In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00201-CV

IN THE INTEREST OF A.G.D., A CHILD

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2014-509,879, Honorable Ruben Gonzales Reyes, Presiding

January 22, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

A.M. appeals, *pro se*, from a final order terminating his parental rights to A.G.D.M.[1] The proceeding was initiated by his ex-wife (S.J.), the child's mother. Termination was sought under § 161.001(b)(1)(Q) of the Texas Family Code. Said provision permits termination if the parent "knowingly engaged in criminal conduct that 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." TEX. FAM. CODE ANN. § 161.001(b)(1)(Q)(i) & (ii) (West Supp. 2015). At the

[1] The petition seeking termination identified the child as A.G.D.M. A change of the child's name to A.G.D.J. was sought as well. In granting both the termination and name change, the trial court omitted a last name for the child and designated her A.G.D. For purposes of this opinion, though, we will refer to the child as A.G.D.M.

time S.J. sued, A.M. had been convicted and imprisoned for possessing child pornography. Trial of the matter was to the trial court, and it entered the foregoing order of termination. Numerous issues were raised to secure reversal of the decree. Some involve the alleged denial of constitutional rights. We address only those needed for the disposition of this appeal, and for the reasons to be discussed, we reverse the trial court's order.

Issue One – Standing

A.M. initially argues that "[t]he Trial Court lacked Subject-matter Jurisdiction due to lack of Plaintiff Standing." We overrule the issue.

He is correct that courts lack subject-matter jurisdiction to adjudicate disputes initiated by parties who lack standing. *Vernco Construction, Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015). Furthermore, inquiries into standing focus on the issue of who may bring the action. *Id.* Here, statute specifies the category of people who are capable of initiating suits to affect the parent/child relationship. That category includes "a parent of the child." TEX. FAM. CODE ANN. § 102.003(a)(1). As previously mentioned, the mother of A.G.D.M. brought the suit at bar. Being the child's mother, she was a parent under § 102.003(a)(1) and, thus, had standing to sue. Consequently, the trial court was not deprived of subject-matter jurisdiction due to the lack of "Plaintiff Standing."

Issue Two – Sufficiency of the Evidence

As with many *pro se* briefs, that filed by A.M. often rambles and intermixes different thoughts and concepts. For instance, in arguing that he was denied due process and that § 161.001(b)(1)(Q) is unconstitutionally vague, he also contends that

1) termination of his parental rights "does not benefit the child"; 2) no "substantial good" was to be gained by the child through termination; 3) S.J. "did not come close to meeting her threshold of proof, contrary to the trial court's assertions"; 4) "[t]he finding by the trial court that [A.M.] . . . is incarcerated and is incapable of providing support to [the child] is wholly unsupported by the record"; 5) "the evidence used to terminate [his] . . . [p]arental rights clearly does not meet the threshold of 'clear and convincing'"; and 6) "the presumtion [sic] in Texas is that it is in the best interest of the child [is] for the parents to cooperate in their conservatorship of the child and be able to coparent [sic] together."

Despite the rambling nature of his brief, we, nonetheless, have an obligation to liberally read its contentions, since A.M. acts *pro se*. *See In re Marriage of Jordan*, 264 S.W.3d 850, 852 n.1 (Tex. App.—Waco 2008, no pet.) (stating that "[b]ecause Marguerite is representing herself, we have strived to construe her appellate pleadings with patience and liberality"). And, in so reading the averments quoted above, we interpret them as effort to challenge the legal and factual sufficiency of the evidence underlying the trial court's decision to terminate his parental rights. With that, we now turn to the applicable standard of review.

