



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00524-CV

IN THE INTEREST OF J.M.E., K.C.S., and A.N.H., Children

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2019PA02574
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 21, 2021

AFFIRMED

Mom appeals the trial court's order terminating her parental rights to her children, J.M.E., K.C.S., and A.N.H.ⁱ Mom asserts the evidence was legally and factually insufficient to support the trial court's best-interest-of-the-child finding. We affirm the trial court's order.

BACKGROUND

Appellant Mom has three children, J.M.E., K.C.S., and A.N.H. The Department of Family and Protective Services opened this case when Mom was hospitalized after expressing suicidal ideations while she had A.N.H. with her. At that time, the children were placed with their maternal grandparents under a Safety Plan. Mom worked with family-based services beginning in

ⁱ To protect the minor's identities, we use aliases for Appellant, family members, and the children. See TEX. R. APP. P. 9.8.

November 2018, during which time the Department had ongoing concerns regarding Mom's mental health and continued illegal drug use. The Department later filed for termination of Mom's parental rights in December 2019, after an incident in which Mom became very upset, threw things at family members, and threatened to kill K.C.S.

During the family-based case, Mom admitted to using Xanax, cocaine, marijuana, and methamphetamines. She tested positive on both urinalysis and hair follicle tests in May 2019 and was referred to services to address both her substance abuse and mental health issues. However, her engagement with treatment was sporadic.

The Department created a service plan for Mom, but she did not initially make any progress. Starting in June 2020, Mom began to make progress, but she was unable to provide proof of stable income or housing. As part of the treatment plan, Mom was assigned to Lifetime Recovery, an outpatient drug treatment facility. On July 22, 2020, the results of a hair follicle test showed that Mom was positive for amphetamines, methamphetamines, cocaine, benzoylecgonine, cocaine metabolite, and marijuana. She claimed the tests were positive because of past drug use. Later, Mom was unsuccessfully discharged from Lifetime Recovery for failing to take a urinalysis test while on a zero-tolerance policy. She was referred to a second drug treatment facility because continued treatment was recommended, but she did not begin the treatment, claiming that she did not receive notice of the second referral.

Mom also did not follow through with opportunities to visit with her children. During the COVID-19 lockdown, child visits were held virtually, which was unsatisfactory to Mom, and she declined all visits. She explained that it was upsetting for her to see her children for only an hour, especially if they were virtual visits. When face-to-face visits resumed, Mom appeared at only two of nine visits with her children. She had various reasons for not appearing, including being

too nervous, feeling suicidal, and going to a job interview. One caseworker testified that she continuously received hundreds of texts from Mom about her intent to self-harm.

During trial, the court heard testimony that the grandparents were meeting the children's needs and that the children appeared happy with their placement. The grandparents have also expressed their intent to adopt the children.

After hearing the evidence, the trial court found by clear and convincing evidence that Mom's course of conduct met Family Code section 161.001(b)(1)'s grounds (N), (O), and (P), and that terminating Mom's parental rights was in the children's best interests. Mom appeals.

EVIDENCE REQUIRED, STANDARDS OF REVIEW

The evidentiary standards¹ the Department must meet and the statutory grounds² the trial court must find to terminate a parent's rights to a child are well known, as are the legal³ and factual⁴ sufficiency standards of review. We apply them here.

BASES FOR TERMINATING MOM'S PARENTAL RIGHTS

A. Mom's Course of Parental Conduct

Mom does not challenge the trial court's findings that her course of conduct met statutory grounds (N), (O), and (P). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N), (O), (P).

B. Best Interests of the Children

Mom challenges the sufficiency of the evidence for the trial court's finding that terminating her parental rights is in her children's best interests. *See id.* § 161.001(b)(2). The Family Code statutory factors⁵ and the *Holley* factors⁶ for determining best interest of the child are well known. Applying each standard of review and the applicable statutory and common law factors, we examine the evidence pertaining to the best interests of the children.

C. Witnesses at Trial

During the bench trial, the court heard testimony from Department caseworkers, maternal grandmother, a licensed chemical dependency counselor who worked with Mom, and from Mom herself. 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); *cf. In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam). The trial court heard the following testimony.

D. Evidence of Best Interest of the Children

According to caseworkers, Mom has been unable to manage her substance abuse and mental health issues. The children have been placed with their maternal grandparents since October 2018 where they have thrived. Grandma testified that K.C.S. does Zumba with her and J.M.E. plays football. Grandma takes the children to all their doctor and dental appointments and has family member support for times when she might be unavailable to take them. Grandma testified that she and Grandpa can afford to continue caring for their grandchildren and expressed their intent to adopt the children. Grandma also clearly stated that she did not prefer sole managing conservatorship with Mom retaining possessory rights because she does not believe mom is stable. When specifically asked why she believed Mom’s parental rights should be terminated, Grandma responded that she just wanted her grandchildren to be safe. When asked whether she did not believe this was possible with Mom retaining possessory and visitation rights, Grandma simply stated no. All the children are quite happy with Grandma, and J.M.E. has expressed that he never wants to return to living with Mom. At times during the case, K.C.S. asked for Mom and was upset that Mom did not visit, but she came to understand and accept that Mom’s participation would continue to be minimal. A.N.H. has been too young to express an opinion about living with Mom. The Department agreed that Grandma should adopt her grandchildren, that Mom’s parental

rights should be terminated, and that it would be dangerous to the health and welfare of the children for them to be returned to Mom. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (8), (10), (11), (12), (13); *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976) (factors (B), (C), (D), (H)).

