Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00432-CV

IN THE INTEREST OF A.G.G., L.P.G., L.M.G., and L.G.G., Children

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA00058
Honorable Norma Gonzales, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: February 7, 2018

AFFIRMED

This is an accelerated appeal from the trial court's order terminating appellant's parental rights to his four children, A.G.G., L.P.G., L.M.G., and L.G.G. In a single issue, appellant challenges the sufficiency of the evidence in support of the trial court's finding that termination of his parental rights was in the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2017). We affirm.

BACKGROUND

The Department of Family and Protective Services ("the Department") became involved in the case in January 2016 based on an allegation that appellant punched his wife, Kylie W., in the face several times while in the presence of the four children. At the time, all four children

lived with appellant and Kylie W. The termination trial commenced before a jury on June 6, 2017.[1] Appellant was the only parent present at the trial. Anastasia W., the mother of the eldest child (A.G.G.) was not present. Kylie W., the mother of the other three children, was killed on October 25, 2016. At the time of the termination trial, appellant was under indictment for her murder.

Bexar County Sheriff's Deputy Jacob Rodriguez testified that on January 5, 2016, he responded to a "suspicious vehicle" call at an address that turned out to be Kylie W.'s house. He recognized the address because of a previous family disturbance call and he knew a protective order had been issued for the address. Deputy Rodriguez said that when he stopped a vehicle driven by appellant, appellant acknowledged he was not supposed to be at the location and appellant showed him a copy of the protective order. Deputy Rodriguez arrested appellant for violating the protective order.

Tiffany Garza, the Department investigator, testified she was assigned to the case on January 5, 2016 to investigate a neglectful supervision referral involving family violence and drug use on the part of both appellant and Kylie W. When she went to Kylie W.'s house the next day, Kylie W. "was clearly seeking help, and she had a very scared look on her face." Kylie W. told Garza she was scared and did not want to lose her children. Garza observed no injuries to Kylie W.'s face, but she saw bruises on both upper arms, which confirmed Garza's concerns about domestic violence. Kylie W. admitted to Garza that she had been in a physical altercation at a local Wal-Mart the day before. Kylie W. also admitted to having used methamphetamine and marijuana, and she tested positive for amphetamines. Kylie W.'s drug use, and the fact that the house smelled of marijuana, contributed to Garza's decision to remove the children from their home.

[1] At the time of the termination trial, A.G.G. was nine years old; L.P.G. was five years old; L.M.G. was four years old; and L.G.G. was almost three years old.

Garza also believed appellant posed a threat to the children. She said she spoke to six-year-old A.G.G., and the child was aware of arguments in the home and provided Garza with "a good amount of information" about the violence in the home, as well as information about drug use in the home. Garza described A.G.G. as "parentified," in the sense that the child had taken on certain duties such as giving her younger siblings milk and responding to them when they cried. She agreed with the description of A.G.G. as "six [years old], going on about 30 [years old]." Garza said A.G.G. was "too worldly" for her age, and she knew "way too much." The other children were not old enough to tell Garza anything.

Cherin E., the maternal grandmother of the three youngest children, testified those children were currently living with her. She said she had been concerned about domestic violence since appellant and her daughter, Kylie W., began their relationship eight or nine years prior. She said that in 2010, appellant beat her daughter with a full whiskey bottle. When she went to her daughter's house one evening in 2010 to get her daughter out of the house, appellant tried to run her off the road when she and her daughter were driving away. During another encounter in 2010, appellant slashed her tires. Because Cherin E. knew her daughter was living in a cycle of abuse, Cherin E. called the police and placed anonymous calls to the Department to help her daughter and grandchildren. Cherin E. said her daughter often came to her in tears, saying appellant threatened to kill Cherin E. or the children. She said she went to get her daughter over twenty times when her daughter said appellant had assaulted her.

