



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-17-00821-CV

**IN THE INTEREST OF N.E.B., A.T.G., and N.V.G., Children**

From the 166th Judicial District Court, Bexar County, Texas  
Trial Court No. 2017-PA-00200  
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

Delivered and Filed: May 23, 2018

**AFFIRMED**

Appellants J.B. (Mom) and J.G. (Dad) appeal the trial court's order terminating their parental rights to the children N.E.B., A.T.G., and N.V.G. \* Each parent asserts the trial court could not have found by clear and convincing evidence that terminating their respective parental rights is in the children's best interests. Having reviewed the evidence, we conclude it is legally and factually sufficient to support the trial court's findings. We affirm the trial court's order.

**BACKGROUND**

Mom is the mother of N.E.B., A.T.G., and N.V.G. Dad is the father of A.T.G. and N.V.G. In December 2016, the Department received a referral based on Mom and N.V.G. testing positive for marijuana at N.V.G.'s birth. The Department initiated a safety plan. In January 2017, the

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\* To protect the minors' identities, we refer to the parents and the children using aliases. See TEX. R. APP. P. 9.8.

Department found Mom and Dad alone with the children, which violated the plan, Dad had physically assaulted Mom, and there was no electricity in the home. The Department removed the children from the home. After several status hearings, the Department moved to terminate the parents' rights. The case was tried, and the parents' rights to their children were terminated.

### **EVIDENCE REQUIRED, STANDARDS OF REVIEW**

The evidentiary standards<sup>1</sup> the Department must meet and the statutory grounds<sup>2</sup> the trial court must find to terminate a parent's rights to a child are well known, as are the legal<sup>3</sup> and factual<sup>4</sup> sufficiency standards of review. We apply them here.

### **BASES FOR TERMINATION**

#### **A. Courses of Parental Conduct**

The trial court found by clear and convincing evidence that (1) Mom's conduct met the grounds stated in paragraphs (D), (E), (N), (O), (P), and (R), and (2) Dad's conduct met the grounds in paragraphs (D), (E), (N), and (O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1) (West Supp. 2017). On appeal, neither Mom nor Dad challenges the trial court's statutory grounds findings.

#### **B. Best Interests of the Children**

Instead, Mom and Dad challenge the sufficiency of the evidence supporting the trial court's findings that terminating their respective parental rights is in the children's best interests. *See id.* § 161.001(b)(2). The Family Code<sup>5</sup> and *Holley*<sup>6</sup> factors for best interests of the children are also well known. With the statutory and common law factors in mind, we examine the evidence.

#### **C. Evidence of Best Interests of the Children**

The two-day bench trial on November 9 and 29, 2017, concerned Mom's and Dad's conduct and their rights to their respective children. The trial court heard testimony from three Department workers and Mom, and it received recommendations from the children's attorney ad litem. The trial court was the "sole judge[] of the credibility of the witnesses and the weight to

give their testimony.” *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

1. *Domestic Violence in the Home*

One reason for the children’s removal was domestic violence in the home. In one incident, Dad tried to hit Mom in the head with a hammer. The children were present in the home at the time of the incident, but there was conflicting testimony on whether the children saw it happen. Dad admitted that he and Mom hit each other, but he blamed Mom for causing the domestic violence. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (3), (4), (7) (West Supp. 2017); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (factors (C), (D), (H)).

2. *Mom’s Plan Services*

Mom has bipolar disorder. After the children were removed in January 2017, she did not start taking medication to treat her bipolar disorder until June 2017, but she is taking it now. Under her plan, Mom’s services included psychological evaluation, individual counseling, parenting, and domestic violence classes. Mom started the domestic violence class two months before trial and the parenting class a few weeks before trial. At the time of trial, she had not completed either course. She just started seeing a counselor once a week, but she acknowledged she did not complete the psychological examination, individual counseling, or parenting classes. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (10), (11); *Holley*, 544 S.W.2d at 371–72 (factors (C), (D), (H)).

3. *Mom’s Visit to the Children*

In the nine months from the time the children were removed, Mom saw her children only once—a few days before trial. She did not see her children because “she was lost. She was trying to get her life together. And having visits with [the children] was overwhelming.” *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (6), (11), (12); *Holley*, 544 S.W.2d at 371–72 (factors (C), (D), (H)).