As recently reiterated by our Texas Supreme Court, "[b]ecause the natural right between a parent and his child is one of constitutional dimensions . . . termination proceedings must be strictly scrutinized." *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014). Furthermore, "due process requires application of the clear and convincing standard of proof." *Id.* That is, the evidence must "'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.'" *Id.*, *quoting*, TEX. FAM. CODE ANN. § 101.007 (West 2014). While our traditional legal sufficiency or no evidence standard of review "upholds a finding supported by '[a]nything more than a scintilla of evidence,'" [citation omitted], that quantum of evidence "'does not equate to clear and convincing evidence.'" *Id.*, *quoting, In re J.F.C.*, 96 S.W.3d 256, 265 (Tex. 2002). So, the analysis in termination cases "must take into consideration whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the [plaintiff] bears the burden of proof." *Id.* Additionally, in conducting that analysis, we 1) "credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so," 2) consider "undisputed facts that do not support the verdict to determine whether there is clear and convincing evidence," 3) remember that more than a scintilla of evidence ". . . will not suffice unless [it] is capable of producing a firm belief or conviction that the allegation is true," and 4) conclude that the evidence is legally insufficient if "no reasonable factfinder could form a firm belief or conviction that the matter to be proven is true." *Id.*[2]

Next, one cannot deny that termination is warranted only when the party seeking it provides the requisite evidence proving not only a statutory ground specified in § 161.001(b) of the Family Code but also that severing the relationship favors the child's best interests. *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005); *In re C.M.T.*, No. 07-14-00300-CV, 2014 Tex. App. LEXIS 13367, at *2 (Tex. App.—Amarillo 2014, no pet.)(mem. op.). As previously mentioned, S.J. utilized § 161.001(b)(1)(Q) of the Family

[2] Because the factfinder's factual decisions remain entitled to deference, a reviewing court that deems them unsupported by legally sufficient evidence must detail the evidence relevant to the issue and clearly explain why it is insufficient. *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014).

Code to secure termination. However, that was not the only statutory ground upon which the trial court based its decision. It also concluded that the parties had tried by consent the statutory ground found at § 161.001(b)(1)(L)(xiii). That ground too warranted termination, in the trial court's view. We consider the latter ground first.

§ 161.001(b)(1)(L)(xiii)

Via its written findings, the trial court found ". . . that the conduct of [A.M.] caused serious injury to a child and that conduct would constitute a violation of Section 43.26 of the Texas Penal Code, possession or promotion of child pornography." Per § 161.001(b)(1)(L)(xiii) of the Texas Family Code, the rights of a parent may be terminated if the parent has "been convicted or has been placed on community supervision . . . for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections . . . Section 43.26 (possession or promotion of child pornography)." TEX. FAM. CODE ANN. § 161.001(b)(1)(L)(xiii).

For purposes of this appeal, we assume *arguendo* that the applicability of § 161.001(b)(1)(L)(xiii) was tried by consent.[3] In so assuming, we also note that satisfying its terms requires proof that "1) the parent has committed acts constituting a

[3] S.J. did not ask that the matter be deemed tried by consent. Apparently, the trial court raised it *sua sponte*.

violation of one of the crimes enumerated in § 161.001(1)(l)(i) through (xiii)[4], 2) the parent's guilt for committing the crime has been adjudicated . . . and 3) the parent, in committing the acts which underlie the crime, was responsible for a child's death or serious injury." *Vidaurri v. Ensey*, 58 S.W.3d 142, 145 (Tex. App.—Amarillo 2001, no pet.). Our focus now turns to evidence, if any, of the latter element.

The only conviction of record here involves A.M.'s possession of child pornography. Nothing of record indicates, insinuates, or suggests that in possessing such pornography he also was responsible for any child's death or serious injury. While his crime may be "heinous," as declared by the trial court, one cannot logically or reasonably infer from the fact of its commission alone that he also killed or injured a child in committing it. Consequently, no reasonable factfinder could have formed a firm belief or conviction that all elements of § 161.001(b)(1)(L)(xiii) were established based on the appellate record before us.

§161.001(b)(1)(Q)

Our having disposed of § 161.001(b)(1)(L)(xiii) as a basis for termination leaves us with § 161.001(b)(1)(Q). Again, it permits vitiation of the parent/child relationship if the parent "knowingly engaged in criminal conduct that 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." TEX. FAM. CODE ANN. § 161.001(b)(1)(Q)(i) & (ii).

