In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00153-CV

IN THE INTEREST OF K.G.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. C-227,211

MEMORANDUM OPINION

This is a parental rights termination case. Following a bench trial in the suit affecting the parent-child relationship (SAPCR), the trial court terminated the parent-child relationship between K.G.[1] and her father. By clear and convincing evidence, the trial court found that four separate statutory grounds existed that justified terminating Father's relationship with K.G., and it found that terminating

[1] We identify the minor by her initials to protect her identity. *See* Tex. R. App. P. 9.8.

his parental rights is in K.G.'s best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), (Q), (b)(2) (West Supp. 2016). In six issues, Father challenges the order terminating his parental rights. Issues one through four challenge the legal and factual sufficiency of the evidence supporting the order terminating Father's rights. In issue five, Father challenges the legal and factual sufficiency of the trial court's best-interest finding. In issue six, Father complains the trial court's appointment of an attorney to represent him in the SAPCR was untimely. *Id.* § 107.013 (West Supp. 2016). We overrule each of Father's issues, and we affirm the trial court's judgment.

Standard of Review

Father's first five issues challenge the legal and factual sufficiency of the evidence supporting the trial court's decision terminating Father's parental rights. With respect to a legal sufficiency challenge to findings that a trial court relies upon to terminate a parent's rights to a child, we review the evidence admitted during the trial of such cases "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). As to factual sufficiency issues raised in appeals from such cases, we give "due consideration to evidence that the factfinder could reasonably have found to be clear and convincing" in reviewing

the trial court's conclusions. *Id.* Nonetheless, we note that the factual sufficiency standard requires that we be highly deferential to the responsibility the trial court has to weigh the evidence and to determine the testimony that it chose to believe. *Id*. In reviewing the appellant's factual sufficiency claims, we review the evidence from the trial to decide "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *Id*.

Father's Imprisonment and Inability to Support

In issue four in Father's case, Father challenges the trial court's finding that Father "knowingly engaged in criminal conduct that has resulted in [Father's] conviction of an offense and confinement or imprisonment and inability to care for [K.G.] for not less than two years from the date" the Department filed the petition to terminate Father's parental rights. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(Q). For convenience, we address issue four before addressing Father's other issues. *See* Tex. R. App. P. 47.1 (requiring the appellate court to issue a written opinion that is as brief as practicable but that addresses all issues necessary to a final disposition of the case being appealed).

In his brief, Father argues that the trial court could not rely on section 161.001(b)(1)(Q) to terminate his parental rights because the Department's petition had not been on file for at least two years when the trial court decided to terminate

his parental rights. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(Q). Additionally, Father argues that because there is a possibility that he might be paroled before the two-year anniversary of the date the Department filed suit, the evidence before the trial court is insufficient to establish that his parental rights could be properly terminated based on the provision in section 161.001(b)(1)(Q) of the Family Code. *Id*.

It is undisputed that when the SAPCR was tried and when the trial court rendered judgment, Father had not been incarcerated for a period of two years. However, the Texas Supreme Court has decided that section 161.001(b)(1)(Q) may be applied prospectively, so that "if the parent is convicted and sentenced to serve at least two years and will be unable to provide for his or her child during that time, the State may use subsection Q to ensure that the child will not be neglected." *In re A.V.*, 113 S.W.3d 355, 360 (Tex. 2003). In other words, because the language in subsection Q applies prospectively, the factfinder may consider the period between the date the Department filed suit and the date the defendant is or will be released from prison. *Id*.; *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).[2]

[2] In 2015, the Legislature added subsection (a) to § 161.001. As a result of the addition, the grounds in which a court may terminate the parent-child relationship designated as (1)(A) – (1)(T), were re-designated as subsection (b)(1)(A) – (b)(1)(T). Act of March 26, 2015, 84th Leg., R.S., ch. 1, § 1.078, sec. 161.001, 2015 Tex. Sess. Law Serv. 1, 18-20 (West).

The Department of Family and Protective Services filed the SAPCR to terminate Father's parental rights on July 14, 2016. The trial that resulted in the termination of Father's rights occurred on May 2, 2017, and the trial court rendered a final judgment that terminated Father's parental rights to K.G. on May 3, 2017. The evidence in the trial shows that Father was arrested in December 2015. At that time, K.G.'s mother[3] was pregnant with K.G. Following Father's arrest, he was charged with committing five felony offenses. *See* Tex. Penal Code Ann. § 22.02(a)(2) (West 2011) (aggravated assault), § 31.03 (West Supp. 2016) (theft).

