Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-21-00169-CV

IN THE INTEREST OF I.I.T., J.J.T., AND R.A.T., III, Children

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2020PA00154
Honorable Susan D. Reed, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Patricia O. Alvarez, Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: October 20, 2021

AFFIRMED

M.A. appeals the trial court's order terminating her parental rights to her children I.I.T. (born 2012), J.J.T. (born 2015), and R.A.T., III (born 2016).[1] M.A. asserts (1) the trial court violated her due process rights in two ways, and (2) the evidence is legally and factually insufficient to support the trial court's findings under Texas Family Code section 161.001(b)(1) and its ruling that termination is in the best interests of the children. We affirm.

BACKGROUND

On January 23, 2020, the Texas Department of Family and Protective Services filed a suit to remove the children from M.A.'s care after receiving a report alleging neglectful supervision

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[1] To protect the privacy of the minor children, we use initials to refer to the children and their biological parents. TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

and daily methamphetamine use. The Department obtained temporary managing conservatorship over all 3 children and placed them with fictive kin. As a condition of reunification, the Department created a family service plan requiring M.A. to, inter alia, maintain stable housing and legal employment or verifiable income, ensure the home was free of safety hazards, participate in and complete parenting classes, submit to random drug testing, complete a drug assessment, engage in individual counseling, undergo psychosocial evaluation and assessment, partake in a psychological evaluation, follow all recommendations for psychiatric treatment, and engage in family violence prevention training. The Department ultimately pursued termination of M.A.'s parental rights.

Approximately eleven months after removal was ordered, the trial court held a one-day bench trial at which M.A. appeared. The trial court heard testimony from three witnesses: (1) the Department's caseworker, Kahmillah Higgs; (2) the children's fictive kin; and (3) M.A. At the conclusion of trial, the court signed an order terminating M.A.'s parental rights pursuant to subsections 161.001(b)(1)(E), (M), (N), (O), and (P) and made a finding that termination of M.A.'s parental rights was in the best interests of the children. M.A. appealed.

JURY TRIAL

In her first issue, M.A. asserts the trial court violated her due process right to a jury trial when it denied her jury demand. We review a claim that the trial court erroneously denied a jury demand for an abuse of discretion. *In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019). To invoke a right to a jury trial, a party must file a written request for a jury trial a reasonable time before the date set for trial on the non-jury docket, but not less than thirty days in advance. TEX. R. CIV. P. 216(a). M.A. concedes her jury demand was initially untimely because it was filed less than thirty days in advance of the January 4, 2021 non-jury setting; however, M.A. argues that the request became timely when the trial court reset trial to January 28, 2021.

The procedural history bears on our analysis. On August 18, 2020, the trial court ordered a bench trial on the merits to occur on January 4, 2021. On December 16, 2020—nineteen days before trial—M.A. filed a demand for jury trial. Later that day, the Department filed a motion to strike the jury demand as untimely. On December 18, 2020—seventeen days before trial—M.A. filed a written objection to the January 4, 2021 bench trial on the basis that she filed a jury demand two days earlier. On December 22, 2020, the children's ad litem filed an objection to M.A.'s untimely demand for jury trial. Later that day, counsel for M.A. filed a motion seeking to withdraw as M.A.'s counsel and for the trial court to appoint new counsel. Also on that day, the trial court entered a permanency hearing order before final order confirming the January 4 setting. On December 30, 2020, the trial court struck M.A.'s jury demand as untimely.

On January 4, 2021, the parties appeared for trial, and the trial court ultimately postponed trial to January 28, 2021. The basis for postponement was the trial court was unable to accommodate M.A.'s time announcement of three to five days. On January 11, 2021, M.A.'s counsel filed a second motion seeking to withdraw. On January 27, 2021—one day before trial—M.A. objected to the non-jury trial scheduled for the following day.

