Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00218-CV

IN THE INTEREST OF A.J.Z., A.I.Z., N.Z., and E.I.Z., Children

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2019-PA-00639
Honorable Susan D. Reed, Judge Presiding[1]

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: October 7, 2020

AFFIRMED AS MODIFIED

J.Z. ("Father") appeals the trial court's order terminating his parental rights to the children who are the subject of this suit. He argues the evidence is legally and factually insufficient to support the trial court's findings as to the existence of a predicate ground under Texas Family Code section 161.001(b)(1) and that termination is in the children's best interest. In addition, Father argues the trial court abused its discretion by rendering judgment following a trial conducted over the telephone because the trial court could not hear evidence. We overrule Father's issues and affirm the trial court's judgment as modified.

[1] The Honorable David A. Canales is the presiding judge of the 73rd Judicial District Court, Bexar County, Texas. The Honorable Susan D. Reed, sitting by assignment, signed the judgment that is the subject of this appeal.

BACKGROUND

This case concerns four children: A.J.Z., who was age nine at the time of trial in March 2020; A.I.Z., who was four; N.Z., who was two; and E.I.Z., who was one. On April 1, 2019, the Department of Family and Protective Services (the "Department") filed a petition to terminate Father's parental rights. The petition lists Father as the presumed father of A.J.Z. and N.Z. and the alleged father of A.I.Z. and E.I.Z. The Department also sought termination of the parental rights of the mother of the children ("Mother") and another presumed father to three of the four children. In March 2020, the trial court held a trial by telephone and, thereafter, issued an order terminating the rights of Father, Mother, and the other presumed father. Only Father appeals.

The trial court found, as to Father, that he did not timely file an admission of paternity or counterclaim under Chapter 160 of the Texas Family Code with respect to A.I.Z. and E.I.Z. The trial court also found, by clear and convincing evidence, that Father failed to comply with the provisions of a court order that specifically established the actions necessary for Father to obtain the return of the children, who had been in the Department's care for not less than nine months as a result of their removal for abuse or neglect, and that termination was in the children's best interest. These latter two findings correctly state the names of Father and the children; however, the subsection in which they are included is mistitled. The title appears: "Alternative Termination of Alleged Father [M.L.K.]'s Parental Rights." M.L.K. has no relationship to this case, and no party argues that there is any confusion that the findings apply to Father. Accordingly, we correct the title by modifying the trial court's order to replace M.L.K.'s name with Father's name. *See* TEX. R. APP. P. 43.2(b) (authorizing a court of appeals to "modify the trial court's judgment and affirm it as modified"); *In re J.A.*, No. 04-20-00242-CV, 2020 WL 5027663, at *3 (Tex. App.—San Antonio Aug. 26, 2020, no pet. h.) (mem. op.) ("An appellate court has the power to correct and reform a trial judgment to make the record speak the truth when it has the necessary data and

information to do so." (citation omitted)); *Eldridge v. State*, No. 05-08-00400-CR, 2009 WL 18715, at *1 (Tex. App.—Dallas Jan. 5, 2009, no pet.) (mem. op.) (not designated for publication) (modifying a trial court's judgment to correct the appellant's name).

STANDARD OF REVIEW AND APPLICABLE LAW

Under section 161.002(b)(1) of the Texas Family Code, "The rights of an alleged father may be terminated if . . . after being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160." *See* TEX. FAM. CODE ANN. §§ 160.401, 161.002(b)(1). "However, if the alleged father files an admission of paternity, his rights may only be terminated if the Department proves by clear and convincing evidence one of the grounds for termination in Section 161.001(b)(1) and that termination is in the child['s] best interest." *In re U.B.*, No. 04-12-00687-CV, 2013 WL 441890, at *1 (Tex. App.—San Antonio Feb. 6, 2013, no pet.) (mem. op.); *see* TEX. FAM. CODE ANN. § 161.001(b). Clear and convincing evidence requires "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.

We evaluate the legal and factual sufficiency of the evidence to support the trial court's findings under the standard of review established by the Texas Supreme Court in *In re J.F.C. See In re J.F.C.*, 96 S.W.3d 256, 266–67 (Tex. 2002). Under these standards, "[t]he trial court is the sole judge of the weight and credibility of the evidence, including the testimony of the Department's witnesses." *In re F.M.*, No. 04-16-00516-CV, 2017 WL 393610, at *4 (Tex. App.—San Antonio Jan. 30, 2017, no pet.) (mem. op.) (first citing *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam); then citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005)).

