In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00192-CV

IN THE INTEREST OF K.S., A CHILD

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 86,810-D; Honorable Carry Baker, Presiding

August 29, 2018

MEMORANDUM OPINION

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

Appellant, T.S., appeals the trial court's order terminating his parental rights to his child, K.S.[1] By a sole issue, he maintains the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights is in his son's best interest. 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). *See also* TEX. R. APP. P. 9.8(b). The child's mother's parental rights were also terminated in this proceeding, but she did not appeal.

BACKGROUND

In October 2016, when K.S. was just two years old, the Department of Family and Protective Services received a complaint of neglectful supervision. The child's mother had a registered sex offender living with her who had unsupervised access to K.S, a male child. The mother has an extensive criminal history and abuses drugs, and at the time of removal, she was advertising her services as an escort on a website. The Department requested emergency removal of K.S. and his two older siblings from the mother's home.[2] At that time, K.S.'s father, T.S., was incarcerated for possession of a controlled substance. In November 2016, the Department filed its petition for termination of parental rights and the following month, T.S. was released from incarceration.

The Department's caseworker and the parents attended a family group conference to discuss implementation of a family service plan. Once a plan was developed for each parent, the required services were discussed and explained to each parent. The caseworker met with T.S. once a month until he was again arrested in March 2017, for an arson he allegedly committed in 2014. At the time of his arrest, he had not completed any of the required services.

T.S. accepted a plea bargain for the arson charge and was sentenced to seven years confinement on November 9, 2017. At the time of the final hearing on April 4, 2018, K.S.'s mother was incarcerated and under indictment for two counts of solicitation of capital murder and conspiracy to commit capital murder for remuneration.

[2] The two older siblings have a different biological father and are not parties to this appeal.

The only witnesses at the termination hearing were the caseworker, the children's mother, and T.S. After the trial court heard their testimonies and considered the exhibits admitted into evidence, it announced that T.S.'s parental rights to K.S. were being terminated based on the following statutory grounds: (1) failing to comply with a court order that established the actions necessary for the parent to obtain the return of the child following his removal by the Department under chapter 262 of the Family Code and (2) knowingly engaging 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)(O), (Q) (West Supp. 2017).[3] The trial court also found that termination of T.S.'s parental rights was in the child's best interest. § 161.001(b)(2).

APPLICABLE LAW

The Texas Family Code permits a court to terminate the relationship between a parent and a child if the Department establishes (1) one or more acts or omissions enumerated under section 161.001(b)(1) of the Code and (2) that termination of that relationship is in the best interest of the child. *See* § 161.001(b)(1), (2); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). The burden of proof is by clear and convincing evidence. § 161.206(a) (West 2014). "'Clear and convincing evidence' means 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).

[3] All further references to "section" or "§" are to the Texas Family Code unless otherwise designated.

STANDARD OF REVIEW

The natural right existing between parents and their children is of constitutional magnitude. *See Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). *See also Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently, termination proceedings are strictly construed in favor of the parent. *In the Interest of E.R.*, 385 S.W.3d 552, 563 (Tex. 2012). Parental rights, however, are not absolute, and it is essential that the emotional and physical interests of a child not be sacrificed merely to preserve those rights. *In the Interest of C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). The Due Process Clause of the United States Constitution and section 161.001 of the Texas Family Code require application of the heightened standard of clear and convincing evidence in cases involving involuntary termination of parental rights. *See In the Interest of E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In the Interest of J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

In a legal sufficiency challenge, we 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. *In re K.M.L.*, 443 S.W.3d 101, 112-13 (Tex. 2014). However, the reviewing court should not disregard undisputed facts that do not support the verdict to determine whether there is clear and convincing evidence. *Id.* at 113. In cases requiring clear and convincing evidence, even evidence that does more than raise surmise and suspicion will not suffice unless that evidence is capable of producing a firm belief or conviction that the allegation is true. *Id.* If, after conducting a legal sufficiency review, a court determines that no reasonable fact finder could form a firm belief or

conviction that the matter that must be proven is true, then the evidence is legally insufficient. *Id.* (citing *In the Interest of J.F.C.*, 96 S.W.3d at 266).

