**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-10-00477-CV**

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**IN THE INTEREST OF C.A.C., JR.**

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**On Appeal from the 253rd District Court**
**Liberty County, Texas**
**Trial Cause No. AD0900229**

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## MEMORANDUM OPINION

Appellant's ex-wife and her new husband filed a combined termination and adoption petition. After a bench trial, the trial court terminated the parental rights of appellant, C.A.C., Sr., to his child, C.A.C., Jr., and granted the adoption petition. Appellant contends the trial court erred in terminating appellant's parental rights upon evidence that is legally and factually insufficient. We affirm the trial court's judgment.

A court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has committed one of the enumerated statutory grounds and the trial court finds that termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(1),(2) (West Supp. 2010). "'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 Ann. § 101.007 (West 2008).

In addition to finding that termination would be in the child's best interest, the trial court found three separate grounds for termination. Tex. Fam. Code Ann. § 161.001(1)(C) (the parent "voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months"); Tex. Fam. Code Ann. § 161.001(1)(F) (the parent "failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition"); Tex. Fam. Code Ann. § 161.001(1)(Q) (the parent "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition"). The judgment will be affirmed if any one of the grounds is legally and factually sufficient and the best interest finding is also legally and factually sufficient. *M.C. v. Tex. Dep't of Family & Protective Servs.*, 300 S.W.3d 305, 309, 311-12 (Tex. App.—El Paso 2009, pet. denied).

In reviewing the evidence for legal sufficiency, we consider all of the evidence in the light most favorable to the termination 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 that the factfinder resolved any

disputed facts in favor of its finding, if a reasonable factfinder could do so, and disregarded all evidence that a reasonable factfinder could have disbelieved. *Id.* In reviewing the evidence for factual sufficiency, we give "due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id.* We consider whether the disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *Id.* "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.*

Appellant contends there is no evidence that he will be incarcerated for two years from the date of the filing of the petition. Appellant was convicted of evading arrest or detention with the use of a vehicle and on January 7, 2008, he received a ten year sentence as a repeat felony offender. *See* Tex. Penal Code Ann. § 38.04(b)(1)(B) (West Supp. 2010); Tex. Penal Code Ann. § 12.42(a)(2) (West Supp. 2010). Appellees filed their petition on August 20, 2009. Appellant testified that he is parole-eligible and that his projected release date is June 27, 2011. The projected release date includes good time in addition to time actually served.

Appellant argues that the trial court could not reasonably form a firm belief or conviction that appellant would remain incarcerated through August 19, 2011, if appellant's projected release date is June 27, 2011, and he "may very likely be released

from incarceration prior to the statutory two year timeframe." The Supreme Court has noted that parole eligibility and the projected release date are relevant but not dispositive evidence of when an incarcerated person will in fact be released from prison. *In re H.R.M.*, 209 S.W.3d 105, 108-09 (Tex. 2006).

> We recognize that a two-year sentence does not automatically meet subsection Q's two-year imprisonment requirement. In some cases, neither the length of the sentence nor the projected release date is dispositive of when the parent will in fact be released from prison. A parent sentenced to more than two years might well be paroled within two years. Thus, evidence of the availability of parole is relevant to determine whether the parent will be released within two years. Mere introduction of parole-related evidence, however, does not prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years. Parole decisions are inherently speculative, *Ex Parte Moussazadeh*, 64 S.W.3d 404, 413 (Tex. Crim. App. 2001) (citing *Ex Parte Evans*, 690 S.W.2d 274, 278 (Tex. Crim. App. 1985)), and while all inmates doubtless hope for early release and can take positive steps to improve their odds, the decision rests entirely within the parole board's discretion. *See In re K.R.M.*, 147 S.W.3d 628, 630 (Tex. App.—San Antonio 2004, no pet.) (stating that a father's "hope that he might be granted early release is pure speculation"). If the mere possibility of parole prevents a jury from ever forming a firm belief or conviction that a parent will remain incarcerated for at least two years, then termination under subsection Q will occur only when the parent has no possibility of parole. By that rationale, the party seeking termination would have to show that there is zero chance of early release. This would impermissibly elevate the burden of proof from clear and convincing to beyond a reasonable doubt.

*Id.*

At the time of the filing of the petition, appellant had served only two years on a ten year sentence. The record shows that appellant has multiple convictions and that when he was released March 16, 2007, appellant returned to prison late the following

month because he committed the offense for which he is currently incarcerated. At trial, appellant conceded that the number of prior felony convictions might be a factor the parole board would take into account when deciding whether to grant parole. Although he was already parole-eligible, appellant had not been released. At least twice appellant had failed to successfully complete probation and that would be taken into account in a parole decision. The trial court could reasonably have formed a firm belief or conviction that appellant would remain incarcerated for two years from the date of the filing of the petition.

Appellant argues the evidence supporting this ground for termination is factually insufficient because "the mere fact that Appellant may be released from prison at any time prior to his maximum sentence date provides sufficient evidence to raise a legitimate question as to the probability of incarceration past the two year[s] provided by the statute." The issue in a factual sufficiency review is not whether there is a possibility of release, but whether the disputed evidence established that appellant would be released from prison before the second anniversary of the date of the filing of the termination petition. *See H.R.M.*, 209 S.W.3d at 108. At the time of trial appellant was in a pre-release program, and he testified that he had been incarcerated for forty months and that he had no fights or other disciplinary issues while he was in prison. Appellant had a December 2010 parole date, but appellant had no guarantee of release on parole in December 2010. Similarly, a June 27, 2011, projected release date, even in the absence

of evidence of an adverse disciplinary record, is not evidence that appellant will be released on that date. The record neither shows how appellant's good time was accrued and credited, nor shows that his release on that date, and not some date after August 19, 2011, will be mandatory. A projected release date falling twenty-two months after the filing of the petition is not so significant that the trial court could not reasonably disregard it. One of the termination grounds is both legally and factually sufficient.