When K.G. was born in July 2016, Father was in jail and awaiting trial on indictments charging him with aggravated assault and four thefts. A medical test on K.G., obtained shortly after she was born, indicates that K.G. had been exposed to amphetamines. Because K.G. had drugs in her system at birth, the Department of Family and Protective Services filed an emergency petition seeking custody of K.G., and the trial court placed K.G. in the Department's custody. In August 2016, Father pled guilty to five felony indictments discussed above charging him with aggravated assault and theft. The judgments of conviction were admitted during the trial of the SAPCR, and the judgments reflect that Father received a four-year sentence for

[3] K.G.'s mother's parental rights to K.G. were terminated in a separate proceeding, which did not involve Father's parental rights.

committing aggravated assault with a deadly weapon, and he received two-year sentences on each of the indictments charging him with theft. *See* Tex. Penal Code Ann. §§ 12.33, 22.02(b) (West 2011), § 31.03(e)(4)(A). In Father's criminal cases, the trial court ordered that Father serve all five sentences concurrently. If Father is required to serve the entire sentence assessed in his aggravated assault case, he will be released from prison in April 2020.

The evidence admitted in the SAPCR supports the trial court's conclusion that Father has not and will probably be unable to provide any support for K.G. for the two-year period that began when the Department filed its suit. When the SAPCR was tried, K.G. was in the care of one of her relatives. During the trial, the Department indicated that its goal for K.G. was to have the relative who was taking care of K.G. adopt her.

Father testified during the trial, and his testimony shows that he had not taken care of K.G. at any time after she was born. Father agreed during the trial that he had never seen K.G., that he had not provided for her, and that he was unable to arrange for anyone to care for K.G. due to his incarceration. His testimony reflects that he thought he would become eligible for parole in April 2018, but he agreed that he did not know whether he would be paroled at that time. Father indicated that if he were not released on parole, his scheduled release date is in April 2020. Father also agreed

that he has two other children, and that he has not been able to provide for them because he has been incarcerated.

In our opinion, based on the evidence admitted in the trial, the trial court could reasonably form a firm belief or conviction that Father had been and would continue to be incarcerated beyond the two-year anniversary of the date the Department filed the SAPCR. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(Q). Father argues that his testimony regarding the possibility that he would be paroled before the two-year anniversary of the date the Department filed suit prevented the trial court from applying subsection Q. While the trial court was required to consider Father's testimony about the possibility he would be paroled, as the factfinder at the hearing, the trial court was not required to believe that Father would actually be placed on parole. The record shows that Father had an extensive history of criminal behavior that resulted in the five sentences he was serving when the case was tried. During his testimony, Father recognized that the date he might be paroled is uncertain.

In this case, the evidence allowed the trial court to form a firm belief or conviction that Father would remain incarcerated beyond July 14, 2018, the two-year anniversary of the date the Department filed the SAPCR. The evidence also allowed the trial court to conclude that Father had not supported K.G. or made arrangements to have someone care for her while he completes the terms of the

sentences in his criminal cases. *See In re H.B.C.*, 482 S.W.3d 696, 702 (Tex. App.—Texarkana 2016, no pet.) (indicating that where there is evidence that a parent is incarcerated, the parent must produce evidence showing that the parent has made arrangements to satisfy the parent's duty to care for the child).

In reviewing Father's legal and factual sufficiency arguments, we are required to determine whether the testimony before the trial court allowed it to form a firm belief or conviction that Father demonstrated an inability to care for K.G. during the two-year period that commenced from the date the Department filed suit on July 14, 2016. *See In re H.R.M.*, 209 S.W.3d at 108. Because the trial court had the right to apply subsection Q prospectively, the evidence admitted in Father's trial allowed the trial court to form a firm belief or conviction that Father knowingly engaged in criminal conduct that resulted in his conviction, incarceration, and inability to care for K.G. for a two-year period that commenced on July 14, 2016. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(Q). Father's fourth issue is overruled.

Best Interest

In issue five, Father argues that the evidence is legally and factually insufficient to support the trial court's best-interest finding. Tex. Fam. Code Ann. § 161.001(b)(2). According to Father, the trial court's conclusion that terminating his parental rights to K.G. was in her best interest is based on evidence that failed to

sufficiently develop whether terminating his parental rights is actually in K.G.'s best interest.

In reviewing a best-interest finding, we note that a strong presumption exists that a child's interests are best served by keeping the child with its parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *see* Tex. Fam. Code Ann. § 153.131 (West 2014). However, there are additional presumptions that can conflict with the parental presumption, such as the presumption that a permanent and prompt placement is in the child's best interest because such a placement will foster the child being reared in a safe and stable environment. *See* Tex. Fam. Code Ann. § 263.307(a) (West Supp. 2016). In reviewing a trial court's best-interest finding, courts generally consider the nine non-exhaustive factors that were identified by the Texas Supreme Court in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).[4]

[4] In *Holley*, the Texas Supreme Court applied the following factors in reviewing a best-interest finding:

- the child's desires;
- the child's emotional and physical needs, now and in the future;
- the emotional and physical danger to the child, now and in the future;
- the parenting abilities of the parties seeking custody;
- the programs available to assist the parties seeking custody;
- the plans for the child by the parties seeking custody;
- the stability of the home or the proposed placement;
- the parent's acts or omissions which may indicate that the existing parent-child relationship is improper;
- any excuse for the parent's acts or omissions.

