



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00198-CV

IN THE INTEREST OF N.S. IV and D.L.S., Children

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-PA-01043
Honorable Linda A. Rodriguez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

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

Delivered and Filed: November 10, 2021

AFFIRMED

Jessica¹ appeals the trial court's termination of her parental rights to her children, N.S. IV and D.L.S. Jessica's sole argument is that the trial court's best-interest finding is not supported by legally and factually sufficient evidence. We disagree and affirm the trial court's order of termination.

BACKGROUND

The Department of Family and Protective Services filed an original petition on May 26, 2020, seeking temporary managing conservatorship of N.S. IV and D.L.S. and to terminate the parental rights of Jessica and the children's father.

¹ To protect the identity of the minor children, we refer to appellant by her first name and to the children by their initials. See TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8.

The trial court issued its initial permanency hearing order in November 2020. The court found Jessica had yet to adequately and appropriately comply with the family plan, urged compliance, and made clear to Jessica that a failure to fully comply with the plan could result in the termination of her parental rights. The trial court issued a substantially identical order in March 2021, the month before trial.

The case proceeded to a bench trial in April 2021.² The evidence at trial consisted of testimony from Jessica and two caseworkers, Jazzmion Owens and Sharmon Wilson. After trial, the court found by clear and convincing evidence that Jessica knowingly placed or allowed the children to remain in conditions that endangered their physical or emotional well-being, engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well-being, constructively abandoned the children, and failed to comply with court-ordered provisions of the family plan. *See* TEX. FAM. CODE § 161.001(b)(1)(D), (E), (N) & (O). The trial court also found by clear and convincing evidence that termination of Jessica's parental rights was in the children's best interest. *See id.* § 161.001(b)(2). The trial court terminated Jessica's relationship with N.S. IV and D.L.S. and appointed the Department to be their permanent managing conservator.

Jessica timely appealed the trial court's order. She argues the evidence presented by the Department was not legally or factually sufficient to support the court's finding that termination of her rights is in the children's best interest.

² The children's father, who was homeless most of the time the case was pending, did not appear at trial, but he was represented by counsel. He does not appeal the trial court's order of termination. Jessica's boyfriend, Pablo—who agreed to work services alongside her—did not testify at trial.

STANDARD OF REVIEW AND APPLICABLE LAW

A judgment terminating parental rights must be supported by clear and convincing evidence. TEX. FAM. CODE § 161.001(b). To determine whether this heightened burden of proof was met, we employ a heightened standard of review to determine whether 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 17, 25 (Tex. 2002). “This standard guards the constitutional interests implicated by termination, while retaining the deference an appellate court must have for the factfinder’s role.” *In re O.N.H.*, 401 S.W.3d 681, 683 (Tex. App.—San Antonio 2013, no pet.). We do not reweigh issues of witness credibility but defer to the factfinder’s reasonable credibility determinations. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005).

A legal sufficiency review requires us to examine 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.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We assume the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could have done so, and we disregard all evidence that a reasonable factfinder could have disbelieved or found incredible. *Id.* When conducting a factual sufficiency review, we evaluate “whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *Id.* The evidence is factually insufficient “[i]f, 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.*

BEST INTEREST FINDING

Jessica argues the evidence is not legally and factually sufficient to support the trial court’s best-interest finding. To terminate parental rights, a trial court must find by clear and convincing

evidence one of the statutory predicate grounds and that termination is in the child's best interest. TEX. FAM. CODE § 161.001(b). Because Jessica does not challenge the trial court's findings of predicate grounds for termination, we consider only whether legally and factually sufficient evidence supports the best-interest finding. *See J.F.C.*, 96 S.W.3d at 263–67.

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) (per curiam). However, a court must also presume “the prompt and permanent placement of the child in a safe environment is . . . in the child's best interest.” TEX. FAM. CODE § 263.307(a). In making a best-interest determination, the factfinder looks at the entire record and considers all relevant circumstances. *See C.H.*, 89 S.W.3d at 27–29.

