In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00413-CV

IN THE INTEREST OF V.A., S.A., S.A., A.A., AND I.A., CHILDREN

On Appeal from the 84th District Court
Ochiltree County, Texas
Trial Court No. 14,272, Honorable Curt Brancheau, Presiding

February 27, 2018

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PARKER, JJ.

Following a bench trial, the trial court signed a judgment terminating the parent-child relationship between A.A. (Mother) and her five children, V.A., S.A., S.A., A.A., and I.A.[1] Raising five issues, A.A. contends that the evidence was not legally or factually sufficient to support termination of her parental rights. We affirm.

[1] 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).

Factual and Procedural Background

The trial court terminated A.A.'s and S.A.'s[2] parental rights on the grounds of endangering conditions, endangerment, failure to comply with court ordered services, and continued use of a controlled substance after completion of a treatment program. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O), and (P) (West Supp. 2017).[3] The trial court also found that termination was in the children's best interest. *See* § 161.001(b)(2).

The Department of Protective and Regulatory Services (Department) initially became involved on October 2, 2015, when A.A.'s fourth child, A.A., tested positive for methamphetamine at birth. A.A. admitted to using methamphetamine approximately twenty times leading up to the birth of A.A. Hair strand drug tests of A.A. and S.A. confirmed the use of methamphetamine. The Department referred the case to the Family Based Safety Services Division (FBSS) to allow the parents to address concerns that resulted from the investigation.

A.A. completed an Outreach, Screening, Assessment, and Referral (OSAR) at the request of the Department. The assessment recommended she complete inpatient drug treatment. A.A. completed inpatient drug treatment on May 16, 2016. On October 25, 2016, A.A. tested positive for methamphetamine. The level of methamphetamine was "extremely" high and "appeared to indicate daily use." A.A. completed a second inpatient

[2] S.A., the father of the children, did not appeal.

[3] Further references to provisions of the Texas Family Code will be by reference to "section __" or "§ __."

drug treatment on May 30, 2017, but failed to submit to drug testing after that date as requested by the Department.

A.A. and S.A.'s case was transferred to the Department's conservatorship unit because of the lack of progress on family-based services. The Department was named the temporary managing conservator of the oldest four children on November 17, 2016, and of newborn I.A. one month later, after I.A. tested positive for methamphetamine at birth.

The Department developed a family service plan for A.A. and S.A. A.A. did not complete services required by the plan. Specifically, A.A. failed to: complete a psychological evaluation; attend parenting classes; submit to random drug testing; provide proof of attending Alcoholics/Narcotics Anonymous classes; and obtain safe and stable housing or employment.

The children are placed with their maternal grandmother who plans to adopt them. She has the support of two adult children in the home and extended family. The children are doing well in this placement.

Applicable Law

A parent's rights to the "companionship, care, custody[,] and management" of a 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. § 161.001(b). 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 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.* Even 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

Sufficiency of the evidence under § 161.001(b)(1)(D), (E), (O), (P)

In her first four issues, A.A. challenges the legal and factual sufficiency of the evidence to support the termination of her parental rights under section 161.001(b)(1)(D), (E), (O), and (P). Although only one statutory ground is required to support termination, *see In re A.V.*, 113 S.W.3d at 362, we find there is sufficient evidence of multiple grounds in this case to support termination. We will limit our analysis of the sufficiency of the evidence in support of subsections (D) and (E).

A trial court may order termination of a parent-child relationship if the court finds by clear and convincing evidence that a parent has knowingly placed or knowingly allowed a child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child and/or 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. *See* § 161.001(b)(1)(D), (E). Both subsections (D) and (E) require proof of endangerment. To "endanger" means to expose the child to loss or injury; or to jeopardize the child's emotional or physical health. *Boyd,* 727 S.W.2d at 533. A child is endangered when the environment creates a potential for danger that the parent is aware of but consciously disregards. *J.S. v. Tex. Dep't of Family & Protective Servs.,* 511 S.W.3d 145, 159 (Tex. App.—El Paso 2014, no pet.). Endanger means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family

environment, but it is not necessary that the conduct be directed at the child or that the child suffer injury. *In re N.K.,* 399 S.W.3d 322, 330-31 (Tex. App.—Amarillo 2013, no pet).