When the SAPCR at issue was tried, K.G. was nine months old. The evidence shows that at that time Father was in prison and serving a four-year sentence scheduled to end in April 2020. The evidence shows that Father had a lengthy criminal history dating to 2000, and that he had been convicted of a total of nine felonies and four misdemeanors. Father did not have any relationship with K.G., having never met her, he had never provided for her support, and had been unable to arrange for anyone to care for her while he was imprisoned. Father admitted during the trial that whenever he obtains his release from prison, he has no employment prospects. Instead, he plans to live in a halfway house upon his release. From this evidence, the trial court could have concluded that the Department's plans for K.G., her adoption by a relative, would better serve K.G.'s short and long-term interests.

The caseworker assigned to K.G.'s case addressed K.G.'s physical and emotional needs. According to the caseworker, K.G. is being cared for by one of her relatives, and that although K.G. had initially shown signs of withdrawal, she is now doing well. The evidence before the trial court shows that K.G. is being taken care of by someone who is stably employed, has a good support system, and has had no negative history with the Department.

Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).

On the other hand, the evidence shows that Father has a significant pattern of criminal behavior. From the testimony, the trial court could reasonably form a firm belief or conviction that Father had no bond with K.G., had never provided for K.G.'s needs, and had no definite plans to care for her when he is released from prison. In determining whether terminating Father's rights would be in K.G.'s best interest, the trial court was reasonably entitled to consider Father's long history of criminal conduct, his proven inability to provide for K.G., and his failure to develop any relationship with K.G. *See In re C.F.H.*, No. 14-07-00720-CV, 2009 WL 196041, at **5-6 (Tex. App.—Houston [14th Dist.] Jan. 29, 2009, no pet.) (mem. op.); *Hampton v. Tex. Dep't of Protective & Regulatory Servs.,* 138 S.W.3d 564, 567-68 (Tex. App.—El Paso 2004, no pet.).

After carefully reviewing the evidence in the light that most favors the trial court's best-interest finding, and after considering the non-exhaustive *Holley* factors, we conclude that the trial court's best-interest finding is supported by legally and factually sufficient evidence. *See J.F.C.,* 96 S.W.3d at 266. We overrule Father's fifth issue.

Timeliness of Appointment of Counsel

In issue six, Father argues that the trial court failed to timely appoint an attorney to defend him against the suit the Department filed seeking to terminate his

rights to K.G. When the Department files a suit seeking to terminate the parental rights of a parent who is indigent and who responds to the Department's petition, the Family Code provides that the court shall appoint an attorney to represent the interests of the indigent parent. Tex. Fam. Code Ann § 107.013(a)(1).

In this case, the clerk's record shows that the trial court appointed an attorney to represent Father in the SAPCR on January 17, 2017. The reporter's record shows that the trial of the case did not occur until May 2017. Importantly, the clerk's record does not show that Father, prior to the trial, complained at any stage of the proceeding about the timeliness of the trial court's decision appointing counsel. To the extent Father complains that due process required the trial court to act sooner, the failure to raise the issue in the trial court prevents appellate review of his complaint. *See* Tex. R. App. P. 33.1(a); *In re K.P.*, No. 09-13-00404-CV, 2014 WL 4105067, at *13 n.3 (Tex. App.—Beaumont Aug. 21, 2014, no pet.) (mem. op.).

Moreover, even had Father preserved his right to our review of his complaint about the timeliness of the trial court's decision appointing counsel, the statute governing the trial court's duty does not contain a "time frame or procedure by which trial courts must appoint counsel." *See* Tex. Fam. Code Ann. § 107.013; *see also In re M.J.M.L.*, 31 S.W.3d 347, 354 (Tex. App.—San Antonio 2000, pet. denied). "[T]he timing of appointment of counsel to indigent parents appearing in opposition

to termination is a matter within the trial court's discretion." *In re M.J.M.L.*, 31 S.W.3d at 354. In Father's case, the record does not show that Father requested the appointment of counsel prior to making his request for counsel known to the trial court in January 2017. Father's request for counsel regarding his claim of indigence was not sworn. Nevertheless, on January 17, 2017, the trial court appointed an attorney to represent Father in the case. The attorney who represented Father in the proceedings in the trial court never sought a continuance or complained that Father had not been given adequate time to prepare for the May 2017 trial.

We conclude the record does not support Father's complaint that the trial court unduly delayed its decision to appoint counsel. We further conclude that the timing of the appointment was not shown to have led to the rendition of an improper judgment. Tex. R. App. P. 44.1(a)(1). We overrule Father's sixth issue.

Conclusion

We hold that legally and factually sufficient evidence supports the trial court's decision to terminate Father's parental rights, and we hold that legally and factually sufficient evidence supports the trial court's determination that terminating Father's parental rights is in K.G.'s best interest. We further hold that Father failed to properly preserve his complaint that the trial court did not act promptly in appointing counsel to represent him in the case. Having overruled the issues raised in Father's brief that

are necessary to decide the appeal,[5] we affirm the trial court's judgment. Tex. R. App. P. 47.1.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on August 1, 2017
Opinion Delivered October 5, 2017

Before Kreger, Horton and Johnson, JJ.

[5] Because reviewing issues one through three would not change the outcome of the appeal, we need not address them. Tex. R. App. P. 47.1.