Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00089-CV

IN THE INTEREST OF B.M.M., a Child

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-PA-00885
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: August 4, 2021

AFFIRMED

Brady M. appeals the trial court's order terminating his parental rights to one-year-old B.M.M. On appeal, Brady M. argues that (1) the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights was in the best interest of the child; and (2) because the evidence is insufficient and the order must be reversed, the trial court abused its discretion by awarding the Texas Department of Family & Protective Services permanent managing conservatorship. We affirm.

BACKGROUND

On April 30, 2020, the Department filed a petition for protection of B.M.M., for conservatorship, and to terminate the parental rights of B.M.M.'s father, Brady M., and mother, Melissa M. B.M.M. was removed from his parents' care, placed with his paternal grandfather, and

later placed with his maternal grandmother. The case proceeded to a bench trial on March 2, 2021. The Department presented the testimony of its legal caseworker, Gabriella Moreno. Although represented by counsel, Brady M. and Melissa M. did not appear for the trial, which was conducted over Zoom. Because the trial court offered no exhibits into evidence, the only evidence presented at trial was Moreno's testimony.

According to Moreno's trial testimony, the Department initially became involved in this case due to a referral based on Melissa M. participating in drug court proceedings in which it was reported she tested positive for methamphetamines. The Department attempted to drug test Brady M. and Melissa M., but they did not submit to testing, and B.M.M. was removed due to concerns of the parents' methamphetamine use. Brady M. had prior CPS history based on child neglect, but his parental rights were not terminated; Melissa M.'s parental rights were terminated as to another child in 2012 based on methamphetamine use.

Moreno prepared a family service plan, and both parents were asked to participate in drug treatment, individual counseling, a parenting course, and a psychological evaluation. Brady M. completed his psychological evaluation and purportedly completed a parenting course, but the Department did not credit the course because Brady M. provided no information about the dates of his attendance or contents of the course, and Moreno received no information from the service provider. According to Moreno, Brady M. did not complete any other services, including drug treatment. Brady M. had participated in individual counseling as recently as a month before trial, but he and Melissa M. were discharged from counseling for missing classes. Brady M. and Melissa M. also participated in drug treatment, but were discharged for not submitting to drug tests and not complying with the program's recommendations.

Moreno asked the parents to get drug tested twenty to forty times, but she only received the results from one drug test, and she described the results as very concerning. The parents both

signed a form on July 30, 2020, acknowledging they had used drugs, but they otherwise denied using drugs. Melissa M. acknowledged using methamphetamines and heroin and Brady M. acknowledged using methamphetamines. Moreno arranged for the parents to engage in their services and discussed their family service plans with them, but the parents explained they did not engage in their services because they did not know about their services and their phones were broken. However, Moreno usually communicated with the parents via group and individual text messaging.

According to Moreno, Brady M. owned a construction company, but she did not know where the parents lived because neither of them provided her with that information. The parents had also not maintained significant contact with B.M.M. They attended approximately 50% of their weekly visits, and would show up late and appear to be under the influence at the visits. For each visit, the parents would come together in the same car because Melissa M. did not have her own car. The last visit the parents attended was two months before trial.

Moreno explained that B.M.M. was placed with his paternal grandfather, but was later moved to live with his maternal grandmother several days before trial. The Department changed B.M.M.'s placement because his grandfather was not willing to adopt, but his grandmother wanted to adopt him. B.M.M. had spent several weekends with his grandmother, who had toys, food, and clothing for him, and he appeared very bonded and happy with her. In addition to weekends, B.M.M. had spent holidays and the week of the snowstorm with her. B.M.M.'s older half-brother, who the grandmother adopted, also lived in the residence. To Moreno, B.M.M. also appeared bonded with his parents, but Melissa M. stated she believed B.M.M.'s grandmother should have custody.

After hearing Moreno's testimony, the trial court found several predicate grounds for terminating Brady M.'s and Melissa M.'s parental rights; specifically, constructive abandonment,

failure to comply with court-ordered provisions of their family service plans, and drug use. The trial court also found that termination of their parental rights was in B.M.M.'s best interest. Additionally, the trial court awarded the Department permanent managing conservatorship of B.M.M., finding that awarding conservatorship to either parent would significantly impair B.M.M.'s physical health or emotional development. After the trial court signed the final order, only Brady M. appealed.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Texas Family Code, the Department has the burden to prove by clear and convincing evidence that parental rights should be terminated pursuant to one of the predicate grounds in subsection 161.001(b)(1) and that termination of parental rights is in the best interest of the child. TEX. FAM. CODE § 161.001(b)(1), (2). In reviewing the legal sufficiency of the evidence to support these findings, we 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.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). In reviewing the factual sufficiency of the evidence, we consider disputed or conflicting evidence. *Id.* at 345. "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.* (quoting *In re J.F.C.*, 96 S.W.3d at 266). Under these standards, the factfinder is the sole judge of the weight and credibility of the evidence. *Id.*