In support of her argument that her originally untimely demand became timely after trial was postponed to January 28, 2021, M.A. cites *Halsell v. DeHoyos*, 810 S.W.2d 371, 371 (Tex. 1991). *Halsell* is clearly distinguishable. In *Halsell*, the trial court struck an untimely jury request *in the same order* that reset the trial approximately one month later. *Id.* The Texas Supreme Court reasoned that the untimely jury demand then became timely as to the ultimate trial date, so the trial court's conclusion that the jury demand was untimely was erroneous. *Id.*

Here, in contrast, the trial court struck M.A.'s untimely jury request on December 30, 2020. At the time the district court ultimately struck the mother's jury demand, the trial on the merits remained set four days later. *See Halsell*, 810 S.W.2d at 371; *see also E. E. v. Tex. Dep't of Fam.*

& Protective Servs., 598 S.W.3d 389, 397 (Tex. App.—Austin, 2020, no pet.). When the parties appeared for that trial setting, M.A.'s counsel announced trial would require three to five days to complete.[2] Because M.A.'s counsel represented to the trial court that trial would require longer than the trial court could accommodate on the day of trial, the trial court reset trial to January 28.

The record demonstrates that M.A.'s counsel sought additional delay even though the January 28 setting already required the trial court to retain the case (over the ad litem's objection) beyond its automatic January 25 dismissal date. M.A. filed no written requests for a jury between December 30, 2020—when her initial demand was struck—and her objection to the January 28 setting one day before trial. *See* TEX. R. CIV. P. 216(a) (requiring a "written request"). On these facts, we cannot conclude the trial court abused its discretion, and we overrule M.A.'s first issue.

AUTOMATIC EXCLUSION

In her second issue, M.A. argues the trial court erred in allowing the testimony of witnesses that the Department failed to disclose by not responding to written discovery.

We generally review a trial court's ruling on a motion to exclude for an abuse of discretion; however, to the extent the trial court's ruling depends on an issue of statutory interpretation, we review the court's ruling de novo. *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Spurck v. Texas Dep't of Fam. & Protective Servs.*, 396 S.W.3d 205, 214 (Tex. App.—Austin 2013, no pet.). In construing rules of procedure, we apply the same rules of construction that govern statutory interpretation. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 579 (Tex. 2012). Our review looks to the plain language of the rule and construes it according to its plain or literal meaning. *See id.*; *Shumake*, 199 S.W.3d at 284; *Spurck*, 396 S.W.3d at 214.

[2] The trial ultimately lasted only one day.

On December 24, 2020—Christmas Eve—M.A. served requests for disclosure, interrogatories, and requests for production on the Department. Categorized as a Level 2 case under the Family Code, the discovery period terminated thirty days before the date set for trial. TEX. R. CIV. P. 190.3(b)(1)(A). At the time of the request, trial was set to commence eleven days later. Thus, at the time M.A. served written requests on the Department, they were untimely.[3] Since discovery already closed at the time M.A. served written discovery on the Department, the Department was not obligated to respond to, or otherwise object to, the written discovery. *See* TEX. R. CIV. P. 193.1, 190.3(b) (subjecting discovery to the "limitation" of the Level 2 discovery period). In other words, we hold M.A.'s untimely written requests were of no force or effect under the plain language of the Rules, and the Rules nowhere contemplate the retroactive revival of M.A.'s untimely requests.[4]

On January 27, 2021—one day before trial—M.A. filed a motion to exclude the Department's witnesses and evidence. As a basis for exclusion, M.A. recited the Department's failure to respond to her December 24 written requests. *See* TEX. R. CIV. P. 193.6(a); *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). Generally, the Rules require the automatic exclusion of evidence if a party "fails to make, amend, or supplement a discovery response in a timely manner." TEX. R. CIV. P. 193.6(a); *Alvarado*, 830 S.W.2d at 914. But as we have held, the Department was under no obligation to respond to M.A.'s untimely written requests at the time they were served, and the untimely requests were not retroactively revived when trial was later

[3] Nevertheless, M.A.'s counsel certified the written requests sent eleven days before trial were consistent with the rules of civil procedure and were not interposed for any improper purposes, such as to cause unnecessary delay. TEX. R. CIV. P. 191.3(c)(1), (3).

