Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00466-CV

IN THE INTEREST OF X.J.L., a Child

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA01784
Honorable Martha Tanner, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: October 18, 2017

AFFIRMED

This is an accelerated appeal from an order terminating Mother and Father's parental rights to the child, X.J.L.[1] Father contends the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights is in the best interests of the child. We affirm the trial court's termination order.

BACKGROUND

On June 9, 2016, the Texas Department of Family and Protective Services ("Department") received a referral alleging neglectful supervision and physical abuse against Mother in relation to X.J.L. The referral alleged there was ongoing domestic violence between Mother and her then-

[1] Although the trial court terminated both parents' parental rights, only Father appeals the trial court's termination order. Therefore, we will only discuss the trial court's order as it pertains to Father.

boyfriend, and that Mother threw the child into a playpen. On August 15, 2016, after an investigation and based on the parents' history with the Department, the Department filed its original petition to terminate Father's parental rights. X.J.L. was fourteen months old at the time of filing. Father was in prison at the time of filing and remained in prison through trial. Following an adversary hearing held on September 15, 2016, the trial court signed a temporary order assigning the Department as temporary managing conservator of the child and ordering Father to comply with the Department's family service plan. A status hearing was held on October 11, 2016, during which the trial court found that Father had not yet reviewed the service plan. The service plan was subsequently made an order of the court. In the following months, the trial court held two required permanency hearings and found Father had not demonstrated adequate and appropriate compliance with the service plan.

During a non-jury trial on July 19, 2017, the Department presented two witnesses: Father, via telephone, and Department caseworker Patsy Haverkamp. After receipt of evidence and testimony, the trial court signed an order terminating Father's parental rights. Specifically, the trial court found Father (1) engaged in conduct or knowingly placed X.J.L. with persons who engaged in conduct endangering X.J.L.'s physical or emotional well-being; (2) constructively abandoned X.J.L.; and (3) failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of X.J.L. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (N), (O) (West Supp. 2016). The trial court also found termination of Father's parental rights was in X.J.L.'s best interest. *See id.* § 161.001(b)(2). Father appeals the trial court's order terminating his parental rights to X.J.L.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Texas 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; *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 reviewing the factual sufficiency of the evidence to support the termination of parental rights, a court "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id*. "A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *Id*. "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 reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id*.

BEST INTEREST OF THE CHILD

Father challenges the sufficiency of the evidence to support the trial court's finding that termination of his parental rights is in the child's best interest.

The Texas Supreme Court has enumerated the following factors to assist courts in evaluating a child's best interest: (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. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). 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 17, 27 (Tex. 2002). "A trier of fact may measure a parent's future conduct by his past conduct and determine whether termination of parental rights is in the child's best interest." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

Turning to the evidence regarding the best interest of the child, we consider the *Holley* factors as outlined above.

Desires of the Child

X.J.L. is a young child, who was fourteen months old at the time the Department filed the suit to terminate Father's parental rights and two years old at the time of trial. X.J.L. was thus unable to verbally communicate his desires. However, when a child is too young to express his desires, the factfinder may consider whether the child has bonded with its current caregiver, is well-cared for, and has spent minimal time with the parent. *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Haverkamp testified X.J.L. was placed in a foster home with his half-sibling, A.K.S., three months prior to trial.[2] Haverkamp described the relationship between X.J.L. and his foster parents as "extremely loving" and a "true … parental type of bond." Haverkamp further testified that X.J.L. is "extremely attached to [the foster parents]," "takes directives from them," and "looks to them for guidance." Father testified that, due to his incarceration, he had not seen X.J.L. since May 2016, over a year prior to trial. Haverkamp testified Father did not have a bond with X.J.L.

