



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

Nos. 07-17-00353-CV
07-17-00354-CV

**IN THE INTEREST OF A.K. AND A.K., CHILDREN
IN THE INTEREST OF J.C., A CHILD**

On Appeal from the 223rd District Court
Gray County, Texas
Trial Court No. 38,305 and 37,927 Honorable Jack Graham, Presiding

February 15, 2018

MEMORANDUM OPINION

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

Following a bench trial,¹ the trial court signed a judgment terminating the parent-child relationship between D.C. and her children, A.K., A.K., and J.C.² In her sole issue, D.C. challenges the legal and factual sufficiency of the evidence supporting the trial

¹ The Associate Judge terminated D.C.'s parental rights after a final hearing on May 25, 2017. D.C. filed a request for *de novo* hearing before the referring court. On August 27, 2017, an agreed motion was filed by all trial counsel requesting the referring court to consider the reporter's record and all exhibits admitted from the hearing before the Associate Judge. Additional evidence was also presented to the referring court. This appeal followed that trial.

² To protect the privacy of the parties involved, we refer to them by their initials. See TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2017); TEX. R. APP. P. 9.8(b).

court's finding that termination of her parental rights is in the children's best interest. We affirm.

BACKGROUND

D.C. is the mother of A.K., A.K., and J.C. L.M. is J.C.'s father, and U.K. is the father of A.K. and A.K. The trial court also terminated the parental rights of both fathers. They did not appeal.

In November of 2015, the Department of Protective and Regulatory Services received a report that D.C. was arrested for possession of methamphetamine. Her twelve-year-old son, J.C., was in the car with her when she was arrested. D.C. admitted to the Department's investigator, Daniel McArthur, that the drugs and pipe found in the car belonged to her, and that she had used methamphetamine before driving with J.C. D.C. acknowledged she smoked methamphetamine in the home with the children present. Sometimes, D.C. and her boyfriend, H.A., smoked methamphetamine together while the children were playing outside. There was also concerns about the condition of the home and domestic violence between D.C. and H.A.

The Department was granted temporary managing conservatorship of the children and assigned Michael Haskins as the caseworker. Haskins provided a service plan to D.C. to assist her in regaining custody of the children. The service plan required D.C. to complete the following services: take parenting classes; participate in a substance abuse assessment with Amarillo Council for Alcohol and Drug Abuse (ACADA) and comply with recommendations; maintain contact with the caseworker; participate in Women Against Violence (WAV); take anger control training; complete rational behavior training (RBT);

attend Narcotics/Alcoholics Anonymous meetings weekly; submit to random drug testing; maintain legal employment; complete an Outreach Screening Assessment and Referral (OSAR); attend weekly supervised visitation; secure reliable transportation; participate in a psychological evaluation; maintain safe, stable housing; attend individual counseling at least twice monthly; and maintain a drug-free lifestyle.³

D.C. completed parenting classes, obtained a psychological evaluation, and attended RBT and anger control training. She reported attending Alcoholics Anonymous, but never provided documentation of her attendance.

Initially, D.C. was to attend individual counseling with Tim Enevoldsen to address anger issues. After attending two sessions, she was discharged for non-attendance. D.C. completed four sessions of individual counseling with Tina Souder. D.C. admitted to Souder that she was still using methamphetamine.

D.C. reported being self-employed, cleaning homes and landscaping. On one occasion, she showed Haskins a check she received for cleaning homes, but that was the only time she showed him verification of being compensated for work.

D.C. missed multiple appointments for her OSAR assessment. Her ACADA assessment recommended that she attend inpatient substance abuse treatment. A bed was available for her at a treatment facility, but due to an imminent foreclosure on the home in which she was living, D.C. did not go on the day scheduled for her admission.

³ H.A. was also offered the same service plan as the father-figure in the children's lives. However, he did not participate in court-ordered services.

The facility offered her admission a few days later, but D.C. declined. The third time the facility offered her admission, she accepted, but then she did not show up for admittance.

D.C. lived in two homes during the case, but she lost both—the first due to a foreclosure, and the second following her arrest in November of 2016. H.A. moved with her to the second home, but it was not a safe place for the children. That home had broken windows, no gas, and no running water.

On May 23, 2016, the Department changed the plan from reunification to termination based on D.C.'s continued drug use and the lack of progress on her court-ordered services. Her visitation with the children was suspended due to her arriving late to the visitations and her continued drug use.