[4] We express no opinion on the construction of the Rules with respect to a party *re-issuing* untimely discovery after a trial continuance renders new service timely.

reset. *See* TEX. R. CIV. P. 190.3(b), 193.1. Absent a legal basis to exclude the Department's trial witnesses, the trial court did not err. We overrule M.A.'s second issue.

PARENTAL TERMINATION STANDARD OF REVIEW

The involuntary termination of a natural parent's rights implicates fundamental constitutional rights and "divests the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit from the parent." *In re S.J.R.-Z.*, 537 S.W.3d 677, 683 (Tex. App.—San Antonio 2017, pet. denied) (internal quotation marks omitted). "As a result, appellate courts must strictly scrutinize involuntary termination proceedings in favor of the parent." *Id.* The Department had the burden to prove, by clear and convincing evidence, both that a statutory ground existed to terminate M.A.'s parental rights and that termination was in the best interests of the children. TEX. FAM. CODE § 161.206; *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). "'Clear and convincing evidence' means the measure or degree of 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 § 101.007; *In re S.J.R.-Z.*, 537 S.W.3d at 683.

When reviewing the sufficiency of the evidence supporting a trial court's order of termination, we apply well-established standards of review. *See In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). To determine whether the Department presented clear and convincing evidence, a legal sufficiency review requires us 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." *Id.* at 266. We "assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re R.S.-T.*, 522 S.W.3d 92, 98 (Tex. App.—San Antonio 2017, no pet.). "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been

incredible." *In re J.F.C.*, 96 S.W.3d at 266. Nevertheless, "we may not simply disregard undisputed facts that do not support the finding; to do so would not comport with the heightened burden of proof by clear and convincing evidence." *In re S.L.M.*, 513 S.W.3d 746, 748 (Tex. App.—San Antonio 2017, no pet.). If a reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then the evidence is legally sufficient. *Id*. at 747.

In contrast, in conducting a factual sufficiency review, we must review and weigh all the evidence, including the evidence that is contrary to the trial court's findings. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). We consider whether the disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the challenged finding. *In re J.F.C.*, 96 S.W.3d at 266. The evidence is factually insufficient only 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." *Id.*

In both legal and factual sufficiency review, the trial court, as factfinder, is the sole judge of the weight and credibility of the evidence. *In re A.F.*, No. 04-20-00216-CV, 2020 WL 6928390, at *2 (Tex. App.—San Antonio Nov. 25, 2020, no pet.) (mem. op.). We must defer to the factfinder's resolution of disputed evidentiary issues and cannot substitute our judgment for that of the factfinder. *See, e.g., In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam) (factual sufficiency); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency).

STATUTORY TERMINATION GROUNDS

Applicable Law

In her third through seventh issues, M.A. challenges the legal and factual sufficiency of the evidence to support the trial court's predicate findings pursuant to subsections 161.001(b)(1)(E), (M), (N), (O), and (P). In general, assuming a best interest finding, only one predicate ground under section 161.001(b)(1) is sufficient to support a judgment of termination. *In re A.V.*, 113

S.W.3d at 362; *In re A.R.R.*, No. 04-18-00578-CV, 2018 WL 6517148, at *1 (Tex. App.—San Antonio Dec. 12, 2018, pet. denied) (mem. op.); *In re D.J.H.*, 381 S.W.3d 606, 611–12 (Tex. App.—San Antonio 2012, no pet.). To be successful on appeal, an appellant must challenge all the predicate grounds upon which a trial court based its termination order. *In re S.J.R.-Z.*, 537 S.W.3d at 682.

Because termination under subsection 161.001(b)(1)(E) may have implications for a parent's parental rights to other children, appellate courts are instructed to address issues challenging a trial court's findings under this subsection. *In re N.G.*, 577 S.W.3d 230, 236–37 (Tex. 2019). Subsection E allows a trial court to terminate a parent's rights if it finds by clear and convincing evidence that the parent "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." TEX. FAM. CODE § 161.001(b)(1)(E).