While both subsections (D) and (E) focus on endangerment, they differ regarding the source of the physical or emotional endangerment to the child. *See In re B.S.T.*, 977 S.W.2d 481, 484 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Subsection (D) requires a showing that the environment in which the child is placed endangered the child's physical or emotional health. *Doyle v. Tex. Dep't of Protective & Regulatory Servs.,* 16 S.W.3d 390, 394 (Tex. App.—El Paso 2000, pet. denied). Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D). *In re W.S.*, 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no pet.). "Inappropriate, abusive, or unlawful conduct by persons who live in the child's home or with whom the child is compelled to associate on a regular basis" in the home is a part of the "conditions or surroundings" of the child's home under subsection (D). *In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.). The fact finder may infer from past conduct endangering the child's well-being that similar conduct will recur if the child is returned to the parent. *Id*. Thus, subsection (D) addresses the child's surroundings and environment rather than parental misconduct, which is the subject of subsection (E). *Doyle*, 16 S.W.3d at 394.

Under subsection (E), the cause of the danger to the child must be the parent's conduct alone, as evidenced not only by the parent's actions, but also by the parent's omission or failure to act. *In re M.J.M.L.,* 31 S.W.3d 347, 350-51 (Tex. App.—San Antonio

2000, pet. denied); *Doyle*, 16 S.W.3d at 395. To be relevant, the conduct does not have to have been directed at the child, nor must actual harm result to the child from the conduct. *Dupree v. Tex. Dep't of Protective & Regulatory Servs.,* 907 S.W.2d 81, 84 (Tex. App.—Dallas 1995, no writ). Additionally, termination under subsection (E) must be based on more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required. *In re E.P.C*., 381 S.W.3d 670, 683 (Tex. App.—Fort Worth 2012, no pet.). The specific danger to the child's well-being need not be established as an independent proposition, but may be inferred from parental misconduct. *In re B.C.S*., 479 S.W.3d 918, 926 (Tex. App.—El Paso 2015, no pet.).

The use of drugs during pregnancy is conduct that endangers the physical and emotional well-being of the unborn child; the fact finder is not required to speculate as to the harm suffered by the child when drugs are ingested by the child's mother during pregnancy. *In re W.A.B*., 979 S.W.2d 804, 806 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Ongoing drug abuse is conduct that subjects the children to a life of uncertainty and instability, which endangers their physical and emotional well-being. *In re A.B.*, 125 S.W.3d 769, 777 (Tex. App.—Texarkana 2003, pet. denied); *see In re K.A.S*., No. 07-12-00234-CV, 2012 Tex. App. LEXIS 8725, at *16-17 (Tex. App.—Amarillo Oct. 18, 2012, no pet.) ("Drug use and its effect on a parent's life and ability to parent may establish an endangering course of conduct.").

It is undisputed in this case that A.A. continuously used methamphetamine, and that her youngest two children tested positive for the drug when they were born. She admitted to using methamphetamine twenty times while she was pregnant with A.A. Additionally, A.A. completed inpatient drug treatment twice after the Department became

involved with the family. Like A.A., S.A. was also using methamphetamine while under the Department's supervision. S.A. failed to complete a drug treatment program or reunification services offered by the Department. The trial court was free to conclude that A.A. endangered the children by failing to guard them against the potential dangers inherent in their exposure to S.A., who was also using drugs. *In re J.J.*, No. 07-13-00117-CV, 2013 Tex. App. LEXIS 11194 at *12-13 (Tex. App.—Amarillo Aug. 29, 2013, no pet.) (mem. op.) (citing father's knowledge of mother's drug use as a basis to support termination of father's parental rights for endangerment under subsection (D)). "A parent's continued drug use demonstrates an inability to provide for the child's emotional and physical needs and to provide a stable environment for the child." *In re E.M.*, 494 S.W.3d 209, 222 (Tex. App.—Waco 2015, pet. denied) (citing *In re F.A.R.*, No.11-04-00014-CV, 2005 Tex. App. LEXIS 234, at *4 (Tex. App.—Eastland Jan. 13, 2005, no pet.) (mem. op.).