In a factual sufficiency review, a court of appeals must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *In the Interest of J.F.C.*, 96 S.W.3d at 266 (citing *In the Interest of C.H.*, 89 S.W.3d at 25). 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. *In the Interest of J.F.C.*, 96 S.W.3d at 266. We consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its finding. 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.*

BEST INTEREST FINDING

T.S. does not challenge any of the statutory grounds for termination. Rather, he opposes the trial court's finding that termination of his parental rights was in K.S.'s best interest.

The Department was required to prove by clear and convincing evidence that termination of T.S.'s parental rights was in his child's best interest. § 161.001(b)(2); *In re K.M.L.*, 443 S.W.3d at 116. Only if no reasonable fact finder could have formed a firm belief or conviction that termination of his parental rights was in his child's best interest

can we conclude the evidence is legally insufficient. *Id.* (citing *In the Interest of J.F.C.*, 96 S.W.3d at 266).

There is a strong presumption that the best interest of the child will be served by preserving the parent-child relationship. *In the Interest of R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *See* § 263.307(a) (West Supp. 2017). Section 263.307(b) of the Family Code provides a non-exhaustive list of factors to consider in determining whether the parent is willing and able to provide the child with a safe environment. One of those factors is providing the child with a safe physical home environment. § 263.307(b)(12)(D).

Additionally, the Supreme Court has set out other factors to consider when determining the best interest of a child. *See Holley*, 544 S.W.2d at 371-72. Those 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 individual seeking custody; (5) the programs available to assist the individual to promote the best interest of the child; (6) the plans for the child by the individual 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 a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* The absence of evidence of one or more of these factors does not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest. *In re C.H.*, 89 S.W.3d at 27.

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 the Interest of C.H.*, 89 S.W.3d at 28. *See also In the Interest of E.C.R.*, 402 S.W.3d 239, 249-50 (Tex. 2013). The best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as direct evidence. *See In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). Additionally, 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 the Interest of K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

ANALYSIS

The caseworker admitted during cross-examination that immediately upon T.S.'s release from prison on the possession conviction, he contacted the Department and signed his family service plan. At that time, he was living with his girlfriend and working at a fast-food restaurant. He did have a few visits with his son prior to his arrest for arson, which resulted from a charge in 2014. He had not committed a new offense upon his release for the possession conviction.

K.S. was too young to express his desires. Although numerous programs were available for T.S. to help him improve his parental skills, he did not avail himself of them prior to his arrest and not all services were available to him in prison. T.S. did provide the Department with the names of relatives as placement options, but they were either deemed inappropriate or unwilling to care for K.S.

T.S. did not have a suitable home for K.S. and after his incarceration for arson, he did not have the resources or support system necessary to care for the child. At the time of the final hearing, K.S. was living in a foster home in Lubbock with one of his siblings. His older sister was in a residential treatment facility but according to the caseworker, the foster parents assured her that the two younger siblings could have a relationship with their older sister. The caseworker testified that K.S. was doing very well with his foster family. The Department's plan was for the foster parents to adopt the two siblings currently in their custody and potentially allow the older sister to move in with them if her behavioral issues improved.

The Department filed its petition for termination on November 4, 2016. T.S. was incarcerated on November 9, 2017. At the time of the final hearing, he was serving a seven-year sentence for arson and was unable to provide a safe and stable home for his son. The caseworker was unsure of T.S.'s possible release date from prison. His counsel suggested that according to the Texas Department of Criminal Justice website, T.S. was eligible for parole and could potentially be released prior to serving less than two years from the date of filing of the petition.

T.S. testified he expected to be released on parole at his next hearing which is scheduled for January 1, 2019. However, during cross-examination, he acknowledged that his projected release date with good behavior was 2020. When questioned about being denied parole in January 2018, he imparted the reasons given to him by the parole board were because of his past criminal history and that it was likely he would commit another offense. He acknowledged there was no guarantee of his release at his next

parole hearing. *See In the Interest of H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam) (noting that parole decisions are inherently speculative).

With the goal of termination proceedings being prompt and permanent placement and stability for the child, based on the record before us, we find that a fact finder could reasonably have formed a firm belief or conviction that termination of T.S.'s parental rights was in K.S.'s best interest. T.S.'s sole issue is overruled.

CONCLUSION

The trial's court's order terminating T.S.'s parental rights to K.S. is affirmed.

Patrick A. Pirtle
Justice