In determining the best interest of a child, a court should consider the factors set out in section 263.307 of the Family Code.³ Courts also apply the non-exhaustive *Holley* factors. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). Those factors include: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future 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 best interest of the child; (6) the plans held by the individuals seeking custody; (7) the stability of the home of the parent

³ These factors include: the child's age and physical and mental vulnerabilities; the frequency and nature of out-of-home placements; the magnitude, frequency, and circumstances of the harm to the child; whether the child has been the victim of repeated harm after intervention by the department; whether the child is fearful of returning to the child's home; 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; whether there is a history of abusive conduct by the child's family or others who have access to the child's home; whether there is a history of substance abuse by the child's family or others who have access to the child's home; 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; the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; whether the child's family demonstrates adequate parenting skills; and whether an adequate social support system consisting of an extended family and friends is available to the child. *See* TEX. FAM. CODE § 263.307.

and the individuals seeking custody; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.*

Not every factor must be proven for a court to find that termination is in the child's best interest. *C.H.*, 89 S.W.3d at 27. Instead, we must consider "the totality of the circumstances in light of the *Holley* factors" to determine whether sufficient evidence supports the challenged finding. *In re B.F.*, No. 02-07-334-CV, 2008 WL 902790, at *11 (Tex. App.—Fort Worth Apr. 3, 2008, no pet.) (mem. op.). If the facts are limited due to the absence of a thoroughly developed record, the evidence still may be sufficient if the cumulative weight and substance of these limited facts establish that termination of parental rights is in the child's best interest. *See In re J.M.G.*, 608 S.W.3d 51, 54 (Tex. App.—San Antonio 2020, pet. denied).

A. History of Substance Abuse and the Emotional and Physical Danger to the Children

The Department became involved with the case in early 2020 when law enforcement pulled over a vehicle with Jessica, her boyfriend, and her children and found methamphetamines and heroin inside it. Jessica was charged with drug possession. Jazzmion Owens, a Department Family Based Safety Services worker, testified the Department was concerned about Jessica's substance abuse and it removed the children under a child safety plan. Owens set up referrals for Jessica to obtain services to address parenting skills, domestic violence, and substance abuse. However, Jessica did not complete the services, explaining she missed appointments because she had the day or time wrong. During this time, Jessica twice tested positive for drugs, including methamphetamines and heroin.

After the Department filed the petition, the trial court ordered Jessica to undergo a psychological evaluation, attend counseling sessions, complete a parenting class, complete a drug

and alcohol dependency assessment, cooperate with all random drug testing, and comply with all provisions of the Department's family plan. The court notified Jessica that a failure to comply with any of these requirements could result in the termination of her parental rights.

Sharmon Wilson, a Department legal caseworker, testified she created Jessica's family plan. The plan additionally required Jessica to maintain stable housing and submit proof, maintain legal and verifiable income and submit proof, complete drug treatment services, remain drug and alcohol free, and regularly attend and actively participate in family violence classes.⁴ Wilson explained to Jessica the plan's requirements to achieve reunification with her children and gave her a copy. She believed Jessica understood what she was required to do to get her children back.

At trial, Wilson testified she recommended relative adoption and termination of Jessica's parental rights because she did not believe Jessica could provide a safe, sober, and stable environment for the children. The evidence admitted at trial shows Jessica failed to complete drug treatment services and submit to random drug testing. *See In re S.B.*, 207 S.W.3d 877, 887–88 (Tex. App.—Fort Worth 2006, no pet.) (considering parent's substance abuse and failure to comply with service plan in holding evidence supported best-interest finding). Jessica initially engaged in a drug treatment program, but she was discharged due to nonattendance. Wilson testified Jessica completed only three of at least nine requested random drug tests. The results of one of those tests showed Jessica was positive for opiates.⁵ *See In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (“A parent's drug use supports a finding that termination is in the best interest of the child.”). Wilson testified returning the children to Jessica

⁴ After Jessica explained to Wilson that she experienced domestic violence with the children's father, but not with her current boyfriend, Wilson told her she did not need to complete domestic violence classes.

⁵ No evidence of the results of the other two random drug tests Jessica took was presented.

would be dangerous because she was living with her boyfriend and the two had a history of using drugs.

Jessica, on the other hand, testified she had been “clean” since her children were removed, worked services on her own, and claimed she did not receive text messages from Wilson requesting that she take a random drug test. However, Jessica did not testify she completed a drug treatment program. She also admitted she received some text messages from Wilson, including at least one text message ordering a random drug test. Jessica testified she did not take that test because she arrived late to the facility. Jessica also testified some of her other service providers drug tested her; however, no evidence was presented of the results of any such tests. Based on Jessica’s arrest for possession, her failure to complete drug treatment, her positive drug tests, and Wilson’s testimony that Jessica repeatedly failed to submit to random drug testing, the trial court could have disbelieved Jessica’s testimony that she was clean and worked services on her own. The court could have reasonably believed Jessica continued to struggle with substance abuse.

