



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

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No. 07-18-00108-CV

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**IN THE INTEREST OF A.L., H.J., AND H.J., CHILDREN**

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**On Appeal from the 100th District Court  
Donley County, Texas  
Trial Court No. DCPS-16-07280, Honorable Stuart Messer, Presiding**

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**July 20, 2018**

**MEMORANDUM OPINION**

**Before QUINN, C.J., and PIRTLE and PARKER, JJ.**

“Harry” appeals the trial court’s order terminating his parental rights to his children, “Henry” and “Heather.”<sup>1</sup> Velma is the mother of Alex, Henry, and Heather. The court also terminated the parental rights of Velma and the father of Alex, but they did not appeal. Harry challenges the sufficiency of the evidence to support the trial court’s finding that termination of his parental rights is in the best interest of the children. We will affirm the trial court’s order.

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<sup>1</sup> To protect the children’s privacy, we will refer to the appellant father as “Harry,” the children the subject of this appeal as “Henry” and “Heather,” the children’s sibling as “Alex,” and the mother of the children as “Velma.” See TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2017); TEX. R. APP. P. 9.8(b).

## Background

In May of 2016, the Texas Department of Family and Protective Services received a report that Velma and her thirteen-year-old son, Alex, were involved in a physical altercation. Velma was arrested and charged with assault. The Department received another report in September of 2016 alleging physical abuse and neglectful supervision of Alex by Velma and her boyfriend, Harry, and neglectful supervision of Velma and Harry's children—Henry, nine years old, and Heather, seven years old. There were also concerns involving drug use in the home by Harry and Velma. During the Department's investigation, Velma tested positive for methamphetamine and marijuana. Harry refused to submit to a drug screen, but admitted that he had a history of drug use.

On October 19, 2016, the Department was granted temporary managing conservatorship of the children and assigned Neal Leeper as the caseworker. Leeper provided a service plan to each parent to assist them in regaining custody of the children and the court ordered compliance with the plan requirements. Harry's service plan required him to complete the following services: maintain a drug-free lifestyle and abstain from the use of illegal drugs; complete a drug and alcohol assessment with Outreach Screening Assessment and Referral (OSAR) and follow all recommendations; submit to random drug testing; participate in rational behavior training (RBT); attend individual counseling with Tina Souder; participate in a psychological evaluation; locate and maintain stable housing; maintain legal employment; maintain contact with the Department; and attend weekly visitation with the children.

Harry submitted to a psychological evaluation and completed RBT. Harry submitted to some but not all of the requested drug testing. When Harry submitted to drug testing he tested positive for methamphetamine and marijuana at “very high levels.” Harry’s hair follicle drug test on October 16, 2016, was positive for methamphetamine and amphetamine. His urinalysis on November 16, 2016, was positive for methamphetamine, marijuana, and amphetamine. Harry did not submit to court-ordered drug testing in February or May of 2017. Harry’s hair follicle test on August 18, 2017, was positive for marijuana, but there was not sufficient hair to test for other drugs. The urinalysis for that same date was positive for methamphetamine and marijuana.

Harry had his first OSAR assessment on December 28, 2016. He admitted to using marijuana and methamphetamine three days a week, with the last use late November or early December. The assessment indicated that Harry minimized the frequency of his drug use and its negative consequences. The recommendation from the OSAR assessment was that Harry attend the Amarillo Council on Alcoholism and Drug Abuse outpatient program (ACADA) and the Parenting Awareness and Drug Risk Education program (PADRE). Harry failed to follow through with either of these programs.

Harry’s second OSAR assessment was on September 20, 2017. The recommendation was inpatient drug treatment based on his admission to using methamphetamine five days a week, with the last use on September 19, 2017, and marijuana use four days a week, with the last use on September 18, 2017. Harry said he had not been motivated to stop using drugs because the children were not in his home. He had recently learned that he was at risk of losing his kids because of his drug use. He also said that he was seeing a counselor every two weeks. Harry was admitted to

managed care, an inpatient drug treatment program, on October 3, 2017. He was discharged for noncompliance shortly thereafter.

On February 2, 2017, the court ordered Harry to pay child support of \$225 per month beginning February 15, 2017, and \$50 per month for medical support. Harry did not make any of these payments.

Harry was originally scheduled to attend individual counseling with Tina Souder. Harry attended one appointment on November 17, 2016. He did not attend appointments scheduled on November 1, November 8, December 1, and December 13, 2016. He did not call back to schedule an appointment until May 4, 2017. He did not show for that appointment or the appointment rescheduled for May 22, 2017.

Although Velma and Harry eventually separated, they exercised visitation with the children together. Both visitation supervisors indicated that the children were bonded to their parents and there was good interaction between them.

Tina Souder provided therapy for Henry and Heather beginning in December of 2016. Both children made progress in therapy. Henry has come out of his shell and has become more confident. Initially Heather was guarded, resistant, and angry, but now she is pleasant and not as defensive. Heather's progress in therapy has been aided by the foster parents' active involvement in ensuring that Souder was aware of any issues that occurred between therapy appointments that needed to be addressed. When the Department's goal changed from reunification to adoptive placement, Souder addressed the issue in the sessions with Henry and Heather. Both children miss their brother Alex

and want to be able to continue to see him. They also desire to preserve the memory of their parents. Henry has demonstrated “more resistance” to being adopted.

Henry and Heather are doing well in their foster family placement and have talked about the possibility of getting to stay there. The structure is very good for them. The Department was recently asked to perform a home study on Harry’s sister-in-law and it plans to do so. The Department’s goal for the children is adoption if parental rights are terminated. Souder will continue to provide counseling to the children after the termination hearing.