Emotional and Physical Danger

The trial court may consider a parent's history with other children when considering the risks or threats of a parent's environment. *In re E.A.F.*, 424 S.W.3d 742, 751 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). At the time of trial, Father was incarcerated pursuant to a conviction for the offense of injury to a child. Father caused "severe facial injuries" to A.K.S., who was one or two years old at the time. The trial court could infer from Father's past violent conduct towards a child that Father represented a threat to X.J.L.'s emotional and physical well-being. *See In re J.D.*, 436 S.W.3d at 118 ("A fact finder may infer that past conduct endangering the well-being of a child may recur in the future if the child is returned to the parent.").

The record additionally shows Father's lengthy criminal history, which includes convictions for assault with bodily injury, driving while intoxicated, theft, and drug possession. Father served time in jail at least once prior to X.J.L.'s birth. A parent's inability to maintain a lifestyle free from arrests and incarcerations is relevant to the best-interest determination. *In re D.M.*, 58 S.W.3d 801, 814 (Tex. App.—Fort Worth 2001, no pet.); *In re Z.I.A.R.*, No. 10-16-00039-CV, 2016 WL 4150691, at *4 (Tex. App.—Waco Aug. 3, 2016, no pet.). Father's inability to maintain a lifestyle free of criminal conduct subjects X.J.L. to instability and endangers the

[2] X.J.L. and A.K.S. share the same mother.

child's well-being. *In re S.M.L.*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005) ("When parents … repeatedly commit criminal acts that subject them to the possibility of incarceration, that can negatively impact a child's living environment and emotional well-being.").

Emotional and Physical Needs/Stability/Plans for the Child

A child's need for permanence is a paramount consideration for the child's present and future physical and emotional needs. *Dupree v. Texas Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 87 (Tex. App.—Dallas 1995, no writ). The goal of establishing a stable permanent home for a child is a compelling government interest. *In re M.A.N.M.*, 75 S.W.3d 73, 77 (Tex. App.—San Antonio 2002, no pet.). The trial court may infer from a parent's past inability or unwillingness to meet a child's physical and emotional needs an inability or unwillingness to meet a child's needs in the future. *In re J.D.*, 436 S.W.3d at 118.

The trial court heard evidence that X.J.L. had formed a close, loving bond with the foster parents. Haverkamp testified the foster parents provide stability for X.J.L. According to Haverkamp, the foster parents were in the process of adopting A.K.S.,[3] and were willing to be a permanent home for X.J.L. as well.

Given his past criminal history and tendency toward violence, Father is unable to provide X.J.L. with stability. Moreover, the record is unclear as to who would care for the child during Father's incarceration. Father listed his mother as a relative option, and testified his mother was the only stable person in his family willing to help him care for X.J.L. However, the Department conducted a home study of Father's mother's residence and found it an unsuitable living environment for X.J.L.

[3] Parental rights to A.K.S. were terminated by prior court proceedings.

Parent's Acts or Omissions

Father is currently incarcerated for committing the felony offense of injury to a child. Father testified it was his own fault that he was incarcerated. Father further testified he did not perform any services on his service plan, such as taking parenting classes, because his prison unit did not offer those classes. Haverkamp testified that in such instances, it is the caseworker's responsibility to coordinate with an outside provider to supply an inmate with the requisite services when the inmate informs the caseworker that his prison unit does not offer them. However, Father never informed Haverkamp that he lacked access to the services, and therefore Haverkamp was not aware of the need to coordinate services.

Conclusion

After evaluating the evidence and testimony in light of the *Holley* factors and viewing the evidence in the light most favorable to the trial court's finding, we conclude the trial court could reasonably have formed a firm conviction that termination of Father's parental rights is in the child's best interest. Thus, the evidence is legally sufficient to support this finding. Based upon the same evidence and conclusions, the evidence is also factually sufficient to support the trial court's finding that termination was in the child's best interest.

CONCLUSION

Based on the foregoing reasons, we overrule Father's sole issue on appeal in which he challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination of his parental rights is in the best interest of the child. We affirm the trial court's order terminating Father's parental rights.

Irene Rios, Justice