In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00003-CV

IN THE INTEREST OF N.M., A CHILD

On Appeal from the 154th District Court
Lamb County, Texas
Trial Court No. DCV-19,278-15, Honorable Felix Klein, Presiding

May 16, 2017

MEMORANDUM OPINION

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

The trial court terminated the parental relationship of Crystal and Baldomero to their child N.M. N.M. was two years old at the time of termination and suffered from cerebral palsy and other severe conditions. The trial court terminated the relationship on various statutory grounds, including child endangerment under § 161.001(b)(1)(E) of the Texas Family Code, and after finding that termination favored the child's best interests. Crystal and Baldomero appealed the decision and questioned the sufficiency of the evidence underlying it. Baldomero also contends that the trial court erred in failing to appoint an attorney ad litem and a guardian ad litem for the child prior to the first adversary hearing. We affirm.

Issue – Sufficiency to Support Termination

As 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,'" 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 [petitioner] 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.*

Next, termination is permitted only when the party seeking it proves 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 Dec. 12, 2014, no pet.) (mem. op.). Our Supreme Court, in *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976), itemized a number of "non-exclusive" factors to be considered when determining best interests in a termination case. 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 re E.N.C.*, 384 S.W.3d 796, 807-808 (Tex. 2012) (reiterating the applicability of *Holley* and the factors mentioned therein); *In re D.L.W.*, No. 07-15-00243-CV, 2015 Tex. App. LEXIS 12372, at *13-14 (Tex. App.—Amarillo Dec. 4, 2015, no pet.) (mem. op.)(reiterating the same). It is not necessary that each factor favor termination. *In re 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 re 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 re C.C.* No. 07-15-00185-CV, 2015 Tex. App. LEXIS 10137, at *12-13 (Tex. App.—Amarillo Sept. 29, 2015, no pet.) (mem. op.)(stating the same).

Statutory Ground (E)

Section 161.001(b)(1)(E) provides that the trial court may order termination if the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." TEX. FAM. CODE ANN. § 161.001(B)(1)(E) (West Supp. 2016). The Supreme Court has held that "endanger" means more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment, but that endangering conduct need not be directed at the child. *See Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). In the case before us, we find the evidence sufficient to support termination of both parents' parental rights on this ground.

Regarding Crystal, evidence of record shows that she 1) used methamphetamine during the first four months of her pregnancy with the child, which she knew was unsafe for the child, 2) began using methamphetamine within a month of the child's birth, 3) used it in the presence of the child, 4) appeared to be under the influence of some intoxicant on the day the child was removed from her possession as evinced by her belligerence and irrationality, 5) used crack cocaine almost daily until incarcerated, 6) was incarcerated for seventeen months after the child's birth, 7) was incarcerated after opting to forego a SAFPF program, 8) received the methamphetamine being taken during her pregnancy from Baldomero, 9) admitted those actions were endangering the

child, and 10) admitted that she had difficulties with managing her emotions. Evidence of record also revealed that she 1) moved frequently, 2) was belligerent, incoherent and threatened the Department workers present on the day the child was removed, 3) left the child in the care of Baldomero for five months while knowing he used drugs around the child, 4) had used drugs for twenty years, 5) failed to complete her service plan, 6) failed to attend NA/AA meetings after leaving prison and while being obligated to do so at least twice a week, 7) failed to obtain individualized counseling, 8) had no driver's license at the time of trial, and 9) was unable to care for the child after her release from jail due to the lack of housing and financial stability. While visiting Baldomero in prison, Crystal purportedly told him not only that she was planning to kill herself but also that she had been prostituting herself to obtain drugs. Crystal denied saying the latter, though.

Regarding Baldomero, evidence of record illustrated that he 1) used controlled substances and began doing so when he was thirteen or fourteen, 2) used such substances during Crystal's pregnancy, 3) knew Crystal used them as well, 4) used drugs after the child's birth, 5) returned the child to Crystal after she returned from her five month sojourn and while knowing she continued to use methamphetamine, and 6) was serving an eight year prison sentence for DWI after having his probation for that offense revoked. Furthermore, his future plans for the child consisted of having Crystal care for his daughter while he simply paid child support.

The evidence we mentioned is sufficient to permit a factfinder to reasonably form a firm conviction or belief that Crystal and Baldomero engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or

emotional well-being of the child. And, because only one statutory ground need support termination, we forego addressing whether the other grounds found by the trial court support termination as well.

Regarding the matter of the child's best interests, we find evidence showing that 1) the child suffered from cerebral palsy and an undeveloped brain related to "white matter deficiency," 2) her healthcare needs due to those conditions would continue for the rest of her life, 3) both Crystal and Baldomero were incapable of taking care of N.M. at the time of the hearing or at any time within the immediate future, 4) the present placement (the child's uncle and prospective aunt) had obtained training to meet and have met the child's needs, 5) the child has improved in most all areas of her life since being removed from Crystal and Baldomero, 6) the child's foster parents want to adopt the child, 7) Baldomero wished to see N.M. returned to Crystal and simply pay child support, 8) Baldomero was married to another woman and had other children, 9) Crystal lacked stable employment or a stable home environment, 10) Crystal acknowledged that the child is doing well in her current placement, 11) the child had siblings that also had cerebral palsy, 12) Crystal did not take the child to undergo medical attention after birth because she feared that the child would have the same disabilities as those of her siblings, and 13) Baldomero had four other children and lived with his mother when he was arrested and subsequently imprisoned.

Other evidence indicated that the parents wish to retain their parental rights and raise the child. So too did they indicate that they would do that needed to perform the task once they eventually left prison or found stable employment or found stable living arrangements.

When the totality of the evidence is considered, we conclude that the record was sufficient to enable a rational factfinder to form a firm belief or conviction that termination is in the child's best interests.

Appointment of Attorney and Guardian ad Litem for Child

Next, Baldomero contends that the trial court reversibly erred by failing to appoint the child either an attorney ad litem or guardian ad litem before the first adversary hearing. He raises the complaints on appeal for the first time. Neither complaint was uttered below. Consequently, they were not preserved for review. *In re B.L.D.*, 113 S.W.3d 340, 350-51 (Tex. 2003) (holding that rules governing error preservation must be followed in cases involving termination of parental rights).

Accordingly, we affirm the trial court's termination order.

Per Curiam