On August 30, 2017, Harry went to his first individual therapy session with Tim Enevoldsen. Harry told Enevoldsen that his last use of methamphetamine was one and a half weeks prior to his appointment. He said he was trying to wean himself off of methamphetamine and states that he “does well for a little bit and then falls back.” Harry went to an AA meeting a week ago and he is committed to going twice a week. He reported that “they are close to terminating his rights, so everything is a lot more real.” At the next session on September 13, 2017, Harry reported that he did not have any place to live so he was staying with a friend. Harry told Enevoldsen that he is “using” a lot less and that he plans to go to inpatient drug treatment. Harry’s last therapy session was November 15, 2017. He said he was released early from drug treatment and he was no longer in a relationship with Velma. He had been looking for a job for the past two and a half weeks. Enevoldsen testified that treatment was Harry’s best opportunity to get clean and he squandered it. Harry made a subsequent appointment but he did not attend. He completed three out of the required six sessions of therapy. According to Enevoldsen, Harry does not take his sobriety very seriously.

On advice of counsel, Harry invoked his Fifth Amendment privilege and did not testify at trial. The trial court terminated Harry's parental rights to Henry and Heather on the grounds of endangerment, failure to support the children in accordance with his ability, failure to comply with a court order that established actions necessary to retain custody of the children, and failure to complete a court-ordered substance abuse treatment program. See TEX. FAM. CODE ANN. § 161.001(b)(1) (E), (F), (O), (P) (West Supp. 2017).<sup>2</sup> The court also found that clear and convincing evidence demonstrated that termination was in the best interest of Henry and Heather. See § 161.001(b)(2).

#### Applicable Law

A parent's right 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. 1994)). 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.*

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<sup>2</sup> Further references to provisions of the Texas Family Code will be by reference to "section \_\_\_" or "§ \_\_\_."

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 factfinder’s conclusions, we must assume that the factfinder resolved

disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder 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 factfinder 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 factfinder 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 factfinder 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 factfinder 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 factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

#### Analysis - Best Interest of the Children

Harry does not contest the statutory basis for termination under section 161.001(b)(1), thereby conceding that the evidence was legally and factually sufficient to terminate his parental rights under at least one of subsections (E), (F), (O), and (P). Harry



challenges the factual and legal 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. See *In re B.C.S.*, 479 S.W.3d 918, 927 (Tex. App.—El Paso 2015, no pet.). 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 Desires of the Children

Henry and Heather are bonded to their father and their interaction in supervised visits has been good. Both children have struggled with accepting the possibility that they may not return to him. Henry has been resistant to being adopted. Through counseling, both children have transitioned to looking at the possibilities of adoption. The children love their foster family and they talk about the fun things they do. The foster placement is structured and provides the stability the children need. This factor weighs neither for nor against termination.

#### 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), *disapproved on other grounds by*, *In re J.F.C.*, 96 S.W.3d at 267. A trial court is entitled to consider a parent's history

of drug use and irresponsible choices. *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009). Evidence of a parent's past misconduct or neglect is permissible as an inference that a parent's future conduct may be measured by their past conduct. *In re D.S.*, 333 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.). 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.).

The trial court's determination that Harry engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children supports the proposition that termination is in the children's best interest under the second and third *Holley* factors. *In re C.H.*, 89 S.W.3d at 28; *In re E.C.R.*, 402 S.W.3d at 249. We also consider Harry's continued use of methamphetamine and marijuana during the pendency of the case as further proof that he endangered the children. See *In re F.A.R.*, No. 11-04-00014-CV, 2005 Tex. App. LEXIS 234, at \*11-12 (Tex. App.—Eastland Jan. 13, 2005, no pet.) (mem. op) (parent's continued drug use demonstrates an "inability to provide a stable environment for [the child] and an inability to provide for his emotional and physical needs"). The trial court could have concluded that Harry is unable to meet the physical or emotional needs of the children and is unable to protect the children from physical or emotional danger.

Harry's history of drug use, his continuous abuse of methamphetamine and marijuana after the children were removed from his home, and his failure to complete inpatient drug treatment suggests that similar conduct will occur in the future. *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 267. The factfinder 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. *Id.* 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 factfinder 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.). A parent's exposure of a child to drug use and violence may be properly considered in determining whether a parent has demonstrated appropriate parenting abilities. *In re H.D.*, No. 01-12-00007-CV, 2013 Tex. App. LEXIS 5699, at \*42 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (mem. op). The factfinder 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 [himself] 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.)).

Although Harry completed some of the court-ordered services, he failed to complete individual counseling or to complete drug treatment. Harry's therapist testified that drug treatment was Harry's best opportunity to get clean and he squandered it. Harry's failure to complete these court-ordered services could have led the trial court to conclude that Harry did not have the ability to motivate himself 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

We will consider the sixth and seventh factors together. The sixth factor examines the plans for the children 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 factfinder 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.

Harry did not testify at the termination hearing or offer any specifics of his plans for the children. The children have made remarkable progress in counseling. The caseworker testified that the children are doing well in the structured environment provided by the foster family placement and the placement is responsive to the children's needs. Additionally, the foster parents are interested in adopting Henry and Heather 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. In the twenty months that the children have been in the care of the Department, Harry has continued to use methamphetamine and marijuana and he has tested positive for these drugs "at very high

levels” throughout the pendency of the case. While he completed a psychological evaluation and RBT, he has failed to complete most of his court-ordered services. Additionally, he has had difficulty maintaining a job and a place to live. Harry’s history of drug use and current lifestyle is wholly inconsistent with a proper parent-child relationship. 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 Harry’s parental rights is in the best interest of Henry and Heather.

#### Conclusion

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

Judy C. Parker  
Justice