On June 16, 2016, D.C. pled guilty to the possession charge and received two years of deferred adjudication probation. In November 2016, D.C. was arrested again after a motion to revoke her probation was filed. The probation revocation was based, in part, on her commission of a new offense—an assault against H.A. On January 12, 2017, D.C. was adjudicated guilty of the underlying drug possession felony and sentenced to serve 180 days in a state jail facility.

At the trial before the associate judge on May 25, 2017, D.C. testified that she planned to enter an inpatient treatment when she is released from the state jail facility in June of 2017. D.C. needs at least six months following her release before she would be able to meet her children's needs. D.C. admitted that she cannot currently meet her children's needs.

At the *de novo* hearing, D.C. testified that H.A. took her to El Paso when she was released from jail on June 28, 2017. D.C. is living in an apartment in El Paso provided by H.A.'s parents and she is working for a mobile phone service.

The Department placed the children in a foster home. The boys are doing "exceptionally well" with this family. There is a "very palpable sense of love and respect between the adults and the children in the home." The children are doing well in school and they are participating in soccer and wrestling. The foster family plans to adopt the children, and the children are excited about the prospect of adoption.

APPLICABLE LAW

A parent's rights to the "companionship, care, custody[,] and management" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); see *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Consequently, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). However, "the rights of natural parents are not absolute" and "[t]he rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (citing *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1993)). Recognizing that a parent may forfeit his or her parental rights by his or her acts or omissions, the primary focus of a termination suit is protection of the child's best interests. See *id.*

In a case to terminate parental rights by the Department under section 161.001 of the Family Code, the Department must establish, by clear and convincing evidence, that

(1) the parent committed one or more of the enumerated acts or omissions justifying termination, and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b). (West Supp. 2017).⁴ Clear and convincing evidence is “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.” § 101.007 (West 2014); *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Both elements must be established, and termination may not be based solely on the best interest of the children 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 K.C.B.*, 280 S.W.3d 888, 894 (Tex. App.—Amarillo 2009, pet. denied). “Only one predicate finding under section 161.001[(b)](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child’s best interest.” *In re A.V.*, 113 S.W.3d at 362. We will affirm the termination order if the evidence is both legally and factually sufficient to support any alleged statutory ground the trial court relied upon in terminating the parental rights if the evidence also establishes that termination is in the children’s best interest. *In re K.C.B.*, 280 S.W.3d at 894-95.

STANDARDS OF REVIEW

When reviewing the legal sufficiency of the evidence in a termination case, the appellate court should look at all the evidence in the light most favorable to the trial court’s 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 at 266. To give appropriate deference to the fact finder’s conclusions, we must assume that the fact finder resolved

⁴ Further references to provisions of the Texas Family Code will be by reference to “section ___” or “§ ___”.

disputed facts in favor of its finding if a reasonable fact finder could do so. *Id.* We disregard all evidence that a reasonable fact finder could have disbelieved or found to have been not credible, but we do not disregard undisputed facts. *Id.* Evidence that does more than raise surmise or suspicion is not sufficient unless that evidence is capable of producing a firm belief or conviction that the allegation is true. *In re K.M.L.*, 443 S.W.3d 101, 113 (Tex. 2014). If, after conducting a legal sufficiency review, we determine that no reasonable fact finder could have formed a firm belief or conviction that the matter that must be proven was true, then the evidence is legally insufficient, and we must reverse. *Id.* (citing *In re J.F.C.*, 96 S.W.3d at 266).

In a factual sufficiency review, we must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266. We must determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *Id.* We must also consider whether disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. *Id.* If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

ANALYSIS

D.C. does not contest the statutory basis for termination under section 161.001(b)(1). She concedes that the evidence was legally and factually sufficient to terminate her parental rights under at least one of subsections (D), (E), (N), (O), and (P).

In her sole issue, D.C. challenges the factual and legal sufficiency of the evidence supporting the best interest finding made under section 161.001(b)(2).

Best Interest of the Children

A determination of best interest necessitates a focus on the children, not the parent. See *In re B.C.S.*, 479 S.W.3d 918 at 927 (Tex. App.—El Paso 2015, no pet.). Appellate courts examine the entire record to decide what is in the best interest of the children. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). There is a strong presumption that it is in the children’s best interest to preserve the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006).