E. Mom's Service Plan Compliance

As stated, Mom did not initially make progress on her service plan. Starting June 2020, according to caseworker testimony, Mom began her psychological, psychosocial, and evaluations; substance abuse treatment; individual and group counseling; and parenting classes. Her psychological evaluation showed that her behavior was a consequence of her drug abuse; she was prescribed medication, but never began the recommended regimen. She was referred to a substance abuse program, which she did not complete. Her chemical dependency counselor testified that Mom missed multiple weeks of sessions, though her engagement improved slightly after being placed on a zero-tolerance policy. Mom was unsuccessfully discharged from the drug treatment program for failing to take the final drug test. And although she began testing negative for drugs toward the end of the case, she did not address the ongoing root issues nor develop coping skills or a relapse plan. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (8), (10), (11); *Holley*, 544 S.W.2d at 372 (factor (H)).

Though Mom made some progress, she was unable to prove stable housing or income. Her caseworker also testified that communication with her was sporadic and difficult and that Mom continued to express intentions of self-harm. Mom also did not follow through with opportunities to visit with her children during her service plan. There was no area in which Mom showed any ability to ultimately follow through with the Department's requirements for reunification, and she did not consistently maintain communication with her caseworkers. *See* TEX. FAM. CODE ANN. § 263.307(b)(10), (12); *Holley*, 544 S.W.2d at 372 (factors (B), (D), (G)).

Mom testified that she had completed all services required, including the parenting program, stable housing, and stable income, though she did not notify her caseworker. She also testified that she had not used illegal drugs since February 2020, did not have mental health issues, only threatened self-harm once, and never threatened to harm K.C.S. She testified that the Department was the problem, that she was in compliance, and that the trial court should award custody to her or give her more time to achieve it. *See* TEX. FAM. CODE ANN. § 263.307(b)(7), (8), (10), (11), (12); *Holley*, 544 S.W.2d at 372 (factors (B), (C), (D), (G), (I)).

F. Mom's Care for her Children

Because Mom was hospitalized for suicidal ideations in 2018, and the children were placed with their grandparents for the duration of Mom's case with the Department, there is very little evidence of Mom's ability to care for her children. During the two in-person visits she had with her children, her interactions were appropriate, but testimony also revealed that Mom threatened to kill K.C.S. in December 2019. During Mom's testimony, she denied threatening to kill K.C.S. and claimed to have the means to support her children, though she never offered proof of the latter. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (7), (11), (12); *Holley*, 544 S.W.2d at 372 (factors (B), (C), (D), (H), (I)).

G. Options, Recommendations

J.M.E., K.C.S., and A.N.H. were placed with their maternal grandparents, who intend to adopt them. The Department and the children's guardian ad litem opined that it would be in the children's best interests for Mom's parental rights to be terminated.

Considering all the evidence under the two evidentiary standards, we conclude the trial court could have formed a firm belief or conviction that terminating Mom's parental rights to her children was in the children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012).

CONCLUSION

Because the evidence was legally and factually sufficient to support the trial court's findings by clear and convincing evidence (1) of at least one predicate ground for termination and (2) that termination of Mom's parental rights is in the best interests of her children, we affirm the trial court's order.

Patricia O. Alvarez, Justice

¹ 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); *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. *In re D.M.*, 452 S.W.3d at 472.

² 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). Here, the trial court found Appellant's course of conduct met the following criteria or grounds:

- (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.

Id. § 161.001(b)(1).

³ 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 *In re 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 *In re J.F.C.*, 96 S.W.3d at 266).

⁴ 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.” *In re 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.” *In re J.F.C.*, 96 S.W.3d at 266; *accord In re H.R.M.*, 209 S.W.3d at 108.

⁵ 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:

- (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, including providing the child and other children under the family’s care with:
 - (A) minimally adequate health and nutritional care;
 - (B) care, nurturance, and appropriate discipline consistent with the child’s physical and psychological development;
 - (C) guidance and supervision consistent with the child’s safety;
 - (D) a safe physical home environment;
 - (E) protection from repeated exposure to violence even though the violence may not be directed at the child; and
 - (F) an understanding of the child’s needs and capabilities; 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 A.C.*, 560 S.W.3d 624, 631 (Tex. 2018) (recognizing statutory factors).

⁶ 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).