Cherin E. said the three children living with her are thriving, but they are still grieving and in counseling. She said the children initially "were all over the place" and had no boundaries, and it has been a "slow progression." However, the children now feel safe and have their own rooms and toys. Before counseling, L.P.G. would hide and tell Cherin E. that she was afraid appellant was coming to get her. Now, L.P.G. feels more secure, although she still wants to sleep with

Cherin E. at night. Cherin E. said a counselor explained to the children why their mother is no longer with them, and they talk about her being in heaven. Cherin E. stated she had never told the children "that daddy killed mommy," and she would not allow anyone else to say that. The eldest child, A.G.G., is in a foster home because Cherin E. did not believe she could care for all four children and she wanted to adopt the three youngest.

Cherin E. admitted a female friend lived with her for a period of time, but when the Department expressed concerns about this woman, Cherin E. moved into her own apartment. She also admitted to having her own domestic violence problems with her first husband almost twenty-seven years ago. She said there were no domestic violence issues with her second husband, and her female friend had several assault charges against her. Finally, Cherin E. admitted that, twenty years in the past, she was addicted to cocaine but she voluntarily went to rehabilitation.

Carlos Castillo-Nunez testified he counseled appellant. He said appellant admitted using marijuana once when he was a teenager, and he admitted that he had been incarcerated "several times" for domestic violence. However, appellant denied the current domestic violence and drug use allegations. Appellant told Castillo-Nunez those allegations were fabricated by Kylie W., whom he referred to as his "ex-wife." According to appellant, the charges were going to be dismissed and he was not sure why he needed counseling. The only incident of violence appellant talked about was when he, Kylie W., and the children drove to Wal-Mart. Appellant told Castillo-Nunez that, while they were all in the car, another individual hit Kylie W. and he did nothing to stop the beating.

Castillo-Nunez said appellant did not acknowledge any problem, appellant blamed everything on Kylie W., appellant lacked empathy for her and his children, and he showed no remorse. Castillo-Nunez was concerned that appellant did not believe he did anything wrong. Appellant attended three counseling sessions, and then did not return. Castillo-Nunez believed

appellant was trying to manipulate the system and that appellant saw himself as "the victim in all this, kind of the protector of his children, . . . and [Kylie W.] as the one with all the issues and the reason that they were involved with CPS."

Elizabeth Schoenbacher, the CASA volunteer, recommended appellant's and Anastasia's parental rights be terminated. She had no concerns about Cherin E. caring for the three youngest children. Schoenbacher said A.G.G. was initially very protective of her younger siblings, they would hide behind her, and A.G.G. "would kind of keep her guard up, watching them." When asked whether A.G.G. had changed since being placed in a foster home, Schoenbacher said A.G.G. was not as withdrawn, she was happy, and she laughs and talks more. She said the foster home is a possible permanent placement for A.G.G. Schoenbacher said another possible permanent placement is with a family member, who for safety concerns, she was unwilling to identify. She said A.G.G. had a very happy and positive visit with this family member. According to Schoenbacher, A.G.G. needs stability and a family where she "counts as number one" and is not caring for other children. Schoenbacher said Cherin E. meets the needs of the three younger children. Schoenbacher was aware of, but not concerned about, Cherin E.'s history, and she believed Cherin E. was an appropriate placement for L.P.G., L.M.G., and L.G.G.

Schoenbacher said appellant missed four visits with his children between July and October. She observed two visits between appellant and the children, on May 21 and June 25. During the May visit, appellant yelled at one of the children who was trying to put something in the trashcan, but on the other visit everything went well. Although she said her few interactions with appellant were positive, she had concerns about returning the children to him. She explained that, after Kylie W.'s death, the children "were acting out"; two of the children said something about appellant that

"threw up a big red flag";[2] when appellant visited the children, he sat in a chair and "direct[ed] them," rather than getting up and interacting with them; and the children were caught up in the domestic violence at home causing A.G.G. to be "a caregiver and a protector." She said during the first visit, appellant brought food and toys but he did not give them to the children or help them with the food and toys. She counseled him after the visit, but saw no change during the second visit.