4. *Mom's Drug Use, Testing, Treatment*

Mom admitted using marijuana while she was pregnant with N.V.G. She knew N.V.G.'s meconium tested positive for marijuana; she denied knowing it tested positive for amphetamines. Mom repeatedly missed drug tests, including urinalyses and hair follicle tests. By skipping the drug tests and refusing to admit she was using drugs, Mom prevented the Department from getting her into a substance abuse treatment program. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (3), (8), (10), (11); *Holley*, 544 S.W.2d at 371–72 (factors (B), (C), (D), (H)).

5. *Mom's Plan to Care for Children*

Mom acknowledged she has not worked for many months, she is currently unemployed, and she lives with her mother. She plans to support her children by continuing to live with her mother, and augmenting her Supplemental Security Insurance with a part-time job she plans to get. Her mother's home is a safe and appropriate place for the children to live, but Mom has not shown she can meet the children's basic needs. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (11), (12); *Holley*, 544 S.W.2d at 371–72 (factors (B), (C), (D), (F), (H)).

6. *Dad's Conduct, Plan Compliance*

Dad was incarcerated for a period after Mom began Family-Based Services and before the children were removed. After the children were removed, while Dad was not incarcerated, he did not regularly visit or maintain significant contact with the children. Dad was again incarcerated. The Department caseworker met with him while he was in jail and reviewed his service plan with him. Dad said his offender level prevented him from participating in services, and he did not. At the time of trial, Dad had pending criminal charges for (1) fraudulent use and possession of identifying information and (2) assault against Mom. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (7), (12); *Holley*, 544 S.W.2d at 371–72 (factors (C), (D), (H)).

7. *Foster Home Placement*

The children's foster home placement is working well. The children are happy and progressing. N.E.B. is getting the speech therapy he needs, and the children are bonded to their foster family. The foster family wants to adopt all three children. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (7), (8); *Holley*, 544 S.W.2d at 371–72 (factors (D), (F), (G)).

8. *Ad Litem's Recommendation*

The children's attorney ad litem concurred with the Department's recommendation that Mom's and Dad's parental rights be terminated. The ad litem referred to all the evidence regarding Mom's and Dad's problems, the children's need for permanency, and how well the children are doing in the foster family placement. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (11), (12); *Holley*, 544 S.W.2d at 371–72 (factors (B), (C), (D), (F), (H)).

Considering all the evidence in the appropriate light for each standard of review, we conclude that the trial court could have formed a firm belief or conviction that terminating Mom's and Dad's parental rights to their respective children was in the children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002).

**CONCLUSION**

Because, for each parent, the evidence was legally and factually sufficient to support the trial court's finding by clear and convincing evidence (1) of a predicate ground for termination and (2) that termination of the parent's rights is in the best interest of each of their respective children, we affirm the trial court's order.

Patricia O. Alvarez, Justice

<sup>1</sup> Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code, and terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.); *see also* TEX. FAM. CODE ANN. § 161.001(b). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

<sup>2</sup> Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE ANN. § 161.001(b)(1). Here, the trial court found one or both parent's conduct met the following criteria or grounds:

- (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
- (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
- ....
- (N) 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;
- (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;
- (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
  - (i) failed to complete a court-ordered substance abuse treatment program; or
  - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
- ....
- (R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription.

*Id.* § 161.001(b)(1).

<sup>3</sup> Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to “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.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). If the court “determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,” the evidence is legally sufficient. *See id.* (quoting *J.F.C.*, 96 S.W.3d at 266).

<sup>4</sup> Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if “a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.” *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider “whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108.

<sup>5</sup> Statutory Factors for Best Interest of the Child. The Texas legislature codified certain factors courts are to use in determining the best interest of a child:

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- (1) the child's age and physical and mental vulnerabilities;
  - (2) the frequency and nature of out-of-home placements;
  - (3) the magnitude, frequency, and circumstances of the harm to the child;
  - (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;
  - (5) whether the child is fearful of living in or returning to the child's home;
  - (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
  - (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
  - (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;
  - (9) whether the perpetrator of the harm to the child is identified;
  - (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;
  - (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;
  - (12) whether the child's family demonstrates adequate parenting skills; . . . and
  - (13) whether an adequate social support system consisting of an extended family and friends is available to the child.

TEX. FAM. CODE ANN. § 263.307(b); *see In re S.J.R.-Z.*, 537 S.W.3d 677, 692 (Tex. App.—San Antonio 2017, pet. denied).

<sup>6</sup> Holley Factors. The Supreme Court of Texas identified the following factors to determine the best interest of a child in its landmark case *Holley v. Adams*:

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;
- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individuals seeking custody;
- (E) the programs available to assist these individuals to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- (I) any excuse for the acts or omissions of the parent.

*Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors).