Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-23-00487-CV

IN THE INTEREST OF A.Z. AND Z.Z., Children

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2022-PA-00654
Honorable Raul Perales, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

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

Delivered and Filed: October 25, 2023

AFFIRMED; MOTION TO WITHDRAW DENIED

A.K. ("Mother") and E.Z. ("Father") appeal from a judgment terminating their parental rights to their children, A.Z. and Z.Z.[1] We affirm.

BACKGROUND

On April 22, 2022, the Texas Department of Family and Protective Services filed an original petition requesting protection of the children, conservatorship, and termination of Mother and Father's parental rights. The Department's primary concern was the children's exposure to domestic violence in the family home. The trial court issued an order authorizing the children's emergency removal from Mother and Father's care.

[1]We use the initials of the appellants and the children to protect the children's identity. *See* TEX. FAM. CODE. § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

On May 4, 2022, the trial court held an adversary hearing and appointed the Department the children's temporary managing conservator. The trial court also ordered Mother and Father to submit to psychological evaluations, attend counseling sessions, complete parenting classes, and comply with all other requirements in the service plans to be prepared by the Department. In August 2022, the Department made the decision to pursue termination of Mother and Father's parental rights in lieu of family reunification.

On April 4, 2023, the Department's termination case proceeded to trial before the court. The Department presented the testimony of five witnesses, including an investigator, a caseworker, one of the children's current caretakers, a CASA[2] volunteer, and a counselor. Mother did not appear at the trial. Father appeared virtually and testified on his own behalf. After hearing the evidence, the trial court terminated Mother's parental rights based on three predicate grounds, *see* TEX. FAM. CODE § 161.001(b)(1)(D),(E),(O), and terminated Father's parental rights based on four predicate grounds. *See id*. § 161.001(b)(1)(D),(E),(N),(O). The trial court also found that termination of both parents' parental rights was in the children's best interest. *See id*. § 161.001(b)(2).

MOTHER'S APPEAL: BEST INTEREST FINDING

In her sole issue, Mother argues the evidence is legally and factually insufficient to support the trial court's best-interest finding.

Standards of Review

To successfully terminate parental rights under section 161.001 of the Texas Family Code, the Department must prove by clear and convincing evidence that: (1) a parent engaged in at least one of the predicate grounds listed in subsection 161.001(b)(1), and (2) the termination of parental

[2]Child Advocates San Antonio

rights is in the children's best interest. *See* TEX. FAM. CODE § 161.001(b)(1),(2). When reviewing the legal sufficiency of the evidence, 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)). When 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).

Applicable Law—Best Interest of the Children

Under Texas law, there is a strong presumption that maintaining the parent-child relationship is in the children's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, there is also a presumption that the children's best interest is served by their prompt and permanent placement in a safe environment. TEX. FAM. CODE § 263.307(a). In determining if a parent is willing and able to provide the children with a safe environment, we consider the factors listed in section 263.307(b) of the Texas Family Code.[3] *Id*. § 263.307(b). We also consider the non-exhaustive list of factors set forth by the Texas Supreme Court in *Holley v. Adams*, 544 S.W.2d

[3]These factors are: (1) the children's ages and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of harm to the children; (4) whether the children have been the victims of repeated harm after the initial report and intervention by the department; (5) whether the children are fearful of living in or returning to the home; (6) the results of psychiatric, psychological, or developmental evaluations of the children, the parents, other family members, or others who have access to the children's home; (7) whether there is a history of abusive or assaultive conduct by the children's family or others who have access to the home; (8) whether there is a history of substance abuse by the children's family or others who have access to the home; (9) whether the perpetrator of the harm to the children is identified; (10) the willingness and ability of the 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 family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the parents demonstrate adequate parenting skills, including providing the children with "a safe physical home environment" and "protection from repeated exposure to violence even though that violence may not be directed at the child[ren]"; and (13) whether an adequate social support system consisting of extended family and friends is available to the children. TEX. FAM. CODE § 263.307(b).

367, 371-72 (Tex. 1976).[4] "The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child[ren]'s best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child[ren]." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). "A best-interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied).

"A parent's abusive or violent conduct can produce a home environment that endangers [the children's] well-being." *In re T.R.M.*, No. 14-14-00773-CV, 2015 WL 1062171, at *6 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.). "Evidence of the parents' history of domestic violence supports the trial court's best interest[] finding." *In re A.H.*, No. 04-15-00416-CV, 2015 WL 7565569, at *7 (Tex. App.—San Antonio Nov. 25, 2015, no pet.). "[I]t is in the child[ren]'s best interest to be protected from repeated exposure to domestic violence, even when that violence may not be directed at [them]." *In re S.Y.*, No. 07-23-00206-CV, 2023 WL 5209104, at *2 (Tex. App.—Amarillo Aug. 14, 2023, no pet.); *see In re M.T.*, No. 07-19-00320-CV, 2020 WL 856334 at *4 (Tex. App.—Amarillo Feb. 20, 2020, no pet.) (recognizing that continued domestic violence shows a parent cannot maintain a safe living environment and is contrary to the children's best interest). A parent's failure to complete services intended to help her "break the cycle of domestic violence" supports a determination that termination of parental rights is in the children's best interest. *In re S.Y.*, 2023 WL 5209104, at *2. The need for permanence through the establishment

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

of a stable, permanent home is the paramount consideration in determining the children's best interest. *In re M.T.*, 2020 WL 856334 at *3.