In assessing whether termination is in a child’s best interest, the courts are guided by the non-exclusive list of factors in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These factors 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 that may indicate that the existing parent-child relationship is not proper, and (9) any excuse for the acts or omissions of the parent. *Id.* “[T]he State need not prove all of the factors as a condition precedent to parental termination, ‘particularly if the evidence were undisputed that the parental relationship endangered the safety of the child.’” *In re C.T.E.*, 95 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (quoting *In re*

C.H., 89 S.W.3d 17, 27 (Tex. 2002)). Evidence that supports one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. See *In re E.C.R.*, 402 S.W.3d at 249. The best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as direct evidence. *In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). We must also bear in mind that a child's need for permanence through the establishment of a stable, permanent home has been recognized as the paramount consideration in determining best interest. See *In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

Several *Holley* factors support the trial court's determination that termination of D.C.'s parental rights is in the children's best interest.

The Desires of the Children

J.C., A.K., and A.K., were ages fourteen, eleven, and ten at the time of trial. D.C. last saw the children in March 2016, almost a year and a half before the trial. J.C. told his counselor that he no longer missed his parents and, while he wanted contact with his family, he liked living with his foster parents. A.K. indicated he liked his foster parents but would want to return to his parents if he could. A.K. related that he liked his foster parents and stated "I don't want to go live with my parents. They probably still have the drug disease." All the children agree with the Department's plan for adoption, and A.K. and A.K. are "very excited." The children stated that they are very tired of CPS involvement and are ready for permanency. There was ample evidence from which the trial court could have determined that this factor weighs in favor of its best interest determination.

The Emotional and Physical Needs of and Danger to the Children

The next two factors are the children's emotional and physical needs now and in the future, and the emotional and physical danger to the children now and in the future. The need for permanence is a paramount consideration for a child's present and future physical and emotional needs. *Edwards v. Tex. Dep't of Protective & Regulatory Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997, no writ). A fact finder may infer that past conduct endangering the well-being of a child may recur in the future if the child is returned to the parent. *In re D.L.N.*, 958 S.W.2d 934, 941 (Tex. App.—Waco 1997, pet. denied), *disapproved on other grounds by, In re J.F.C.*, 96 S.W.3d at 256.

The undisputed evidence demonstrated that the Department became involved after D.C. was arrested for possession of methamphetamine with J.C. in the vehicle. She admitted that the drugs and pipe found in the car were hers, and that she used methamphetamine before driving with J.C. She also admitted to methamphetamine use with the children in the home, or while they were playing outside the home.

J.C. told the Department's investigator about the drugs and the arrest. He also reported going to a neighbor's home to bathe because they did not have water and the toilet did not work. A.K. knew D.C. used drugs because, one time, he saw her shaking and she told him the shaking was caused by drug use. He also described physical pushing and frequent verbal arguments between D.C. and H.A.

After her arrest for possession of methamphetamine in November of 2015, and the children's removal, D.C. continued to use methamphetamine "on and off" until she was arrested for the assault of H.A. H.A. was the father-figure in the children's lives. H.A.

failed to participate in services offered by the Department and he admitted to marijuana use.

A parent's history and admissions are relevant to the best interest determination. *In re D.M.*, 58 S.W.3d 801, 814 (Tex. App.—Fort Worth 2001, no pet.). A trial court is entitled to consider a parent's history of drug use and irresponsible choices. See *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009). Drug use during the pendency of a termination proceeding is evidence of an inability to provide a stable environment and provide for the children's emotional and physical needs. *In re Y.G.*, No. 07-11-00349-CV, 2012 Tex. App. LEXIS 1572, at *19 (Tex. App.—Amarillo Feb. 29, 2012, no pet.) (mem. op.).

A child's exposure to domestic violence in the home is relevant when considering best interest. *In re B.R.*, No. 02-12-00137-CV, 2013 Tex. App. LEXIS 41, at *36 (Tex. App.—Fort Worth Jan. 4, 2013, pet denied) (mem. op.). "Repeated exposure to violence, even if the violence is not directed at the children, undermines the safety of the home environment" and supports a finding that termination of parental rights is in the children's best interest. *In re A.M.Y.*, No. 04-15-00352-CV, 2015 Tex. App. LEXIS 10806, at *15 (Tex. App.—San Antonio Oct. 21, 2015, no pet.) (mem. op.).