Having examined the entire record, we find that the trial court could reasonably form a firm belief or conviction that A.A. knowingly placed or knowingly allowed V.A., S.A., S.A., A.A., and I.A. to remain in conditions or surroundings which endangered their physical or emotional well-being and engaged in conduct which endangered the children's emotional and physical well-being. The same evidence is factually sufficient to support the trial court's affirmative finding. Issues one and two are overruled. Having overruled issues one and two, it is unnecessary to address issues three and four.[4]

[4] Because only one statutory predicate ground is required to support termination when there is also a finding that termination is in the children's best interest, we need not address A.A.'s challenge to the sufficiency of the evidence to support the trial court's finding of a statutory predicate ground under subsections (O) and (P). *See In re A.V.*, 113 S.W.3d at 362; *In re K.C.B.,* 280 S.W.3d at 894-95.

Best Interest of the Children

In issue five, A.A. challenges the legal and factual sufficiency of the evidence supporting the best interest finding made under section 161.001(b)(2). "A determination of best interest necessitates a focus on the child, not the parent." *In re B.C.S.,* 479 S.W.3d at 927. Appellate courts examine the entire record to decide what is in the best interest of the child. *In re E.C.R.,* 402 S.W.3d 239, 250 (Tex. 2013). There is a strong presumption that it is in the child'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.).

The Emotional and Physical Needs of and Danger to the Children

The trial court's determinations that A.A. knowingly placed or allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being, and engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children supports the proposition that termination is in the best interest of the children under the second and third *Holley* factors. *See In re C.H*., 89 S.W.3d at 28. We also consider A.A.'s continued drug use during the pendency of the case as further proof that she endangered the children. *See In re F.A.R*., 2005 Tex. App. LEXIS 234, at *11-12.

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.

A parent's endangerment of a child by continued exposure to the other parent's dangerous conduct is also a relevant consideration in determining a child's best interest. *In re O.N.H.,* 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.) (considering parent's exposure to other parent's drug habits as relevant factor in determining child's best interest).

A.A.'s five children range in age from ten months to eight years old. The undisputed evidence establishes that A.A. failed to complete her court-ordered services directly related to the reason for the children's removal. In addition, A.A. remained in a relationship with S.A., who tested positive for methamphetamine off and on during the two years the Department was involved. A.A.'s ongoing drug use and her willingness to remain in a relationship with someone who used drugs suggests that similar conduct will occur in the future, thereby constituting evidence of emotional and physical danger to the children now and in the future. *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

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.). The fact finder can infer from a parent's failure to take the initiative to avail herself of the programs offered to her 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.)).

A.A. 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. She failed to complete a psychological evaluation; did not take the recommended parenting classes; failed to provide proof that she was attending NA classes; and failed to submit to random drug testing. A.A.'s failure to complete these necessary services could have led the trial court to infer that A.A. 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 Children and Stability of the Home or 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 children and determine whether the plans and expectations of each party are realistic or weak and ill-defined. *Id.* at 119-20.

A.A. has continued to use methamphetamine and failed to avail herself of services that would better her living situation. Her "on and off" relationship with S.A., coupled with her lack of employment and frequent moves during the pendency of this case, underscores her instability. The five young children who are the subject of this appeal deserve a safe and stable home. The children are doing well in the current placement with their maternal grandmother and she has the family support she needs to raise the

children. She is interested in adopting them if parental rights are terminated. At this time, the children are in the best possible placement. This evidence supports the trial court finding that termination was in the best interest of the children.

Acts and Omissions of the Parent

In two years, A.A. has had two children who tested positive for methamphetamine at birth. During that same time frame, A.A. moved four to five times and failed to complete services available to address the issues which led to the children's removal. Moreover, A.A. did not attend the final hearing. The absence of a parent at the trial to terminate her parental rights is prejudicial to the parent. *In re J.D.S.*, 111 S.W.3d 324, 327 (Tex. App.—Texarkana 2003, no pet.). The parent's absence could leave the fact finder with the impression that the proceeding is not important to the parent. *Id*. In considering this evidence, the trial court could have found that the existing parent-child relationship is not a proper one.

Having reviewed all of the *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 A.A.'s parental rights is in the best interest of V.A., S.A., S.A., A.A., and I.A. Issue five is overruled.

Conclusion

The judgment of the trial court terminating A.A.'s parental rights is affirmed.

Judy C. Parker
Justice