The Trial Evidence and Application of the Law

The trial evidence showed that the Department became involved in this case after receiving a report of neglectful supervision of the children "due to domestic violence." At the time the Department opened its case, A.Z. was four years old and Z.Z. was one year old.

Before the Department filed the underlying suit, one of its investigators met with Mother. During this meeting, Mother acknowledged that Father had perpetrated domestic violence against her. Mother told the investigator about an incident in which Father had dropped her off on the roadside at night and made her walk home barefoot. Mother also told the investigator that she had obtained a protective order against Father, but she denied that Father was currently perpetrating any domestic violence against her.

Contrary to Mother's representations, neighbors told the investigator that the domestic violence was continual. A.Z. told the investigator that Father "put his hands on" Mother, and that Father drank and fought with people. The investigator also learned that Mother and Father were having contact with each other, despite the protective order prohibiting such contact. While Father was in jail, Mother was communicating with him daily. Additionally, after Father's release from jail, Father moved back in with Mother and the children. A.Z. told the investigator that she and her little brother, Z.Z., went with Mother to pick up Father when he was released from jail.

Based on his investigation, the investigator encouraged Mother to agree to family-based services and a safety plan, but Mother refused to agree, stating that she did not see the need for services or a safety plan.

After A.Z. and Z.Z. were removed from Mother and Father's home, the children were placed with a relative and her spouse ("the children's caretakers."). The caseworker and her

caretakers soon learned that A.Z. was deeply affected by her exposure to domestic violence and other inappropriate activities in Mother and Father's home. Despite her young age, A.Z. spoke openly about domestic violence and other illegal and adult activities. Specifically, A.Z talked about drugs, "weed," and alcohol; Father "beating up" Mother; Mother "hitting" Father with kitchen utensils; Mother walking on the side of the road and getting glass in her foot; and Mother having sex with another man. A.Z. began therapy to help her deal with the trauma she had experienced in Mother and Father's home.

A Department caseworker created a service plan for Mother, which required her to: (1) complete a parenting education course, (2) engage in individual counseling until successfully discharged, (3) complete a domestic violence program, and (4) complete a drug assessment. According to the caseworker, Mother understood that completion of the services in the service plan was necessary for A.Z. and Z.Z. to be returned to her care. Mother completed a parenting education course and attended ten domestic violence group therapy sessions, but she failed to engage in individual counseling until successfully discharged. About two months before trial, Mother attended two individual counseling sessions with a licensed counselor. After only two individual counseling sessions and before the counselor could develop a treatment plan, Mother stopped attending individual counseling sessions with this counselor.[5]

Mother was permitted to have regular, supervised visits with the children. Father was not permitted to have visits with the children. Mother was warned that Father was not to have contact with the children, unless specifically authorized by the Department. Nevertheless, Mother facilitated contact between Father and the children on two occasions. During one of her visits with the children, Mother called Father and allowed him to talk to A.Z. over the phone. During another

[5]There was testimony that Mother also participated in individual counseling with another counselor, but the record does not reveal how may sessions she attended.

visit, Mother gave Father the location of the visit and Father appeared at the visit unexpectedly. When A.Z. saw Father, she became very upset and started crying.

For most of the case, Mother attended her visits with the children. However, in the two months prior to trial, Mother missed seven of her last eight visits. And, when Mother missed these visits, she failed to provide adequate notice that she would not attend. Because of the lack of notice, the children were already at the visitation site waiting for Mother. When Mother failed to appear, the children were disappointed. In fact, A.Z. became extremely upset and cried.

The caseworker testified that while the case was pending, Mother and Father were together and in violation of the protective order. There were more domestic violence incidents. For example, about two months after the children's removal, Mother and Father were at a restaurant, drinking alcohol and arguing loudly. The police were called to the scene and Mother and Father were found asleep and "passed out" in Mother's vehicle. At the time, Mother was five or six months pregnant.

The Department was concerned that if the children were returned to Mother, they would be placed in harm's way again. The caseworker testified that Mother simply had not been able to demonstrate that she could keep A.Z. and Z.Z. safe; in fact, she had continued to show the opposite. Despite Mother's participation in domestic violence group therapy, there was nothing to suggest that Mother had gained any protective capacity for herself or for her children.

