COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00208-CV

IN THE INTEREST OF A.M. AND
J.M.-D., CHILDREN

FROM THE 355TH DISTRICT COURT OF HOOD COUNTY
TRIAL COURT NO. D2015125

MEMORANDUM OPINION[1]

I. INTRODUCTION

This appeal involves the termination of the parental rights of "Father" to the child "John."[2] After a bench trial, the trial court found that Father had knowingly engaged in criminal conduct that resulted in Father's incarceration and in Father's inability to care for John, and the trial court also found that termination of

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[1] *See* Tex. R. App. P. 47.4.

[2] To protect the minor children involved in this case, this court is using pseudonyms for the parties and children involved. *See* Tex. R. App. P. 9.8(b)(2).

Father's parental rights to John was in John's best interest.[3] In one issue, Father argues that the evidence is insufficient to support the trial court's finding that termination of his parental rights was in John's best interest. We will affirm.

II. Background

Father, thirty-three years old at the time of trial, and Mother, twenty-two years old at the time of trial, are the biological parents of John, who was four years old at the time of trial. Mother is also the biological mother of Arthur, John's half-brother, who was seven at the time of trial. Father also has an eight-year-old child from another relationship. Mother voluntarily relinquished her parental rights to both John and Arthur at trial. And the trial court ordered the termination of Arthur's biological father's parental rights at trial—evidence showed that Arthur's father was incarcerated at the time of trial and had been for more than two years prior. This appeal only involves Father's parental rights to John.

According to the affidavit in support of John's removal from Mother, which was admitted at trial, Father has a nineteen-year history of criminal activity, including burglary of a habitation, terroristic threat, several counts of theft, criminal mischief, burglary of a vehicle, criminal trespass, resisting arrest or transport, and failing to stop and render aid. Father has been incarcerated multiple times. According to his own testimony, Father is currently incarcerated

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[3] *See* Tex. Fam. Code Ann. §§ 161.001(b)(1)(Q), (2) (West Supp. 2016).

until the year 2028 for assaulting Mother. The record indicates that he assaulted her by impeding her breath or circulation. The record also indicates that Mother was pregnant with John at the time of this assault.

At trial, Samantha Perez, the Department's caseworker assigned to John and Arthur's case, testified that John and Arthur were currently living together in a foster home. Perez said that the two boys were doing "very well" in foster care. According to Perez, both boys were bonded with their foster parents, and the foster parents had expressed their intentions to adopt both boys. Perez also said that the foster parents were very familiar with the two boys because these same foster parents had cared for the two boys during a previous removal from Mother's care. Perez said that she believed that termination of both fathers' parental rights, Father and Arthur's father, was in both boys' best interests. Perez testified that it was in John's best interest that the Department remain permanent managing conservator.

Regarding why the boys were in foster care, Perez said that the boys had twice been placed with the Department, the second time due to the fact that Mother—a documented, chronic methamphetamine user who has been in jail multiple times during the boys' lives—had moved in with the boys' temporary-placement home, their maternal grandmother.

Specifically regarding Father, Perez said that despite Father having been given his service plan and having had the service plan explained, including what was expected of Father, the Department had never received any certificates of

completion for any of his court-ordered services. Perez also averred that Father had failed to stay in contact with the Department regarding John. By Perez's account, Father had never seen John and had never demonstrated an ability to provide a safe environment for him. Perez said that Father had abandoned Mother and that Father had never provided any financial or medical support for Mother or John since Mother's pregnancy with John.

Lisa Bradley, a court-appointed advocate for both John and Arthur, averred that the boys' foster mother had indicated a desire to adopt the boys and that placement of the boys in their current foster home was a proper placement. Bradley said that she believed that it was in both John's and Arthur's best interests that the Department remain their permanent managing conservator.