The evidence admitted at trial shows Jessica also failed to comply with, or only partially complied with other requirements of the family plan that sought to assure the children would have a safe and stable environment. Wilson testified that although Jessica completed a psycho-social assessment, she did not regularly attend or actively participate in individual counseling sessions. Wilson also testified that Jessica had been able to maintain stable public housing but had not shown she was receiving a stable income. Jessica told Wilson she was working for her boyfriend’s brother in a cleaning business, but she never provided Wilson any proof of her employment. The trial court therefore could have reasonably credited this evidence as supporting its best-interest finding. *See O.N.H.*, 401 S.W.3d at 687 (noncompliance with service plan is probative of child’s best interest).

B. The Desires of the Children, the Present and Future Needs of the Children, and Jessica's Parental Abilities

The children were seven and five years old at the time of trial. The record does not reflect their desires. When children are too young to express their desires, the factfinder may consider whether the children have bonded with their caregivers, are well-cared for by them, and have spent minimal time with a parent. *See In re N.J.D.*, No. 14-17-00711-CV, 2018 WL 650450, at *6 (Tex. App.—Houston [14th Dist.] Feb. 1, 2018, pet. denied) (mem. op.). At the time of trial, the children were placed with Jessica's first cousin and spouse where they had been for approximately six weeks.⁶ Wilson testified the children are "doing good," are in a stable environment, and are succeeding in school. She testified the current caregivers were meeting the children's needs, and she anticipated this home to be a long-term placement for the children if the parent's rights were terminated. Wilson acknowledged that N.S. IV occasionally struggled with aggression when he did not get his way, and testified the current caregivers were working to get him into behavioral therapy.⁷ Jessica did not offer any plan to address N.S. IV's behavior, testifying her son was well-behaved and is only angry because people are telling him that she does not want him.

The evidence showed Jessica visited with the children regularly, often brought toys and food, and was bonded with them. However, she sometimes fell asleep during visits and was sometimes accompanied by her boyfriend, who smelled like marijuana.

Whether Jessica completed the required parenting class was disputed. Wilson testified Jessica did not complete a parenting course. She was initially engaged with the Mommies Program, but it discharged her for nonattendance. The Department referred her to a second program, which

⁶ Immediately prior to being placed with Jessica's relatives, the children were at Legacy Ranch foster home in Gonzales, Texas.

⁷ Two previous relative caregivers cited N.S. IV's aggression as one of the reasons they could no longer care for the children.

Jessica did not complete either. Jessica explained that the Mommies Program discharged her for missing one day when she had a scheduling conflict, and the second program discharged her after she missed class because she was confused about the schedule. She testified that she completed an alternative parenting course through Alison—a website offering free online education courses—and said it was approved by Wilson. We defer to the trial court’s determinations of credibility. *J.P.B.*, 180 S.W.3d at 573. The trial court reasonably could have believed Wilson’s testimony that Jessica did not complete an approved parenting course. *See In re J.M.G.*, 608 S.W.3d at 63 (failure to complete parenting class “is some evidence in favor of the best-interest finding”).

C. Jessica’s Other Arguments

Jessica argues there is a strong presumption that keeping a child with a parent is in the child’s best interest, and the Department was only interested in removing the children from her and placing them with someone else. Although there is a strong presumption that the best interest of a child is served by keeping the child with a parent, a court also presumes that the prompt and permanent placement of a child in a safe environment is in the child’s best interest. TEX. FAM. CODE § 263.307(a); *R.R.*, 209 S.W.3d at 116. The cumulative weight and substance of the evidence supports the trial court’s determination that Jessica has not taken sufficient steps to address her substance abuse or otherwise complete her court-ordered services to ensure she is able to safely care and provide for her children. The evidence also shows the children’s current placement with extended family is a stable and safe environment where the children are doing well, and their caregivers are addressing their needs.

Jessica also argues the evidence at trial failed to address a majority of the relevant best interest factors. However, not every factor in support of a best-interest finding must be proven by the Department for the court to find termination of the parent-child relationship is in a child’s best interest. *C.H.*, 89 S.W.3d at 27. Finally, Jessica contends the Department did not present any

evidence she was unable or unwilling to meet the children's physical and emotional needs. We disagree. The evidence at trial established Jessica had not shown the Department she had stable and sufficient income to provide for the children's needs; Jessica failed to participate in required counseling sessions; she failed to address her illegal drug use; and she was dismissive of N.S. IV's behavioral health needs that required therapy. *See J.M.G.*, 608 S.W.3d at 63.

Having reviewed the evidence admitted at trial, we hold a factfinder could have reasonably formed a firm belief or conviction that termination of Jessica's parental rights is in the children's best interest. *See In re J.F.C.*, 96 S.W.3d at 266. We therefore hold the evidence is legally and factually sufficient to support the trial court's best-interest finding.

CONCLUSION

We affirm the trial court's order of termination.

Luz Elena D. Chapa, Justice