Regarding the first element, that is, engagement in criminal conduct resulting in a conviction, the record illustrates that A.M. 1) pled guilty to possessing child pornography

[4] Section 161.001(1)(L)(i) through (xiii) of the Texas Family Code was the predecessor to §161.001(b)(1)(L).

in violation of federal statute and 2) was convicted of that violation in 2011. So too does the record illustrate that the conviction resulted in a prison sentence of ninety-seven months. A.M. began serving that sentence in a facility located in Big Spring, Texas but was transferred to La Tuna federal correctional facility in Anthony, Texas. That ninety-seven months exceeds two years cannot be denied. So, the record also contains undisputed evidence satisfying the two year component of § 161.001(b)(1)(Q). Yet, conviction coupled with imprisonment for more than two years alone does not satisfy the statute. The burden lay with S.J. to also prove that A.M. was unable to "care" for the child for those two years from the date she petitioned to end his parental rights.

A.M. makes much of the term "care." That is, he believes it to be impermissibly vague. Admittedly, it is not defined in § 161.001(b) of the Family Code. *In re S.R.*, No. 13-15-00114-CV, 2015 Tex. App. LEXIS 5863, at *5-6 (Tex. App.—Corpus Christi-Edinburg June 11, 2015, no pet.)(mem. op.). Nonetheless, courts have interpreted it to encompass both financial and emotional support. *Id.*; *C.B. v. D.S.*, No. 03-07-00718-CV, 2009 Tex. App. LEXIS 3791, at *7-8 (Tex. App.—Austin May 22, 2009, no pet.)(mem. op.); *In re C.F.H*, No. 14-07-00720-CV, 2009 Tex. App. LEXIS 503, at *10-11 (Tex. App.—Houston [14th Dist.] January 29, 2009, no pet.)(mem. op.); *Brazoria County Children's Protective Servs. v. Frederick*, 176 S.W.3d 277, 279 (Tex. App.—Houston [1st Dist.] 2004, no pet.)

Indeed, it would seem only logical that "care" has components other than mere financial support. For instance, under § 161.001(b)(1)(F) of the Family Code, the parent/child relationship may be ended if the parent "failed to support the child in accordance with the parent's ability . . ." for a particular period of time. TEX. FAM. CODE

ANN. § 161.001(b)(1)(F). The "support" contemplated there is financial. *See In re J.M.T.,* 39 S.W.3d 234, 238-39 (Tex. App.—Waco 1999, no pet.). Given the use of the word "support" under § 161.001(b)(1)(F), it is obvious that the legislature knew to say "support of the child" or "child support" when discussing simply the economic or financial support of a child. Yet, neither of those terms were used in § 161.001(b)(1)(Q). Instead, the legislature incorporated the word "care." So, because it used different terms in each provision, the words must mean something different. "Care" must mean something more than just financial support. *See In re State*, 325 S.W.3d 848, 854-55 (Tex. App.—Austin 2010, no pet.) (stating that when the legislature uses different words in a statute, the words must be afforded their own meaning).

Here, the record contains evidence that A.M. will be imprisoned until 2019 and has not provided financial support for his child since being imprisoned. Though, he earns approximately $18 per month while incarcerated, most, if not all of it, is spent on litigation costs incurred in defending against the suit at bar, deodorant and peanut butter. And though A.M. asked his parents to help support the child financially, they were unable to do so. To that we also add evidence of A.M.'s inability to communicate with his three year old child except through letters and the occasional phone call. Additionally, the trial court accorded him no visitation rights when it granted A.M. and S.J. a divorce after he was imprisoned and despite his being designated the possessory conservator of the child. This is more than some evidence of A.M.'s inability to provide the child with financial support for at least two years after S.J. petitioned to terminate his parental rights. On the other hand, the undisputed evidence also indicates effort by

A.M. to counsel the child via letter and send the youth gifts and cards. A.M. did not know if the letters and gifts were received by the youth, though.