ACKNOWLEDGMENT OF PATERNITY

The Department argues that we should affirm the trial court's judgment based on the finding that Father failed to file admissions of paternity or a counterclaim under Chapter 160. *See*

TEX. FAM. CODE ANN. § 161.002(b)(1). While Father neither filed admissions of paternity as to any of children nor a counterclaim, we decline to affirm termination on this ground.[2]

"There are no formalities that must be observed when filing an admission of paternity or for such an admission to be effective." *See In re U.B.*, 2013 WL 441890, at *2 (holding an alleged father's letter to the court, referring to children as "my children" and trial testimony that he was the father of the children constituted an admission of paternity under section 161.002(b)(1)); *see also In re K.E.S.*, No. 02-11-00420-CV, 2012 WL 4121127, at *3 (Tex. App.—Fort Worth Sept. 20, 2012, pet. denied.) (mem. op.) (holding an alleged father admitted paternity, for purposes of section 161.002(b), when he filed a request for counsel on a form for a "Respondent Parent," acknowledged in a letter to the Department's caseworker that he believed the child was his, cooperated when asked to take a paternity test, and did not object when the Department offered the results of the paternity test at trial); *Toliver v. Tex. Dep't of Family & Protective Servs.*, 217 S.W.3d 85, 105 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that, although father did not file a document with the court, he "timely file[d] an admission of paternity" by appearing at trial, asserting that he was the child's father, and requesting that his rights not be terminated).

Here, Father admitted his paternity, for purposes of section 161.002(b)(1), as to all four children through his testimony at trial acknowledging the children were his. Father stated: "I love my kids to death." Although Father did not elaborate on his paternity, it does not appear that Father's paternity was contested. Mother testified that the children were Father's, and neither the Department's caseworker nor its attorney argued that Father was not the children's biological parent. The caseworker's testimony, in large part, concerned Father's failure to complete his court-ordered service plan, and Father's testimony largely concerned his assertions to the contrary. The

[2] The trial court ordered termination of parental rights on this ground only as to two of the four children, A.I.Z. and E.I.Z.

pretrial record shows that the trial court ordered genetic testing, but the results are not in the record; however, the Department asserts in its appellate brief, without citation: "By the time of trial a DNA test had determined [Father] was the father of all four [children]." Under these circumstances, we hold that Father admitted his paternity within the meaning of section 161.002(b)(1) of the Family Code. *See* TEX. FAM. CODE ANN. § 161.002(b)(1); *Toliver*, 217 S.W.3d at 105 ("[W]e hold that [an alleged father], by appearing at trial before his rights were terminated and admitting that he was in fact [the child]'s father, triggered his right to require [the Department] to prove that he engaged in one of the types of conduct listed in section 161.001(1) before his parental rights could be terminated.").

PREDICATE GROUND UNDER SECTION 161.001(B)(1)(O)

With paternity admitted, Father's parental rights could only be terminated by the Department proving by clear and convincing evidence one of the statutory grounds for termination in Section 161.001(b)(1) and that termination was in the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b); *In re U.B.*, 2013 WL 441890, at *1. The trial court found the Department had proved statutory ground section 161.001(b)(1)(O): that Father had failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of the children who had been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the children's removal from Father under Chapter 262 for abuse or neglect. *See* TEX. FAM. CODE ANN. § 161.001(b)(1); *see also id.* §§ 262.001–.352. Father argues the Department failed to prove that he did not comply with a court order establishing his service plan. Additionally, he argues that any noncompliance was excused under section 161.001(d). We disagree.

"Texas courts generally take a strict approach to subsection (O)'s application." *In re S.J.R.-Z.*, 537 S.W.3d 677, 690 (Tex. App.—San Antonio 2017, pet. denied) (quoting *In re C.A.W.*, No.