Under subsection E, the trial court determines whether there is evidence that a parent's acts, omissions, or failures to act endangered the child's physical or emotional well-being. *See In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). "It is not necessary that the parent's conduct be directed at the child or that the child actually be injured; rather, a child is endangered when the environment or the parent's course of conduct creates a potential for danger which the parent is aware of but disregards." *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The factfinder may further consider parental conduct that did not occur in the child's presence, including conduct before the child's birth or after the child was removed from a parent's care. *In re K.J.G.*, No. 04-19-00102-CV, 2019 WL 3937278, at *4–5 (Tex. App.—San Antonio Aug. 21, 2019, pet. denied) (mem. op.).

Application

On January 19, 2020, the Department received a report alleging neglectful supervision of the children by M.A. as well as her partner; there were concerns regarding drug use in the home and a negligent lack of supervision resulting in the five-year-old child falling from a second-floor balcony. In late January, M.A. removed the children from school and did not re-enroll them while they were in her custody. For approximately a month and a half, M.A. absconded with the children. On March 9, 2020, M.A. was identified during a traffic stop and arrested in front of the children; the Department then took custody of the children. In April 2020, the Department caseworker, Higgs, created M.A.'s service plan and provided it to M.A.'s attorney.

Beginning in February 2020, Higgs made repeated efforts to contact M.A. After the children were in the Department's custody, M.A. sporadically exchanged text messages with Higgs regarding drug testing but otherwise avoided communicating with Higgs. Higgs' first conversation with M.A. did not occur until October 8, 2020. According to Higgs, M.A. claimed the nearly seven-month delay was caused by issues with her phone.

Five days later, Higgs explained to M.A. what services she needed to complete and their alternatives. During this conversation, M.A. admitted to relapsing by use of methamphetamines after August 2020. This prompted a new drug assessment, which M.A. undertook in December 2020. The December 2020 assessment resulted in additional recommendations, including outpatient drug treatment. M.A. did not engage in the recommended services arising out of her December 2020 drug assessment.

M.A. has a long history of substance use. Asked whether she had an issue with drugs since 2008, M.A. testified, "Yes, ma'am. I was a drug addict." M.A. testified to a lengthy history of involvement with the Department stemming from her prolonged use of illicit drugs that resulted in the termination of her parental rights to six other children prior to this proceeding. M.A. also

testified she had been arrested an unknown number of times for drug use and "chose to go to prison for it." M.A.'s drug use was also ongoing as evidenced by her admission to use of methamphetamines sometime after August 2020 and her positive hair follicle and urine tests during the proceeding. After removal, M.A. attended only six of twenty-three available visits with her children. Notably, visitation was conditioned on M.A. submitting to drug testing.

Higgs testified that M.A. was unemployed, that she did not know when M.A. was last employed, and that she could not verify that M.A. had stable housing. M.A. confirmed she was unemployed and stated her only income was unemployment benefits. Higgs indicated that M.A. told her she was "working on purchasing a mobile home," but at the time of trial, M.A. had not been able to demonstrate stable housing. Higgs testified she did not believe M.A. addressed the reasons leading to the children's removal or that M.A. could provide the children a safe and stable home environment. Higgs believed there remained a continuing danger to the children and that it would be dangerous to return the children to M.A. because of M.A.'s ongoing drug use, failure to complete drug treatment after her admitted relapse, and failure to complete a psychiatric evaluation. Additionally, M.A. admitted to domestic violence in her relationship, and M.A. did not complete the family violence prevention program.

After reviewing the evidence under the appropriate standards of review, we conclude that a factfinder could reasonably have formed a firm belief or conviction that M.A.'s conduct subjected the children to physical and emotional danger. *See, e.g.*, *In re L.W.*, 609 S.W.3d 189, 201 (Tex. App.—Texarkana 2020, no pet.) (exposure of children to domestic violence supports subsection E termination); *In re J.S.*, 584 S.W.3d 622, 636–37 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (continuing substance abuse supports subsection E termination). We therefore hold legally and factually sufficient evidence supports the trial court's finding that M.A. violated section 161.001(b)(1)(E), and overrule her arguments to the contrary. Having overruled subsection E, we

need not reach the remainder of M.A.'s issues on predicate termination grounds. *In re A.V.*, 113 S.W.3d at 362; TEX. R. APP. P. 47.1.