Whether the foregoing is enough to rise to the level of "clear and convincing evidence" of an inability to care, is not something we need to decide at this juncture. This is so because several of the more prominent indicia indicating an inability to care come with excuse or explanation vitiating their weight. And, while our Supreme Court in *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976) held that such excuses may not be used to nullify the existence of a statutory ground for termination, they play a role in assessing whether the best interests of the child favor termination. *See Holley v. Adams*, 544 S.W.2d 367, 371 (Tex. 1976) (stating that "[t]he interpretation of Section 15.02 [involving the failure to pay child support] which will best fulfill the intent of the Legislature is that any 'excuse' for the acts or omissions of the parent can be considered by the trial court only as one of the factors in determining the best interest of the child."); *In the Interest of S.K.S.*, 648 S.W.2d 402, 405 (Tex. App.—San Antonio 1983, no writ) (recognizing *Holley* and its holding that an excuse for failing to pay child support can be considered only when addressing the best interests of the child). Thus, we turn to the matter of the child's best interests.

Holley is a seminal case for many reasons. Most importantly, it has been used to guide courts in conducting the "best interests" analysis required before termination may be ordered. Through it, the Supreme Court itemized a number of "non-exclusive" factors to be considered. They include 1) the child's desires, 2) the child's emotional and physical needs now and in the future, 3) any emotional and physical danger to the child now and in the future, 4) the parental abilities of those seeking custody, 5) the

programs available to assist the individuals seeking custody to promote the best interests of the child, 6) the plans for the child by the person seeking custody, 7) the stability of the home or proposed placement, 8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper, and 9) any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d at 371-72; *accord, In the Interest of E.N.C.*, 384 S.W.3d 796, 807-808 (Tex. 2012) (reiterating the applicability of *Holley* and the factors mentioned therein); *In the Interest of D.L.W.*, No. 07-15-00243-CV, 2015 Tex. App. LEXIS 12372, at *13-14 (Tex. App.—Amarillo December 4, 2015, no pet.) (mem. op.)(reiterating the same). It is not necessary that each factor favor termination. *In the Interest of N.L.D.*, 412 S.W.3d 810, 819 (Tex. App.—Texarkana 2013, no pet.) (stating that "[t]here is no requirement that the party seeking termination prove all nine factors"). Nonetheless, those that do must be sufficiently weighty to overcome the strong presumption that the best interest of the child will be served by preserving the parent-child relationship. *See In the Interest of D.L.W.*, 2015 Tex. App. LEXIS 12372, at *13 (stating that "[t]here is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship."); *In the Interest of C.C.* No. 07-15-00185-CV, 2015 Tex. App. LEXIS 10137, at *12-13 (Tex. App.—Amarillo September 29, 2015, no pet.) (mem. op.)(stating the same).

Regarding the factor of "excuse," we turn to the decree entered by the trial court in divorcing S.J. from A.M. Therein, the trial court "ordered that no party will owe child support to the other party" and that "[n]o party is under a child support obligation. . . ." Given this, A.M.'s failure to provide financial care to the child (one of the defaults upon which S.J. relied heavily) was excused. *See Holley v. Adams*, 544 S.W.2d at 372

(holding that because the mother was not ordered to pay child support when custody of the child was granted to the father, her failure to pay same was excused and not a factor indicating that the best interests of the child warranted termination of the parent/child relationship). Also, we uncovered no evidence that S.J. ever asked A.M. for financial help once he was imprisoned or that the financial care being received by the child from other sources was deficient. Indeed, S.J. informed the trial court that she wanted no child support from A.M. because "it makes it very easy for him to worm his way into her life and be a very negative influence on her." To fault A.M. for withholding financial support while declaring that she wanted no such support creates a rather hollow foundation upon which to base termination of parental rights. Indeed, a similarly inconsistent position was taken in *Holley*. One parent sued to terminate the parental rights of the other parent because the latter paid no child support, but no support was ever sought from the defaulting parent. The *Holley* court apparently recognized the inconsistency in the argument when it concluded that the conduct was both excused and not an indicia favoring termination. *Id.* The same is no less true here.