Leonor Cisneros-Salazar, the Department caseworker, testified she became involved in the case on January 8, 2016. She said she reviewed appellant's service plan with him, and he understood and agreed to engage in the services, one of which was that he engage in group and individual counseling services. According to Cisneros-Salazar, appellant did not meet the goals set for him on domestic violence because there were approximately thirteen criminal reports on appellant from March to July of 2016. Appellant completed a psychological evaluation and drug assessment, and a parenting class. He provided the name and a telephone number of his employer, but this information was not sufficient to verify his employment. Appellant did not provide proof of housing.

Cisneros-Salazar said that after appellant's first counselor (Castillo-Nunez) discharged him, the Department referred appellant to another counselor with whom appellant later made contact. However, appellant did not complete his counseling requirement. Appellant also refused several requests for drug tests. He missed seven visits with his children, and, in October 2016, the Department notified appellant he was not allowed to see his children after Kylie W.'s death. Although appellant was upset, he did not pursue further visits.

[2] No details on what the children told Schoenbacher were allowed.

Cisneros-Salazar agreed with the CASA volunteer's assessment of A.G.G. that the child has shown much improvement since being placed into foster care. She said A.G.G., who is in counseling, is doing extremely well in school, is on the honor roll, and participates in school activities.

Robert Wesley, a family therapist, testified Cherin E. retained him to provide L.P.G. with counseling in September 2016. He said L.P.G. was sad, had screaming and crying tantrums, and acted younger than her age. Although he described L.P.G. as very verbal, he said she "shut down" and would not express herself when they addressed the loss of her mother and she would act like a two or three-year-old instead of a five-year-old. When he asked L.P.G. if she wanted to see her father, the child would cover herself with pillows trying to hide. L.P.G. would yell calling herself a "monster." Wesley believed this behavior, which declined after several sessions, was related to whether L.P.G. wanted to see her father. He believed the prospect of seeing appellant emotionally distressed L.P.G. He believed Cherin E. provided stability for the child.

Cecilia G. testified she is A.G.G.'s foster mother, and she and her husband want to adopt the child. She said A.G.G. was quiet when she arrived in her new foster home, but she quickly adjusted, and she is on the honor roll at school. Cecilia G. said she was comfortable maintaining contact with Cherin E. to allow the four children to remain in touch with each other. Erin Hernandez testified she provided counseling to A.G.G. on three occasions beginning in March 2017. According to Hernandez, A.G.G. expressed uncertainty about seeing her father again, but she appeared to have a "very healthy, close relationship" with her foster parents.

Dr. Richard Drake conducted a psychological evaluation of appellant on March 21, 2016. He said appellant described himself as the victim. Appellant blamed Kylie W. or Cherin E. for the Department's case, and he blamed Kylie W. for his arrest after he violated the protective order. When Dr. Drake asked appellant what he was working on in his individual counseling, appellant

responded: helping the children deal with the fact that they were in a shelter and "making sure [he was] faithful to [his] next relationship." When Dr. Drake asked appellant to clarify, appellant responded "that sometimes female friends, quote, take it too far and my wife gets upset." Appellant acknowledged extra-marital affairs and said that was part of what he was working on in counseling. However, appellant did not indicate he was working on issues related to domestic violence or anger management.

Dr. Drake stated appellant's responses on certain tests revealed he had a high degree of defensiveness and he portrayed himself "as exceptionally free of even common shortcomings that most people would admit to." Another test revealed appellant was egocentric with an inflated self-esteem and a lack of awareness of other people's needs or opinions; and he exhibited a tendency to become bored, impatient, or frustrated when others did not go along with his plans. Appellant's history indicated significant impulsivity and significant aggressive acting out, although appellant denied such behavior.

Dr. Augustin Sicard testified he is a church pastor and a full-time therapist to whom the Department referred appellant for counseling on drug use and his issues with Kylie W. After an initial assessment, Dr. Sicard developed a treatment plan for appellant that included domestic violence classes and individual therapy. Appellant attended approximately twenty individual therapy sessions with Dr. Sicard. After the first ten sessions, Dr. Sicard recommended to the Department that there was no need for individual therapy if the family violence therapy continued. However, the Department requested additional individual sessions. Dr. Sicard believed appellant completed the domestic violence class, although appellant was quiet and did not fully engage in the group sharing sessions. He said appellant agreed he "played a role" in domestic violence, but he also placed blame on his wife.