The non-exhaustive list of factors considered in determining whether termination is in the child's best interest 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 these individuals to promote the best interest of the child; (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 acts or omissions of the parent which may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

Appellant argues that the child has no special emotional and physical needs and has not been abused or neglected. Appellant argues that he demonstrated his sensitivity to the child's needs and that other than his incarceration there was no evidence indicating the existing parent-child relationship was not proper. He contends that his failure to act

as a parent was due to his incarceration and the mother's behavior that discouraged appellant's attempts to communicate with C.A.C., Jr.

The child's mother testified that she met appellant in October 2003 and gave birth to the child the following year. In 2004, appellant was put on probation on a charge of possession of a controlled substance. That probation was revoked in April 2005 and appellant returned to prison. On April 5, 2005, when the child was six months of age, appellant became angry with the child's mother, kicked down the door to her dwelling, grabbed the child by the arm and snatched him out of his highchair, then ripped the telephone out of the mother's hand, grabbed her hair and dragged her out of the house while he was holding the baby by one arm.

The child's parents married while appellant was incarcerated. Appellant was released from prison in March 2007, but appellant went back to drinking and using drugs and moved in with his father. The last time appellant saw his child, appellant had been drinking and demanded the child's mother give him her car keys. When she refused, he started breaking glass in the house, then grabbed her and pushed her up against the wall of the house, cutting her foot on the broken glass in the process. Appellant grabbed the child and stated that she could not leave unless she gave him the car keys. Appellant started to choke her. Her seven-year-old daughter tried to run outside to summon help, but appellant grabbed the child by the waist and brought her back inside. After ten or

fifteen minutes, appellant let the family leave. Appellant left before the police arrived at the home. Appellant's conviction for evading arrest arose out of this incident.

These were not the only incidents of domestic violence. Either the child's mother or her family members contacted law enforcement to file assault charges against appellant twenty-seven times. She filed a non-prosecution affidavit "probably" twenty times.

The child's mother filed for divorce in August 2007. A possession order granted appellant supervised visitation, but appellant never exercised that visitation while he was free. During their marriage, appellant never paid any child support for his children by his first wife. The decree ordered appellant to pay $457 monthly for child support for C.A.C., Jr. When appellant was out of prison, he "didn't pay a penny" of child support.

Appellant testified that he earns no money in prison and personally has no ability to pay child support. He did, however, attempt to make arrangements to pay $50 per month through the Attorney General's Office. Appellant testified that he had the ability to pay monthly child support payments of $50, that he had that ability on April 24, 2010, when he filed an affidavit with the Attorney General's Office, and that he "could have been doing it all along." According to appellant, he had the ability to make such a payment for the previous thirty months. He would have gotten the money from his family. Appellant explained that he sent no support to the child's mother because it would have been "more like a gift[.]"

The child has been living with his mother and her new husband, whom the child calls "Daddy" and believes to be his father. There are three half-siblings living in the home. Appellant claimed he sent the child several letters from prison. Appellant has taken parenting classes while he has been imprisoned. Appellant testified that the child's mother is an excellent mother.

Appellant testified he took six hundred hours of an electrical class while he was in prison and that he would eventually go to work as a journeyman electrician. Appellant's first ex-wife testified that appellant is "an excellent father" who maintains a relationship with their two children.

Appellant was convicted and sentenced to serve ten years in prison for evading arrest in an incident of domestic violence. The child's mother claimed appellant had a long history of assaultive behavior against her and her children. She claimed appellant never provided any financial support for the child. She also claimed that appellant never attempted to see the child after the couple divorced. Her testimony showed that the relationship between appellant and the child was not a proper one because the appellant engaged in domestic violence with the child's mother and the appellant failed to provide any financial support for the child. From this evidence, the trial court could reasonably have formed a firm belief or conviction that the termination of appellant's parental rights was in the child's best interest. *See In re J.L.*, 163 S.W.3d 79, 88 (Tex. 2005).

Evidence that does not support the finding includes appellant's testimony that he has been learning a trade that would enable him to earn a living and that he has been taking life resource classes that would help him improve his parenting skills. He has also maintained a relationship with his other children. Appellant suggested that the child's mother gave an exaggerated account of the April 2007 domestic assault, and he stated that the child was already crying and he just grabbed the child by the arm during the argument; however, the record provides no other insight into appellant's actual functioning as a parent. The finder of fact could reasonably determine that appellant had failed to provide for the emotional or financial needs of his child. On the entire record, the factfinder could reasonably form a firm conviction or belief that termination of the appellant's parental rights would be in the child's best interest. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). Because legally and factually sufficient evidence supports at least one ground for termination and the best interest finding, the trial court did not abuse its discretion when it terminated C.A.C., Sr.'s parental rights to C.A.C., Jr. We overrule appellant's five issues and affirm the judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on April 26, 2011
Opinion Delivered May 5, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.