As for the matter of emotional, educational, and physical care afforded to the child by A.M., it may be minimal due to his incarceration. Yet, the trial court denied him visitation rights under the divorce decree. Why he was denied them went unexplained. S.J. acknowledged at trial that she had made no "accusation that [A.M.] was an unfit father or that [his] parental rights should be terminated" when addressing custody issues during the divorce. By that time, A.M. had already been convicted and imprisoned. Nor does the record contain evidence indicating that A.M. was denied

visitation because he posed some threat to the child or that permitting visitation would pose harm to the child.

Without visitation rights, A.M. was effectively denied means to compel continued interaction with his child. More importantly, S.J. utilized this circumstance as fodder justifying termination. For instance, she was asked at one point whether A.M. had any "dreams" for the child. She answered: "I have no idea." She was then asked if she was able to "cooperate with [A.M.] about care for this child" and answered "[t]here is no cooperation between us." When asked why, she explained that there was "no contact between us . . . ." Shortly thereafter, legal counsel for S.J. asked if the child "even ha[d] an idea which parent to prefer" and if the three year old child ". . . expressed any kind of preference?" S.J. responded by first saying "no" and then stating that "[s]he prefers me because I am what she knows." Admittedly, the foregoing is evidence that A.M. plays a little role in the life of his child. Yet, it is not because he had not tried. Prior to January 2013, (the month in which S.J. sued to terminate his parental rights), he sent his offspring letters twice a week, "age-appropriate books from a book fair," and other gifts. So too did he try to phone the child. Yet, S.J. decided to either block phone calls from A.M. to the child or change her phone number.[5] The new number was apparently withheld from A.M. because, according to S.J., ". . . the Court did not order that I had to be in contact with him about the care of my child."

That S.J. utilized the terms of the decree to hinder the development of a relationship between the child and A.M. is exemplified by other undisputed evidence uttered by S.J. It appears in her declaration to A.M. at trial that "[t]he court very clearly

[5] S.J. recited an instance where A.M. phoned and asked to speak to his child. She would not let him do so because the child was asleep. When asked for a time when he could call, she apparently refused because "[t]he court did not require [her] to allow [him] to have phone calls with [the child]."

laid out that . . . I did not have to take her to visit you. I do not have to write you letters with her information. I do not have to keep you apprised of her condition via phone." Yet, the divorce decree itself belies the accuracy of her statements. In it appears a directive imposing upon her "the duty to inform the other conservator [*i.e.*, A.M.] of the child in a timely manner of significant information concerning the health, education, and welfare of the child. . . ."[6] While there may be various reasons why such a directive appears in a custody order, one, no doubt, involves the public policy recognizing that the best interests of the child are served by maintaining the parent/child relationship. Requiring the exchange of such information about the child serves to foster that relationship. So, S.J. was simply wrong in believing that she had no obligation to communicate with A.M. about their child. Nevertheless, she proceeded to ignore that directive and thwart the few avenues A.M. had to remain in touch with and obtain information about his child. That serves as some excuse for A.M.'s failure to play a role in and develop a relationship with the child.

As for the testimony about A.M. being "dangerous" and that he "is bad for us," those were reasons given when asked by the *ad litem* why it would not be appropriate to leave A.M.'s parental rights "intact." The examples purportedly supporting her conclusion consisted of his writing "age inappropriate" letters, his stating that "he won't stop at anything to be in her life," and his statement, during the divorce, that "he would make [S.J.'s] life hell." As for the "age inappropriate" letters, S.J. deemed them so because they were "all about life and love and all this existential stuff that a three-year-old has no hope of understanding." In her view, A.M. should have been sending letters asking such things as whether the child had seen "a butterfly today," what the child was

[6] The decree did permit S.J. to withhold her Social Security and driver's license numbers.

"learning in school," or "[h]ow are your ABC's going?" A.M. conceded that he wrote his letters from the aspect of them being read later in life or when the child would encounter issues met by young adults, such as teenage suicide. Yet, no one suggested that they contained threats, obscenities, or the like. Nor did anyone testify that or attempt to explain how letters ". . . about life and love and . . . existential stuff" posed some detriment to or were inappropriate for a three year old. Instead, S.J. simply concluded that they were, and nothing of record indicated that she was trained in or otherwise gained some expertise in child psychology and development.