Appellant also testified. When asked if he had been convicted of felony assault of Kylie W. in 2010, appellant insisted he remembered only being on probation for seven months for a misdemeanor domestic violence assault. Appellant said he did not remember being served with a protective order taken out by Kylie W. in 2012. Appellant admitted he was charged with assaulting Kylie W. in 2016, but he said that case was later dismissed. Appellant invoked his Fifth Amendment right to not testify when asked (1) whether he was parked outside Kylie W.'s house on October 21, 2016; (2) why he parked outside her house on that date; (3) whether a friend who was with Kylie W. came out of the house and fired a gun at appellant's car in an attempt to scare appellant away; (4) whether Kylie W. was found dead in her home a few days later; (5) where he was between 5:00 a.m. on October 21 until the body was found on October 23; (6) whether he later told police he was at a friend's house at the time; and (7) the identity of his alibi witness.

Appellant also invoked his Fifth Amendment right when asked (1) if it was true he had gone to prison for burglary of a habitation and possession of 200 grams of cocaine; (2) for the identity of his 2002 stalking victim; (3) whether his relationship with Kylie W. was volatile and both had called the police numerous times; (4) whether Kylie W. called the police more than once to report he stole from her, broke the windows of her car, keyed her car, and sent her a threatening text message; (5) whether he went to Kylie W.'s place of employment and tried to assault one of her co-workers; and (6) whether Kylie W. called her mother more than once to tell her mother appellant had beaten her.

Appellant testified that if the children were returned to him, he would keep them in school and get them counseling. Appellant invoked his Fifth Amendment right when asked what would happen to his children if he went to prison. After first attempting to invoke his Fifth Amendment right when asked about his employment, appellant stated he held a job as a "club promoter" and

he earned about $30,000 a year, which he believed was enough to care for his children. Appellant admitted he missed two or three visitations with the children because of his work schedule.

Appellant said he understood there were two primary concerns in the case: drug use and domestic violence. However, when asked if he understood that, because of those issues, the Department asked him to comply with his service plan and demonstrate he had changed his behavior, appellant responded that he never engaged in the alleged behavior and he "went through the motions of CPS to satisfy CPS."

A jury returned a verdict terminating Anastasia's parental rights to A.G.G., and appellant's parental rights to all four children.

PREDICATE FINDINGS

Appellant does not challenge the sufficiency of the evidence to support the predicate statutory grounds for terminating his parental rights. Based on the jury's findings, the trial court concluded there was clear and convincing evidence that appellant: (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the children's physical or emotional well-being; and (3) failed to comply with the provisions of a court order specifically establishing the actions necessary for appellant to obtain the return of the children. TEX. FAM. CODE § 161.001(b)(1)(D), (E), (O).

BEST INTEREST

As stated previously, appellant challenges the sufficiency of the evidence that termination of his parental rights was in the children's best interest. A trial court may order termination of the parent-child relationship only if the court finds by clear and convincing evidence one or more statutory grounds for termination and that termination is in the child's best interest. *Id.*

§§ 161.001(b)(1), (2); 161.206(a). 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 § 263.307(a) (West Supp. 2017). In determining whether a child's parent is willing and able to provide the child with a safe environment, we consider the factors set forth in Family Code section 263.307(b).

We also apply the non-exhaustive *Holley* factors to our analysis. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). Finally, 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) (holding same evidence may be probative of both section 161.001(1) grounds and best interest, but such evidence does not relieve the State of its burden to prove best interest). 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 and determine whether termination of parental rights is in the child's best interest. *Id.*

When reviewing the sufficiency of the evidence, we apply the well-established standard of review. *See* TEX. FAM. CODE §§ 101.007, 161.206(a); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (factual sufficiency).