Father testified that he learned of his paternity to John via a letter while he was incarcerated for his assault on Mother. Father averred that he had been incarcerated John's entire life and had never met John. Father also said that he had never provided child support for John nor had he taken steps to provide care for John, but he averred that he was unable to do to these things because of his incarceration. Father said that he had completed "[s]ome of the things" on his court-ordered service plan regarding John but that he was incapable of completing "other things" due to his incarceration. Specifically, Father said that he had completed "[a]nger management [and] drug counseling." Father stated that he was aware that all the services in his plan were court-ordered. Father said that he was currently eligible for parole, even though his sentence was to

run until 2028, but that he did not have any documentation regarding his parole-eligibility. Father said that he wanted to be in John's life and that when he was released from prison, he intended to live with his own mother until he got on his feet. Father said that his mother was a willing placement for John, but Father agreed that he had not informed the Department of this possible placement until the eve of trial. Father indicated that he had an older son by a woman other than Mother.

The record indicates that Father had written the department and included his signed caregiver resource form after receiving his service plan. In this correspondence, Father wrote that his service plan was "very good." He also stated in the plan that the Department should place John with "my other Baby Mamma." Other than these notations on his service plan, the Department's file, which is part of the record, does not contain any evidence that he completed any of his services.

III. Discussion

In his sole issue, Father argues that that the evidence is legally and factually insufficient to support the trial court's best-interest findings. We disagree.

A. Burden of Proof and Standards of Review

For a trial court to terminate a parent-child relationship, the Department must establish by clear and convincing evidence that the parent's actions satisfy one ground listed in family code section 161.001(b)(1) and that termination is in

the best interest of the child. Tex. Fam. Code Ann. § 161.001(b); *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012); *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). Both elements must be established; termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re C.D.E.*, 391 S.W.3d 287, 295 (Tex. App.—Fort Worth 2012, no pet.).

In evaluating the evidence for legal sufficiency in parental termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the challenged ground for termination was proven. *See In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). We review all the evidence in the light most favorable to the finding and judgment. *Id.* We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved. *Id.* We consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.* "A lack of evidence does not constitute clear and convincing evidence." *E.N.C.*, 384 S.W.3d at 808.

In evaluating the evidence for factual sufficiency in parental termination cases, we are required to perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support the termination of a parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In

reviewing the evidence for factual sufficiency, we give due deference to the factfinder's findings and do not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the termination of the parent-child relationship would be in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b)(2); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). 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 in the truth of its finding, then the evidence is factually insufficient. *H.R.M.*, 209 S.W.3d at 108.

B. Factors for Determining Best Interest

There is a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). We review the entire record to determine the child's best interest. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). The same evidence may be probative of both the subsection (1) ground and best interest. *Id.* at 249; *C.H.*, 89 S.W.3d at 28.

Nonexclusive factors that the trier of fact in a termination case may also use in determining the best interest of the child include the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the

programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (citations omitted); *see E.C.R.*, 402 S.W.3d at 249 (stating that in reviewing a best-interest finding, "we consider, among other evidence, the *Holley* factors"); *E.N.C.*, 384 S.W.3d at 807. These factors are not exhaustive, and some listed factors may be inapplicable to some cases. *C.H.*, 89 S.W.3d at 27. Furthermore, undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest of the child. *Id.* On the other hand, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

C. *Holley* Factors Weigh in Favor of Termination

With regard to John's desires, due to his age, he did not possess sufficient maturity to express an opinion regarding a parental preference. *See In re M.H.*, 319 S.W.3d 137, 150 & n.9 (Tex. App.—Waco 2010, no pet.). The trial court was entitled to find that this factor weighed neither in favor of nor against termination of Father's parental rights to John.

As for the emotional and physical needs of John now and in the future, his basic needs include food, shelter, and clothing; routine medical and dental care;

a safe, stimulating, and nurturing home environment; and friendships and recreational activities appropriate to his age. *In re L.S.*, No. 02-16-00197-CV, 2016 WL 4699199, at *6 (Tex. App.—Fort Worth Sept. 8, 2016, no pet.) (mem. op.). The record indicates that Father has never provided any of these needs for John. Indeed, Father has never met John, and the evidence is that Father testified that he had never provided any financial or medical support for John or Mother, despite knowing he was John's father. Moreover, the record indicates that it could possibly be more than ten years before Father is even capable of earning money. Even then, by Father's own testimony, there is no indication that he will be able to provide for himself upon his release from incarceration. And the record is devoid of any evidence of Father's proposed placement, John's paternal grandmother, and her ability to provide for John's needs. In contrast, the Department presented evidence that John was in a foster home that had cared for him and Arthur during both of the boys' removals and that the foster parents had expressed a desire to adopt both boys. Testimony revealed that their placement there was going "very well." The trial court was entitled to find that this factor weighed in favor that termination of Father's parental rights to John was in John's best interest.