01-16-00719-CV, 2017 WL 929540, at *4 (Tex. App.—Houston [1st Dist.] Mar. 9, 2017, no pet.) (mem. op.)). "Courts do not measure the 'quantity of failure' or 'degree of compliance'" with a court order. *Id.* (quoting *In re D.N.*, 405 S.W.3d 863, 877 (Tex. App.—Amarillo 2013, no pet.)). "A parent's failure to complete one requirement of [his or] her family service plan supports termination under subsection (O)." *In re D.D.R.*, No. 04-18-00585-CV, 2019 WL 360657, at *2 (Tex. App.—San Antonio Jan. 30, 2019, pet. denied) (mem. op.) (internal quotation marks and brackets omitted) (quoting *In re J.M.T.*, 519 S.W.3d 258, 267 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)).

Father argues that he complied with all of the services the trial court required, except for the completion of family counseling, which he was unable to complete despite his best efforts. However, the record belies Father's assertion that he completed all required services other than family counseling. The Department's caseworker testified that Father's service plan required him to complete parenting classes, a psychological evaluation, a psychosocial evaluation, and individual therapy. *See In re A.A.F.G.*, No. 04-09-00277-CV, 2009 WL 4981325, at *3 n.4 (Tex. App.—San Antonio Dec. 23, 2009, no pet.) (mem. op.) (stating that a caseworker's testimony setting forth the requirements of a court-ordered service plan sufficed to establish the trial court's order for purposes of subsection O). In addition, the caseworker testified that Father's service plan required him to receive substance abuse treatment and provide proof of employment and stable housing. According to the caseworker, Father was dismissed from individual therapy and did not complete substance abuse treatment or provide proof of employment or stable housing. The caseworker also testified that the trial court ordered Father to complete a drug test after the pretrial hearing immediately preceding trial, and Father tested positive for marijuana, benzos, opiates, and methadone when tested.

In addition to this testimony, the trial court's record includes orders issued prior to trial. The "Temporary Order Following Adversary Hearing" orders Father, among other things, to submit to a drug and alcohol dependency assessment. This order further requires Father to comply with any original or amended service plan created by the Department. The trial court's record includes a copy of the Department's service plan for Father, which confirms the requirements stated by the caseworker. Among requirements in Father's service plan, are requirements that Father complete a drug assessment, complete a recommended inpatient treatment program, and demonstrate sobriety.

The caseworker's testimony and the trial court's orders contained in the record specifically established the actions necessary for Father to obtain the return of his children. *See In re V.A.G.*, No. 04-19-00449-CV, 2019 WL 5927451, at *2–4 (Tex. App.—San Antonio Nov. 13, 2019, no pet.) (reviewing a caseworker's testimony and pretrial orders to determine that a parent failed to comply with trial court orders for purposes of subsection O). As the caseworker testified, Father failed to comply with several requirements that the trial court imposed, including that he complete individual therapy and substance abuse treatment. Father also failed to maintain sobriety and provide proof of employment and stable housing as ordered by the trial court. The trial court was entitled to credit the caseworker's testimony, and the failings stated by the caseworker are sufficient to satisfy subsection O, without our consideration of additional requirements in the trial court's orders that Father may have satisfied or been excused from satisfying. *See In re Z.M.M.*, No. 04-18-00099-CV, 2019 WL 4805399, at *5 (Tex. App.—San Antonio Oct. 2, 2019, no pet.) ("Because Father's noncompliance with the court-ordered requirement that he remain drug free was unexcused, we need not address Father's arguments to excuse his noncompliance with the court-ordered requirement that he complete drug treatment."); *In re N.W.L.T.*, No. 14-18-00497-CV, 2018 WL 6217313, at *8 (Tex. App.—Houston [14th Dist.] Nov. 29, 2018, pet. denied) (mem.

op.) (holding a finding under subsection O was supported by sufficient evidence because, even if a mother had proven a defense under section 161.001(d) with respect to her failure to complete substance abuse counseling, she did not attempt to invoke the defense with respect to her failure to remain alcohol-free during the case, as required by a court order).

BEST INTEREST

Father also challenges the legal and factually sufficiency of the trial court's best interest finding. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). There is a strong presumption that keeping a child with a parent is in a child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, it is equally presumed that "the prompt and permanent placement of the child in a safe environment is . . . in the child's best interest." TEX. FAM. CODE ANN. § 263.307(a). 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 Texas Family Code section 263.307(b). *See id.* § 263.307(b).