CHILD'S BEST INTEREST

As to the trial court's order of termination, Brady M. does not challenge the trial court's findings of predicate grounds for termination, and argues only that the evidence is legally and

factually insufficient to support the trial court's finding that termination of his parental rights was in the best interest of B.M.M. Under Texas law, there is a strong presumption that the best interest of a child is served by keeping the child with a parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). In determining whether the child's parent is willing and able to provide the child with a safe environment, the factors set out in section 263.307 of the Family Code should be considered. *See* TEX. FAM. CODE § 263.307(b).[1] In addition to these statutory factors, in considering the best interest of the child, a factfinder may also consider the nonexclusive list of factors set forth by the Texas Supreme Court in *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).[2] The *Holley* factors are neither all-encompassing nor does a court need to find evidence of each factor before terminating the parent-child relationship. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Finally, in determining whether termination of the parent–child relationship is in the best interest of a child, a factfinder may judge a parent's future conduct by her past conduct. *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

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[1] These factors include (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 § 263.307(b).

[2] These factors include, but are not limited to, the following: (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 these individuals to promote the child's best interest; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions that may indicate the existing parent-child relationship is improper; and (9) any excuse for the parent's acts or omissions. *In re E.C.R.*, 402 S.W.3d 239, 249 n.9 (Tex. 2013) (citing *Holley*, 544 S.W.2d at 371–72).

B.M.M. was approximately eighteen months old at the time of trial. "When children are too young to express their desires, the fact finder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent." *In re S.J.R.-Z.*, 537 S.W.3d 677, 693 (Tex. App.—San Antonio 2017, pet. denied). B.M.M. was removed from his parents when he was approximately seven months old. The evidence shows B.M.M. was bonded with both parents, but was also bonded with his maternal grandmother, with whom he had spent a substantial amount of time. The evidence also shows B.M.M.'s grandmother passed a home study and Melissa M. wanted her to have custody. The Department planned to have B.M.M.'s grandmother adopt him, and placed B.M.M. with his grandmother because she expressed her intent to do so. Although the evidence shows B.M.M. has no specialized needs, the evidence shows B.M.M.'s grandmother had demonstrated an ability to meet his basic needs. Conversely, the evidence shows Brady M. missed approximately 50% of his weekly visits with B.M.M., he would show up late and appeared to be under the influence of drugs during visits, his last visit was two months before trial, and he did not appear for the trial, despite confirming he had received information about the trial date.

Brady M. argues the evidence is insufficient to support the trial court's best-interest finding, considering only the evidence that directly pertained to him. But when, as here, the evidence shows a parent continued a relationship with another person and knew of their conduct, a factfinder is entitled to consider evidence showing the parent does not adequately grasp the severity of other person's conduct and the danger it poses to the child. *See In re O.N.H.*, 401 S.W.3d 681, 688 (Tex. App.—San Antonio 2013, no pet.). Here, the evidence shows Brady M. maintained a relationship with Melissa M., and the trial court was entitled to consider evidence showing the effect of Brady M.'s continued relationship with Melissa M. on B.M.M.'s welfare. *See id.*

The evidence shows Brady M. and Melissa M. used drugs; specifically, both had used methamphetamines and Melissa M. had used heroin. The trial court could have reasonably inferred Brady M. would continue to endanger B.M.M. from the evidence showing he had used methamphetamines, refused to take numerous drug tests, denied using drugs, and did not complete drug treatment. *See In re C.J.Y.*, No. 04-20-00009-CV, 2020 WL 3441248, at *5 (Tex. App.—San Antonio June 24, 2020, pet. denied) (mem. op.). While the parents started drug treatment, both were discharged for failing to complete drug tests and follow their program's recommendations. They were also discharged from other services for failing to attend and participate, which shows Brady M. was not improving during the pendency of the case. Furthermore, neither parent provided the caseworker with information about where they lived. Having reviewed the record and considered all the evidence in the appropriate light of each standard of review, we conclude the trial court could have reasonably formed a firm belief or conviction that termination of Brady M.'s parental rights was in B.M.M.'s best interest. *See In re J.O.A.*, 283 S.W.3d at 344-45.

CONCLUSION

Having concluded there is legally and factually sufficient evidence to support the trial court's best-interest finding, and with the findings of predicate grounds for termination unchallenged, we affirm the trial court's order terminating Brady M.'s parental rights.[3]

Liza A. Rodriguez, Justice

[3] Brady M. also argues the trial court abused its discretion in awarding the Department permanent managing conservatorship. As presented, this issue is conditioned upon the "trial court's termination order [being] reversed on appeal." Because we affirm the trial court's order of termination, we need not reach this issue. *See* Tex. R. App. P. 47.1.