As for Father's parenting abilities and programs available to assist him, Father's repeated incarcerations suggest that "his parenting skills are seriously suspect." *In re A.W.*, No. 06-07-00118-CV, 2008 WL 360825, at *3 (Tex. App.—Texarkana Feb. 12, 2008, no pet.) (mem. op.). And there is evidence that Father

did not take the initiative to avail himself of programs offered to him by the Department despite testimony that what was expected of him to complete his services had been explained to him. *In re W.E.C.*, 110 S.W.3d 231, 245 (Tex. App.—Fort Worth 2003, no pet.). The trial court was entitled to find that this factor weighed in favor that termination of Father's parental rights to John was in John's best interest.

With regard to the plans for John and the stability of the proposed placement, Father only offered on the eve of trial that John's paternal grandmother had said that John could be placed with her. Father's only other proposed placement for John was Father's proclaimed "other Baby Mamma" found written on his service plan. In contrast, the Department offered evidence that it had currently placed John along with his brother Arthur in a foster home where the two boys were doing "very well" and that the foster parents intended to adopt both boys. Given that the trial court was free to contrast Father's plans against those of the Department and that the trial court was free to determine the truth or accuracy of Father's testimony regarding his plans for John, the trial court was entitled to find that this factor weighed in favor that termination of Father's parental rights to John was in John's best interest. *See D.O. v. Tex. Dep't of Human Servs.*, 851 S.W.2d 351, 356, 358 (Tex. App.—Austin 1993, no writ) ("That leads us to review the evidence concerning the parenting abilities of [the parent and the parent's] plans for the child contrasted with those of [the Department]."); *see also D.F. v. State*, 525 S.W.2d 933, 939–40 (Tex. Civ.

App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) ("The trial court was not required to accept the truth or accuracy of appellant's testimony, either as to her past actions or her future intentions.").

With regard to Father's acts or omissions which may indicate that the existing parent-child relationship is not a proper one, Father has a lengthy criminal history and has been incarcerated for a variety of crimes, including assaulting Mother by impeding her breathing or circulation while she was pregnant with John. As a result of his incarceration, Father has never seen John, does not have a bond with John, and has never provided for any of John's basic needs. While Father's criminal record and repeated incarcerations alone are not sufficient to show that termination of Father's parental rights is in John's best interest, this evidence could have appropriately been considered by the trial court as constituting a course of conduct by Father demonstrating that termination of parental rights was in John's best interest. *Hampton v. Tex. Dep't of Protective & Regulatory Servs.*, 138 S.W.3d 564, 567–68 (Tex. App.—El Paso 2004, no pet.) (reasoning that appellant's incarceration could properly be considered by factfinder in determining best-interest finding). The trial court was entitled to find that this factor weighed in favor that termination of Father's parental rights to John was in John's best interest. *Id.* at 569.

Viewing all the evidence in the light most favorable to the best-interest finding and considering the nonexclusive *Holley* factors, we hold that the trial court could have reasonably formed a firm conviction or belief that termination of

the parent-child relationship between Father and John was in John's best interest, and we therefore hold the evidence legally sufficient to support the trial court's best-interest finding. *See* Tex. Fam. Code Ann. § 161.001(b)(2); *Jordan v. Dossey*, 325 S.W.3d 700, 732-33 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (holding evidence legally sufficient to support best-interest finding when most of the best-interest factors weighed in favor of termination).

Similarly, reviewing all of the evidence with appropriate deference to the factfinder, we hold that the trial court had sufficient evidence before it relevant to the *Holley* factors from which it could have reasonably formed a firm conviction or belief that termination of the parent-child relationship between Father and John was in John's best interest, and we therefore hold that the evidence is factually sufficient to support the trial court's best-interest finding. *See* Tex. Fam. Code Ann. § 161.001(b)(2); *Jordan*, 325 S.W.3d at 732–33 (holding evidence factually sufficient to support best-interest finding when most of the best-interest factors weighed in favor of termination). We overrule Father's sole issue.

IV. Conclusion

Having overruled Father's sole issue on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: December 2, 2016