Mr. Grimes, the children's counselor, testified J.C. appeared "angry" and "walled off" when he first met him, and was not dealing well with his circumstances. Over the past year, Grimes observed improvements in J.C. J.C. was more relaxed and happier about his situation. He agreed that it would be in J.C.'s best interest to be raised in a stable family, with his brothers, where he will not be moved anymore. A.K. appears less timid now than initially and has opened up and laughs more. A.K., the youngest, also

showed improvements and appears the happiest and most outgoing of the brothers. He indicated that he had coped with the bad things that have happened in his past, and he has accepted them. The trial court may consider evidence that the children made improvements since removal when looking at the emotional and physical needs of the children now and in the future. *In re C.C.*, No. 07-12-00500-CV, 2013 Tex. App. LEXIS 5704, at *46 (Tex. App.—Amarillo May 8, 2013, no pet.).

D.C. testified at trial that H.A. picked her up when she was released from prison. She and H.A. are discussing moving in together again, even though she knows nothing about his current drug usage. She is aware that the Department maintains concerns about H.A. because of his failure to participate in services. D.C.'s willingness to pursue a relationship with H.A. given their history of drug use and domestic violence suggests that similar conduct will occur in the future. The fact finder may infer that a parent's past conduct of endangering the well-being of the children may recur in the future if the children are returned. *In re D.L.N.*, 958 S.W.2d at 941. These two factors weigh heavily in favor of the trial court's best interest determination.

Parenting Ability and Programs Available to Assist Party Seeking Custody

The fourth and fifth factors will be discussed together. In reviewing the parenting ability of the parent, a fact finder can consider the parent's past neglect or past inability to meet the physical and emotional needs of the children. *In re G.N.*, 510 S.W.3d 134, 139 (Tex. App.—El Paso 2016, no pet. h.). The fact finder can infer from a parent's failure to take the initiative to utilize the available programs offered by the Department that the parent "did not have the ability to motivate herself to seek out available resources needed

now or in the future.” *In re J.M.*, No. 01-14-00826-CV, 2015 Tex. App. LEXIS 2130, at *21 (Tex. App.—Houston [1st Dist.] Mar. 5, 2015, no pet.) (mem. op.) (citing *In re W.E.C.*, 110 S.W.3d 231, 245 (Tex. App.—Fort Worth 2003, no pet.)).

D.C. was court-ordered to comply with reunification services, yet she failed to complete the services directly related to the reason for the children’s removal. Although D.C. completed some of the services, she failed to complete inpatient drug treatment or individual counseling. D.C.’s failure to complete these necessary services could have led the trial court to infer that D.C. did not have the ability to motivate herself to seek out available resources now or in the future. See *id.* The trial court was entitled to find that this evidence weighed in favor of the best interest finding.

Plans for the Child and Stability of the Home or Placement

We will consider the sixth and seventh factors together. The sixth factor examines the plans for the child by those individuals or the agency seeking custody. The seventh factor is the stability of the home or proposed placement. Stability and permanence are paramount in the upbringing of children. *In re J.D.*, 436 S.W.3d 105, 120 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The fact finder may compare the parent’s and the Department’s plans for the child and determine whether the plans and expectations of each party are realistic or weak and ill-defined. *Id.* at 119-20.

D.C. failed to avail herself of services that would better her living situation. D.C.’s home was foreclosed and the home she and H.A. moved into was not appropriate for children. D.C. has demonstrated that she is unable to provide an appropriate environment for herself, much less her three children who need a safe and stable home.

The caseworker testified that the children were doing “exceptionally well” in the current placement and the placement is interested in adopting the children if parental rights are terminated. This evidence supports the trial court finding that termination was in the best interest of the children.

Acts and Omissions of the Parent

The eighth factor is the parent’s acts or omissions that may indicate that the existing parent-child relationship is not a proper one. The evidence established that D.C. engaged in conduct which endangered the children’s physical and emotional well-being. She did not maintain stable housing or a drug-free lifestyle. In considering all the evidence, the trial court could have found that the existing parent-child relationship is not a proper one.

From a review of these *Holley* factors, we conclude that the evidence is both legally and factually sufficient to establish a firm conviction in the mind of the trial court that termination of D.C.’s parental rights is in the best interest of A.K., A.K., and J.C.

CONCLUSION

The judgment of the trial court terminating D.C.’s parental rights is affirmed.

Judy C. Parker
Justice