Our best-interest analysis is guided by consideration of the non-exhaustive *Holley* factors. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and (9) any excuse for the parent's acts or omissions. *See id.*; *accord In re E.C.R.*, 402 S.W.3d 239, 249 n.9 (Tex. 2013). The Department is not required to prove each factor, and the absence of evidence regarding some of the factors does not preclude the factfinder from reasonably forming a strong conviction that termination is

in a child's best interest, particularly if the evidence is undisputed that the parent-child relationship endangered the safety of the child. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The focus of our review is whether the evidence, as a whole, is sufficient for the trial court to have formed a strong conviction or belief that termination of the parent-child relationship is in the best interest of the child. *Id.*

Here, the trial court's finding is supported by legally and factually sufficient evidence. According to the caseworker, the children came into the Department's care after the youngest child was born positive for opiates and marijuana. Father argues that he was the "non-offending parent," and there was no showing that Father used drugs in the presence of the children; however, Father's drug use, even if not the immediate cause of the children's removal and even if done outside of their presence, presented an emotional and physical danger to the children, negatively affected the stability of Father's home, weighed on the children's emotional and physical needs, and indicated an improper parent-child relationship. *See Holley*, 544 S.W.2d at 371–72; *In re A.N.*, No. 04-19-00584-CV, 2020 WL 354773, at *3 (Tex. App.—San Antonio Jan. 22, 2020, no pet.) (explaining that a parent's drug use is relevant to multiple *Holley* factors). The evidence also shows that Father failed to comply with his service plan by, among other things, maintaining sobriety and completing his drug treatment program and individual counseling. *See In re J.M.T.*, 519 S.W.3d at 270 ("A fact finder may infer from a parent's failure to take the initiative to complete the services required to regain possession of his child that he does not have the ability to motivate himself to seek out available resources needed now or in the future."); *see also* TEX. FAM. CODE ANN. § 263.307(b)(10), (11) (providing courts may consider willingness and ability of the child's family to seek out, accept, and complete counseling services and willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time);

Holley, 544 S.W.2d at 371–72 (listing parental abilities of an individual seeking custody and programs available to assist the individual as a best-interest factor).

Father's service plan required him to provide proof of employment and stable housing, which Father did not provide. *See In re L.G.R.*, 498 S.W.3d at 205 ("A child's need for permanence through the establishment of a stable, permanent home has been recognized as the paramount consideration in a best-interest determination." (internal citation omitted)); *see also In re K.J.G.*, No. 04-19-00102-CV, 2019 WL 3937278, at *8 (Tex. App.—San Antonio Aug. 21, 2019, no pet. h.) (mem. op.) (considering a parent's drug use and failure to obtain and maintain stable housing and employment supportive of the trial court's best-interest finding for termination because the parent's conduct subjected the children to a life of uncertainty and instability).

After removal, the Department placed the children with their maternal great grandmother. According to the caseworker, the children were doing "great" in her care; they were safe and secure. The oldest child was on the honor roll and enrolled in extracurricular activities. She wished to stay in the great grandmother's care. The other children were too young to express their desires. *See In re M.C.L.*, No. 04-17-00408-CV, 2017 WL 5759376, at *3 (Tex. App.—San Antonio Nov. 29, 2017, no pet.) ("When a child is unable to express his desires, a fact finder may consider that he has bonded with the foster family, is well cared for by them, and has spent minimal time with the parent." (citation omitted)). The great grandmother had completed foster certification and could adopt the children.

Having reviewed the record, we hold the evidence is legally and factually sufficient to support the trial court's finding that termination of Father's parental rights was in the children's best interest.

FAILURE TO PRESERVE ABUSE OF DISCRETION ISSUE

Last, Father argues the trial court abused its discretion by rendering a judgment when it could not hear evidence presented during the telephonic proceeding. Father asserts that the trial court should have continued proceedings until such time as technical difficulties were resolved. Father, however, fails to point to any particular testimony that the trial court purportedly could not hear. The reporter's record transcribes statements and questions by the trial court judge, which indicate that the judge was engaged in the trial. The record does not show that Father raised his concern to the trial court at any time before, during, or after trial by request, objection, or motion. Accordingly, we hold that Father did not preserve his complaint for appellate review. *See* TEX. R. APP. P. 33.1; *In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003) ("[A]llowing appellate review of unpreserved error would undermine the Legislature's intent that cases terminating parental rights be expeditiously resolved[.]"). We overrule Father's issue.

CONCLUSION

The judgment of the trial court is affirmed as modified.

Rebeca C. Martinez, Justice