Why a parent voicing his desire to stop at nothing to remain part of his child's life evinced danger went unexplained. S.J. considered it a "threat," nonetheless. And, assuming that A.M. did say such a thing and also vowed to make his ex-wife's life hell during the divorce, one cannot reasonably ignore her admission that she 1) never accused A.M. of being an unfit father during the divorce proceeding or 2) never suggested, during the divorce, that his parental rights should be terminated when debating custody matters.[7] Nor did she reveal to the trial court instances of A.M. engaging in violence or other abusive conduct towards her or the child, save for him once yelling when she would not let him speak to the child on the phone.

Indeed, had A.M. truly posed such a threat or danger, the trial court could have denied him all status as a conservator of the child. *See* TEX. FAM. CODE ANN. § 153.191 (West 2014) (stating that the trial court shall appoint as a possessory conservator the

[7] S.J. did testify that she decided to divorce A.M. after he was imprisoned because "he was slowly going down the rabbit hole to Crazytown" and she believed that his "mental status ha[d] deteriorated rapidly." Missing, however, are factual examples of conduct from which S.J. drew her conclusory statements, and being conclusory, they have no evidentiary weight. *See Coastal Transport Co., Inc. v. Crown Cent. Petroleum*, 136 S.W. 3d 227 (Tex. 2004) (holding that conclusions carry no evidentiary weight).

parent who is not appointed as a sole or joint managing conservator "unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child"); *In the Interest of Walters*, 39 S.W.3d 280, 284 (Tex. App.—Waco 2001, no pet.) (stating the same). Yet, S.J. withheld complaint. And, the trial court found, just three months before S.J. petitioned to terminate A.M.'s parental rights, that it was "in the best interest of the child" to appoint A.M. possessory conservator. That the appointment was made despite the trial court knowing A.M. had been incarcerated is clear from the record; indeed, it informed A.M. that his incarceration influenced the conservatorship decision.

As for the possibility that the best interests of the child warranted termination because of the "heinous" nature of A.M.'s crime, the nature of that crime is certainly a matter that may be weighed in considering the child's best interests. We acknowledged as much in *In re McDaniel*, No. 07-13-00372-CV, 2015 Tex. App. LEXIS 1697, at *13-14 (Tex. App.—Amarillo February 19, 2015, no pet.) (mem. op.)(noting appellant's tie to child pornography as an indicia affecting the best interests of the child when determining conservatorship). Yet, *McDaniel* dealt with a parent being appointed possessory, as opposed to managing, conservator. Here, we deal with the termination of parental rights, a more grave and final procedure implicating rights of constitutional magnitude. *See Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (stating that "[a] termination decree is complete, final, irrevocable and divests for all time that natural right as well as all legal rights, privileges, duties and powers" of the parent involved.). That compels us to do more than simply cite the circumstance as basis for ending A.M.'s parental rights. Determining whether the circumstance has the potential to affect

the child's safety and well-being should also be weighed as part of our obligation to strictly scrutinize the proceeding. *See In re K.M.L.*, 443 S.W.3d at 112 (mandating that termination proceedings be strictly scrutinized). In that regard, S.J. made no effort to prove what, if any, harm a child faces when parented by an adult who views child pornography. Nor did she endeavor to illustrate that whatever harm such conduct may threaten, it cannot be avoided through counseling or psychological programs. Indeed, she focused little upon the nature of the crime or its potential for harm, at trial. This may be because she knew of its commission before the child was conceived and opted not only to remain with A.M. but also have him impregnate her. So too did she inform the federal judge at A.M.'s sentencing that A.M. would be a good father.[8] Additionally, nothing of record indicates that A.M. ever directed his conduct toward his child or that pornographers prey on their own family members. It may well be that A.M.'s crime is a sign of a socially, morally, and legally unacceptable mindset. But, whether that mindset is immutable (despite the receipt of professional help) or poses danger to or bodes ill for his daughter is mere speculation, given the record before us. And while a factfinder or jurist may be tempted to engage in mere speculation because of the crime's heinous nature, it cannot.