BEST INTERESTS

Applicable Law

In her eighth issue, M.A. challenges the legal and factual sufficiency of the trial court's order that termination of her parental rights was in the best interests of the children. There is a strong presumption that a child's best interest is served by maintaining the relationship between a child and the natural parent, and the Department has the burden to rebut that presumption by clear and convincing evidence. *See, e.g.*, *In re R.S.-T.*, 522 S.W.3d at 97. To determine whether the Department satisfied this burden, the Texas Legislature has provided several factors[5] for courts to consider regarding a parent's willingness and ability to provide a child with a safe environment, and the Texas Supreme Court has provided a similar list of factors[6] to determine a child's best interest. TEX. FAM. CODE § 263.307(b); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

[5] These factors include, inter alia: "(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 § 263.307(b).

[6] Those factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist those individuals to promote the best interest of the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

A best interest finding, however, does not require proof of any particular factors. *See In re G.C.D.*, No. 04-14-00769-CV, 2015 WL 1938435, at *5 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.). Neither the statutory factors nor the *Holley* factors are exhaustive, and "[e]vidence of a single factor may be sufficient for a factfinder to form a reasonable belief or conviction that termination is in the child's best interest." *In re J.B.-F.*, No. 04-18-00181-CV, 2018 WL 3551208, at *3 (Tex. App.—San Antonio July 25, 2018, pet. denied) (mem. op.). Evidence that proves a statutory ground for termination is probative on the issue of best interest. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). "A trier of fact may measure a parent's future conduct by [her] past conduct [in] determin[ing] whether termination of parental rights is in the child's best interest." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). This conduct can include drug use. Drug use can destabilize the home and expose children to physical and emotional harm if not resolved. *See, e.g.*, *In re K.J.G.*, 2019 WL 3937278, at *8.

Application

M.A. argues the only evidence from which the trial court could find it was in the best interest to terminate her parental rights were (1) Higgs' opinion that termination was in their best interest and (2) the fictive kin's testimony that the children were doing well in her and her husband's household. We disagree.

All of the evidence we have discussed with respect to subsection E is probative on the issue of best interest and touches on numerous other *Holley* factors. *In re C.H.*, 89 S.W.3d at 28; *see also, e.g.*, *In re J.I.M.*, 517 S.W.3d 277, 286–87 (Tex. App.—San Antonio 2017, pet. denied) (finding best interest to terminate based in part on child's condition improving in foster home); *In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (pattern of illicit drug use supports best interest finding); *In re M.R.*, 243 S.W.3d 807, 820–21 (Tex. App.—Fort Worth 2007, no pet.) (exposure to domestic violence, inability to provide a stable home, and failure

to comply with service plan support best interest finding); *In re S.B.*, 207 S.W.3d 877, 887 (Tex. App.—Fort Worth 2006, no pet.) (parent's unstable lifestyle supports best interest finding); *In re E.A.F.*, 424 S.W.3d 742, 752 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (failure to complete services supports best interest finding). Additionally, there was evidence the children desired to stay with their fictive kin (who planned to adopt the children after termination). *See Holley*, 544 S.W.2d at 372 (desires of child are factor for factfinder's consideration).

After reviewing the evidence under the appropriate standards of review, we conclude a reasonable factfinder could have formed a firm belief or conviction that termination of M.A.'s parental rights was in the best interests of her children. *In re J.F.C.*, 96 S.W.3d at 266. We therefore hold legally and factually sufficient evidence supports the trial court's best interest finding, and we overrule M.A.'s arguments to the contrary.

CONCLUSION

Having overruled each of M.A.'s issues, we affirm the trial court's order of termination.

Lori I. Valenzuela, Justice