By the time of trial, A.Z was five years old and Z.Z. was two years old. According to the caseworker, the children's physical and emotional needs were being met in their current placement. Their current caretakers' home was safe and appropriate. One of the children's current caretakers testified that A.Z. was doing "really well and [had] come a long way in processing all of the trauma" she had experienced in Mother and Father's home. Specifically, A.Z. had learned to talk to her caretakers and her counselor about the trauma she had experienced. A CASA volunteer

echoed this assessment, recognizing that the children turned to their current caretakers for comfort and support.

The Department's permanency goal for the children was adoption by their current caretakers, who loved A.Z. and Z.Z. and wanted to adopt them. Both A.Z. and Z.Z. were thriving in their current placement. A.Z. was enrolled in pre-kindergarten, where she was doing very well. Additionally, the children regularly attended gatherings with extended family members. Both A.Z. and Z.Z. enjoyed these gatherings and their interactions with extended family members.

In arguing that the evidence is legally and factually insufficient to support the trial court's best interest finding, Mother directs our attention to isolated portions of the testimony. First, Mother points to the caseworker's testimony that the children have a bond with Mother. However, the evidence also showed that the children are attached to their current caretakers. According to the CASA volunteer, A.Z. and Z.Z. show "a lot of affection" to their current caretakers and turn to them for comfort and support.

Second, Mother points to the caseworker's testimony that Mother's interactions with A.Z. and Z.Z. were appropriate during visits. However, the evidence also showed that Mother exercised poor judgment by facilitating contact with Father during some of these visits. And, by the end of the case, Mother had stopped visiting A.Z. and Z.Z. altogether.

Finally, Mother points to her counselor's testimony that she would be willing to continue to work with Mother in therapy. However, there was no evidence that Mother was willing to re-engage in individual counseling.

Based on the totality of the evidence, the trial court could have formed a firm belief or conviction that termination of Mother's parental rights was in the children's best interest. In reaching its decision, the trial court could have considered: (1) the physical and emotional danger the children experienced while living with Mother and Father; (2) Mother's unwillingness or

inability to protect A.Z. and Z.Z. from repeated exposure to domestic violence and to provide them with a safe home environment; (3) Mother's unwillingness or inability to distance herself from Father; (4) Mother's unwillingness or inability to complete services intended to help her break the cycle of domestic violence within a reasonable time; and (5) the safety and stability of the proposed placement.

After reviewing the evidence under the appropriate standards of review, we conclude that the trial court could reasonably have formed a firm belief or conviction that terminating Mother's parental rights was in A.Z. and Z.Z.'s best interest. We hold the evidence is legally and factually sufficient to support the trial court's best-interest finding. Mother's sole issue is overruled.

FATHER'S APPEAL: *ANDERS* BRIEF FILED

Father's court-appointed counsel filed a brief in which he conducts a professional evaluation of the record and concludes there are no meritorious issues to be raised on appeal. *See In re P.M.*, 520 S.W.3d 24, 27 n.10 (Tex. 2016) (recognizing that counsel's obligation to the client in a parental termination appeal may be satisfied by filing a brief meeting the standards established in *Anders v. California*[6] and its progeny). In accordance with the standards established in *Anders* and its progeny, counsel informed Father of his right to review the record and file his own brief and provided him with a form motion requesting access to the appellate record. *See In re A.L.H.*, No. 04-18-00153-CV, 2018 WL 3861695, at *2 (Tex. App.—San Antonio Aug. 15, 2018, no pet.) (citing *Kelly v. State*, 436 S.W.3d 313, 319-20 (Tex. Crim. App. 2014)). Thereafter, this court set deadlines for Father to file a pro se motion for access to the appellate record and a pro se brief and informed him of these deadlines, but Father did not request the appellate record or file a pro se brief.

[6]386 U.S. 738 (1967).

We have reviewed counsel's brief, which provides a conscientious examination of the record and cites to relevant legal authorities. In his brief, counsel discusses two grounds that might arguably support the appeal, but ultimately concludes that these grounds are frivolous. After conducting our own review of the appellate record, we conclude there are no meritorious issues to be raised on appeal and Father's appeal is wholly frivolous.

Counsel also filed a motion to withdraw, which does not assert any ground for withdrawal apart from counsel's conclusion that the appeal is frivolous. In parental termination appeals, counsel's duty to his client extends through the exhaustion or waiver of all appeals, including the filing of a petition for review in the Texas Supreme Court. *In re P.M.*, 520 S.W.3d at 27. Thus, we conclude counsel's motion to withdraw is premature. *See id.* ("[A]n *Anders* motion to withdraw brought in the court of appeals, in the absence of additional grounds for withdrawal, may be premature."). Accordingly, we deny counsel's motion to withdraw.

CONCLUSION

Having overruled Mother's sole issue and concluded that Father's appeal is wholly frivolous, we affirm the judgment terminating their parental rights.

Liza A. Rodriguez, Justice