Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00452-CV

IN THE INTEREST OF A. L. T., a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-PA-01692
Honorable Richard Garcia, Judge Presiding

Opinion by: Karen Angelini, Justice

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

Delivered and Filed: November 8, 2017

AFFIRMED

David T. appeals the trial court's termination of his parental rights to his daughter, A.L.T.[1] In a single issue on appeal, David challenges the sufficiency of the evidence to support the trial court's finding that termination of his parental rights was in A.L.T.'s best interest. We affirm the trial court's order.

BACKGROUND

On August 4, 2016, the Department of Family and Protective Services (the "Department") filed its petition to terminate David's parental rights. The termination hearing before the bench commenced on July 10, 2017. A.L.T. was born on July 19, 2015, and was almost two years old at the time of the hearing.

[1] The trial court also terminated the parental rights of A.L.T.'s mother, who is not a party to this appeal.

Only two witnesses testified at the termination hearing, Katie Walston for the Department and David who testified telephonically because he was incarcerated. Walston testified that when A.L.T. was born, she tested positive for opiates, suffered from withdrawal symptoms, and remained in the hospital for about one month. Upon her release from the hospital, A.L.T. went to live with her maternal aunt and uncle, with whom she continues to live. A.L.T.'s mother tested positive for opiates, cocaine, and amphetamines. Walston stated A.L.T. is doing well and is on-track developmentally; she is in the only home she has ever known; and her aunt and uncle are willing to adopt her and they provide her a safe, stable, and loving home. A.L.T. calls them her "mom" and "dad" or "mama" and "dada."

Walston said David is currently incarcerated for possession of a controlled substance, one to four grams. She first met with David in September 2016 when he was in the Bexar County jail and they discussed the case. After David was transferred to the Garza West Unit in Beeville, Texas, Walston spoke to a social worker at the unit who said the unit offered classes such as ones for substance abuse and coping with life outside the facility. However, the social worker said David had to enroll himself in the classes. Walston stated she provided a service plan to David that allowed him to complete any services available to him at his facility, as well as engage in any available counseling. As of the time of the termination hearing, David had not engaged in any of the requirements on his service plan and had not enrolled in any classes offered at the Garza West Unit. When asked if she believed A.L.T. would be safe if returned to David's care, Walston responded:

> No. . . . [David] has also displayed a consistent pattern of drug use and criminal activity. He has been incarcerated the entirety of this case and will not be released until June of 2018, [A.L.T.] does not have a bond with him. He has not supported [A.L.T.] or provided any type of stability for her. . . . It has been over a year and a half [since David visited A.L.T.].

In addition to drug possession, David's criminal past includes theft, burglaries, and robberies. According to Walston, David has not shown a willingness to effect a positive environment or make positive changes in his life, and he has not shown that he can properly care for and nurture A.L.T.

At the beginning of the case in July 2015 when A.L.T. was born, and before David's July 2016 incarceration, David and A.L.T.'s mother were engaged in a family-based plan with the Department. During this time, David refused to take a drug test and had only "a few inconsistent visits" with his daughter. Walston said the last visit was Easter of 2016. The Department filed its petition to terminate parental rights on August 4, 2016. Since their September 2016 meeting in the Bexar County jail, Walston has communicated with David only by letters. In his most recent letter, David indicated he was still trying to enroll in classes.

David testified telephonically. He recalled meeting Walston at the Bexar County jail and that she gave him a service plan. He said he has taken classes in parenting, anger management, and "New Life Behaviours," and he has the certificates for each. David said Walston included classes on his service plan that are not offered at the Garza West Unit and the unit does not offer therapy. David said his release date is June 27, 2018, and he has been denied parole. He does not want his parental rights terminated.

At the conclusion of the evidence, the trial court terminated David's parental rights, and he now appeals.

STANDARD OF REVIEW

To terminate parental rights pursuant to Family Code section 161.001, 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 child's best interest. *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 § 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 § 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." *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. In a bench trial, the trial court is the sole judge of the weight and credibility of the evidence, including the testimony of the Department's witnesses. *See In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006).

PREDICATE FINDINGS

The trial court found by clear and convincing evidence that David: (1) knowingly placed or knowingly allowed A.L.T. to remain in conditions or surroundings that endangered her physical or emotional well-being; (2) engaged in conduct or knowingly placed A.L.T. with persons who engaged in conduct that endangered her physical or emotional well-being; (3) constructively abandoned A.L.T.; and (4) failed to comply with the provisions of a court order specifically establishing the actions necessary for him to obtain the return of A.L.T. TEX. FAM. CODE § 161.001(b)(1)(D),(E),(N),(O). David does not challenge the sufficiency of the evidence to support these 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).

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.* Although proof of acts or omissions under section 161.001(b)(1) does not relieve the Department from proving the best interest of the child, the same evidence may be probative of both issues. *In re C.H.*, 89 S.W.3d at 28.

At the time of the termination hearing, A.L.T. was too young to express her desire. However, she lives with the only family she has ever known since she was born—her maternal aunt and uncle, whom she calls "mom" and "dad" or "mama" and "dada." She has bonded with her aunt and uncle, and they want to adopt her. They provide her with a safe and stable home in which she has thrived.

On the other hand, before his incarceration, David had few, inconsistent visits with his daughter. As of the date of the hearing, it had been almost eighteen months since his last visit, he has no bond with his daughter, and has provided no support for her. He is currently incarcerated and will not be released until June 2018. Although David testified he completed three classes while incarcerated, Walston had no proof he had done so and he had not enrolled himself in the classes offered at the Garza West Unit. David's criminal history and drug use indicate he has not and cannot provide for A.L.T.'s physical and emotional needs or provide her with a safe and stable

environment. *See In re C.H.*, 89 S.W.3d at 28 (proof of acts or omissions under section 161.001(b)(1) may be probative of the child's best interest); *In re E.D.*, 419 S.W.3d at 620 ("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"); *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied) ("conduct that subjects a child to a life of uncertainty and instability, endangers the physical and emotional well-being of a child").

Finally, we note that although David argues the *Holley* factors and the factors under Family Code section 263.307(a) "were largely ignored by the State at trial," a court is not prohibited from reasonably forming a strong conviction or belief that termination is in a child's best interest simply because there may not be evidence of one or more of these factors. *See In re C.H.*, 89 S.W.3d at 27; *In re J.I.M.*, 517 S.W.3d 277, 287 (Tex. App.—San Antonio 2017, pet. denied). Thus, whether we look at all the evidence in the light most favorable to the trial court's finding, or whether we look at all the evidence, including disputed or conflicting evidence, we conclude the trial court's best interest finding is supported by sufficient evidence.

CONCLUSION

We overrule David's issue on appeal and affirm the trial court's Final Order in Suit Affecting the Parent-Child Relationship.

Karen Angelini, Justice