Next, it was suggested that the fact of A.M.'s imprisonment caused S.J. to be concerned about the child's well-being. At one point, she testified that "[h]e is in a place where even like taking her to visit him is inconceivable." Why it was "inconceivable" went unexplained; it simply appears to be a conclusory opinion lacking in probative value. *Dallas Ry. & Terminal Co. v. Gossett,* 156 Tex. 252, 294 S.W.2d 377, 380-81 (1956)(stating that conclusory opinions have no probative value). On the other hand,

[8] A.M. testified to this at trial, and S.J. did not contradict it.

undisputed evidence appears of record disclosing that S.J. actually took the child to visit A.M. in prison. When later writing about the event, she described 1) how she "loved" watching A.M. interact with the child, 2) how the latter "smiled so big" for A.M., 3) how the child would engage in certain playful conduct with A.M. that she would not with S.J., 4) how she would not "keep" the child from A.M. "ever," 5) how she thought A.M. and the child would have a "special bond," and 6) how she would "foster" that bond. S.J. having taken the child to see A.M. in prison and having come away with a positive experience tends to contradict the notion that A.M.'s place of residence alone carries with it some adverse impact on the child. And, no expert (or otherwise informed witness) testified about the impact upon a child, if any, of a parent's incarceration or of taking a child to visit an incarcerated parent.

S.J. also insinuated that termination should occur because A.M. had no parenting skills and "quit believing in God." Upon what she based her conclusion regarding his lack of parenting abilities is unknown. She provided no evidence to explain or develop the comment, and being conclusory, it too has no evidentiary value.

As for A.M.'s purported religious views, or lack thereof, we note that the evidence of his purported disbelief in God was contradictory, at best. The comment to which S.J. referred apparently was uttered when A.M. became embroiled in the federal criminal prosecution around 2010 or 2011. About two years later, though, A.M. was voicing other beliefs. For instance, the child's *ad litem* tendered into evidence a letter written in September of 2013 by A.M. to his child. Therein, A.M. talked about finding "strength in you [and] myself and always in God." So too did he quote biblical passages to the child. Such commentary hardly connotes a disbelief by A.M. in a supreme being. It may well

be that S.J. was unaware of A.M.'s religious views prior to trial. By then, she had decided to forego communicating with him about the child due to her mistaken conclusion that such was not required by the trial court.

Yet, even if we were to assume that S.J.'s description of her ex-husband's religious views were accurate, we are unwilling to suggest that only those who believe in a supreme being may raise a child. No doubt instilling children with faith may help when they later encounter the travails of life. Yet, each person has the right to believe or disbelieve. *See West Virginia State Bd.of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (stating that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). To consider the absence of a religious foundation as indicia warranting termination of parental rights would be to denigrate that right, especially when (like here) the record contains no evidence of how the absence of a parent's religious foundation would affect the child.

Regarding plans for the child, S.J. had "big dreams" for the three year old. They included growing up, going to school and earning a college degree. How retaining the parent/child relationship between A.M. and his offspring would interfere with those dreams went unexplained. The child's mother also hoped that termination of A.M.'s parental rights would lead to the child being adopted by a future husband. Though evidence indicates that S.J. was dating someone, she denied any plans of marriage. Nor did she indicate that her boyfriend had any interest in adopting the child if A.M.

were no longer her father. And, while S.J. also mentioned that a better job may cause her to move in the future, she had no current plans of leaving her present location.

S.J. also testified about the child being healthy, developing normally, and facing neither physical nor emotional danger. Other evidence appears of record indicating that S.J. had stable employment and earned sufficient income to raise the child. S.J. suggested that the stability and security she and the child had would be jeopardized if A.M. were to remain the child's father. As previously mentioned, she testified that having him pay child support would simply be a way "for him to worm his way into her life and be a very negative influence on her." Yet how his presence would be a "negative influence" or why his allowing him to remain part of the child's life would be detrimental to the child was unexplained. These opinions, like others noted above, were simply conclusory without probative value. Yet, given that the child's life was stable and secure despite the circumstances of her father tends to contradict the notion that his circumstances pose a threat to the child.

