. The Department's plan is for R.C.M.'s foster family 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").

Viewing all the evidence in the light most favorable to the judgment, we conclude the trial court could have formed a firm belief or conviction that termination of C.M.'s parental rights is in the best interest of R.C.M. *See In re J.F.C.*, 96 S.W.3d at 365-66. Although there was evidence that C.M. participated in drug court for four weeks, this evidence is not so significant that the trial court could not reasonably have formed a firm belief or conviction that termination of C.M.'s parental rights is in the best interest of R.C.M. *Id*. Accordingly, we hold the evidence is legally and factually sufficient to support the trial court's finding that termination of the parent-child relationship is in R.C.M.'s best interest.

CONCLUSION

We overrule C.M.'s sole issue on appeal and affirm the trial court's order.

Rebeca C. Martinez, Justice