On appeal, appellant contends many of the *Holle*y factors were ignored at trial. He asserts the evidence shows he communicated and cooperated with the Department, he visited with his children, he completed his service plan, there was no evidence he would not provide for his

children's future needs, he was employed, and he had stable housing. Therefore, appellant contends the evidence is legally and factually insufficient to support the best-interest finding.

A best-interest finding does not require evidence concerning every *Holley* factor. The Texas Supreme Court recognized "that [the *Holley*] considerations are [not] exhaustive [and] that [not] *all* such considerations must be proved as a condition precedent to parental termination." *C.H.*, 89 S.W.3d at 27 (emphasis in original). "The absence of evidence about some of [the *Holle*y] considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child." *Id.* Therefore, while we will consider appellant's complaint about the purported lack of evidence of some *Holle*y factors, the ultimate question before us is whether the evidence, as a whole, is sufficient for the jury to have formed a strong conviction or belief that termination of appellant's parental rights was in his children's best interest. *See id.*

L.M.G. and L.G.G. were too young to express their desires. The Department caseworkers described A.G.G. as "parentified," "six [years old], going on about 30 [years old]," "too worldly" for her age, and she knew "way too much." According to A.G.G.'s counselor, A.G.G. expressed uncertainty about seeing her father again, but she appeared to have a "very healthy, close relationship" with her foster parents. Cherin E. testified that, before L.P.G. began counseling, L.P.G. would hide all the time and would tell Cherin E. she was afraid appellant was coming to get her. Now, L.P.G. feels more secure, although she still wants to sleep with Cherin E. at night.

Apart from counseling, none of the children had on-going medical problems. All the children appeared to improve in their new homes. *See In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (relying on evidence of children's improvement in foster care to support best interest finding). The CASA volunteer said A.G.G. was initially very

protective of her younger siblings, but since being placed in a foster home, A.G.G. is not as withdrawn, she is happy, and she laughs and talks more. A.G.G. needs stability and a family where she "counts as number one" and is not caring for other children. L.P.G.'s therapist believed the prospect of seeing appellant emotionally distressed the child.

Although little is known of the foster parents who wish to adopt A.G.G., the evidence shows that all four children improved after the Department placed them with the foster family and Cherin E. *See In re S.B.*, 207 S.W.3d 877, 887 (Tex. App.—Fort Worth 2006, no pet.) (noting improvement of children's lifestyle after placement supported trial court's best-interest finding).

The Department caseworkers testified thirteen criminal reports were filed on appellant between March and July 2016. Two of appellant's counselors testified appellant blamed Kylie W. for the domestic violence, and appellant himself admitted he was only going "through the motions . . . to satisfy CPS." The mere fact that an act or omission occurred in the past does not *ipso facto* prove that termination is currently in the child's best interest. *In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.). However, a fact-finder can measure a parent's future conduct by his past conduct to determine if termination is in the child's best interest. *Id.* The domestic violence engaged in by appellant—whether due to his own fault or at Kylie W.'s instigation—placed the children at risk and endangered their emotional and physical well-being; therefore, the jury could have reasonably inferred similar future conduct. *See In re T.L.B. Jr.*, No. 01-16-00806-CV, 2017 WL 1019520, at *11 (Tex. App.—Houston [1st Dist.] Mar. 16, 2017, no pet.) (mem. op.) (noting evidence of domestic violence in home even if not directed at the child is supportive of a trial court's best-interest finding).

Although appellant stated he had no drug issues and he completed his service plan, the Department caseworker testified appellant had not completed his service plan and he refused drug tests. *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 finding that termination is in child's best interest); *In re S.B.*, 207 S.W.3d at 887-88 (noting failure to comply with family service plan supports finding that termination is in child's best interest).

We conclude the jury reasonably could have formed a firm belief or conviction that termination of appellant's parental rights was in the children's best interest.

CONCLUSION

We overrule appellant's issue on appeal and affirm the trial court's Order of Termination.

Sandee Bryan Marion, Chief Justice