As stated earlier, a termination decree is complete, final, irrevocable, and divests for all time the natural right as well as all legal rights, privileges, duties and powers of the parent involved. *Holick v. Smith*, 685 S.W.2d at 20. That natural right of a parent to his child is a "'basic civil right of man,'" *Id*.; and "'far more precious than property rights.'" *Holick v. Smith*, 685 S.W.2d at 20, *quoting*, *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1976); *see In the Interest of E.R.*, 385 S.W.3d 552, 563 (Tex. 2012). This is why termination "'can never be justified without the most solid and substantial reasons.'" *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *In the*

Interest of N.L.D., 412 S.W.3d at 822. That solid and substantial reason is missing here when it comes to the best interests of the child.

It is true that A.M. committed a "heinous" crime resulting in his imprisonment for about eight years. Yet, S.J. knew of it and remained committed to having him father their child. Once born, the child went to visit A.M. in prison, and S.J. deemed it a good experience for the infant. And though she would eventually divorce A.M., she did not allege or attempt to prove that he or his circumstances posed some measure of harm to the child. That the trial court deemed it to be in the best interests of the child to designate A.M. a possessory conservator despite knowing of his circumstances cannot be denied, either. Yet, three months after the designation by the trial court's decision, S.J. sued to end her ex-husband's parental rights. She then built a barrier preventing communication between A.M. and the child under the auspices that she had no obligation to reveal her contact information to A.M. So too did she ignore her court ordered duty to provide A.M. with "significant information concerning the health, education and welfare of the child."

The reason for creating the foregoing barrier is best captured by her own words. She sought to end the relationship so "***[w]e*** can move on," so "[h]e won't have a line on ***us***," so [h]e won't have any contributing say in ***our*** lives," and so "[a]t some point, ***I*** can get married and she can have a real father figure in her life." (Emphasis added). But, there was no "father figure" standing ready to assume the role. And, though in one breath she decried A.M.'s failure to provide financial support, in another she declared that she did not want it since that would enable him to remain part of the child's life. These utterances were clear, uncontradicted and reveal that the best interests of the

child played a subservient role in her decision to end A.M.'s relationship with their offspring. And, her conclusory opinions about his alleged lack of parenting skills, his purported dangerousness, his alleged negative impact, and the like are just that, conclusory and have no evidentiary value.

We have no testimony from an expert or anyone else trained in the area of family dynamics, child development, or the like testifying that the relationship between A.M. and his child should end.[9] Nor do we have any evidence of record indicating that a child who otherwise has a stable and secure environment with one parent would suffer in some way because the other parent is incarcerated. Instead, we have S.J.'s *ipse dixcit* that the best interests of the child require termination due in many respects to circumstances she previously acknowledged, accepted, and enhanced.

Attention must focus on the child, not on what the mother wants. And, all we have before us is clear and convincing evidence that S.J. wants A.M.'s rights terminated. That is not enough to "'produce in the mind of the trier of fact a firm belief or conviction'" that termination is in the best interests of the child. And, in so concluding, we have strictly scrutinized the termination proceeding. *In the Interest of E.R.*, 385 S.W.3d at 563; *Holick v. Smith*, 685 S.W.2d at 20. We have abided by the directive to ignore evidence that a factfinder could reasonably ignore but consider evidence that a factfinder should reasonably consider. We have relied on S.J.'s own words and conduct and on undisputed evidence that neither implicates credibility determinations nor requires deference to the trial court.

[9] The concurrence is correct. We are not requiring evidence from a particular kind of witness, only competent evidence from a witness establishing the proposition at issue.

Accordingly, we reverse the order of termination because S.J. failed to prove by clear and convincing evidence that terminating the parental rights of A.M. to his child was in the child's best interests, and render judgment denying termination of A.M.'s parental rights. Because we reverse the decision to terminate, we also reverse the order changing the child's name to A.G.D.[10]

Brian Quinn
Chief Justice

[10] Having disposed of the appeal as we do, it is unnecessary to consider other issues raised by A.M.