In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00299-CV

IN THE INTEREST OF I.O., N.S., AND J.S., CHILDREN

On Appeal from County Court at Law Number 1
Randall County, Texas
Trial Court No. 78,164-L1; Honorable James Anderson, Presiding

April 29, 2022

OPINION

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

Appellant, A.O., presents two issues challenging the trial court's order terminating her parental rights to her three sons, I.O., N.S., and J.S.[1] First, she contends the trial court erred in terminating her parental rights prior to expiration of the statutory extension for dismissal under section 263.401(b) of the Texas Family Code. Second, she questions whether termination was in her children's best interests. 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). *See also* TEX. R. APP. P. 9.8(b).

BACKGROUND

A.O. has a history with Appellee, the Texas Department of Family and Protective Services. Prior to the initiation of the underlying case, she previously lost custody of two older children. Furthermore, the children the subject of this proceeding had previously been removed from her care; however, they were subsequently returned to her. In May 2020, they were again removed on a report of neglectful supervision and drug use by her and her live-in boyfriend. Her boyfriend, a heroin addict, had overdosed several times necessitating intervention by law enforcement. He has also perpetrated domestic violence against A.O.[2] The evidence showed that neither the boyfriend's overdoses nor incidents of domestic violence occurred in the children's presence. However, the Department's case showed that A.O. was not prioritizing the needs of her children over those of her boyfriend.

After the children were removed from A.O., the trial court appointed her possessory conservator with rights of visitation. The Department, on two separate occasions, moved the trial court to halt her visitation due to her lack of progress. The trial court granted the Department's motions.

A.O. signed a family service plan that was explained to her by her caseworker. She did not fully comply with the requirements of the plan, continued using drugs, and remained in a toxic relationship with her boyfriend.

[2] The children's biological father was in prison during this most recent case and has a history of domestic violence committed against A.O.

A.O. has a history of intravenous methamphetamine use, and at the time of the final hearing, she had participated in at least six substance abuse treatment programs. She either failed to complete most programs or relapsed quickly after completion of the programs. During the course of the proceedings, she did not have a stable home or any employment. Just days before the final hearing, A.O.'s boyfriend was arrested for assaulting her and, without his constant influence, she finally began to focus on her services.

In December 2020, when the children were ages two, three, and five, they began sessions with a counselor. The counselor testified that all three children suffered from adjustment disorders and neglect and I.O, the oldest child, had been diagnosed with autism. The counselor believed I.O. required further evaluation due to the complications of an autism diagnosis. At the final hearing, she opined the children had made progress from counseling.

On June 16, 2021, the trial court signed an order retaining the suit on its docket until December 18, 2021 (a Saturday). The order set a trial date of July 13, 2021; however, the final hearing did not commence until August 3. During that hearing, it was revealed that A.O.'s husband, the presumed father of the children, was not the biological father. The hearing was recessed to serve the children's natural father.

The final hearing resumed on October 5, 2021. After presentation of testimony and evidence, the trial court found the Department had presented clear and convincing evidence to support termination of A.O.'s parental rights to her children on the following grounds:

- knowingly placed or allowed the children to remain in conditions or surroundings which endangered their well-being;

- engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their well-being;

- failed to comply with a court order that established the actions necessary for the parent to obtain the return of the children following their removal under chapter 262 of the Family Code; and

- used a controlled substance, as defined by chapter 481 of the Texas Health and Safety Code in a manner that endangered the health or safety of the children and failed to complete a court-ordered substance abuse treatment program or after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.

See TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O), and (P). The trial court also found that termination of A.O.'s parental rights was in her children's best interests. § 161.001(b)(2).

A.O. requested a *de novo* hearing which was held on November 10, 2021. The trial court reviewed the transcript from the final hearing and heard additional testimony from witnesses for both A.O. and the Department. According to several witnesses from Martha's Home, a women's homeless shelter, A.O. was following its rules. However, no details were offered on the rules and requirements for residing at Martha's Home and no proof was offered that A.O. was drug-free. The case manager for Martha's Home described A.O. as a model resident.

The Department presented testimony that A.O. had been unsuccessful in approximately six other substance abuse programs. The testimony also showed she did not have a home for her children, nor did she have stable employment at the time of the hearing. After reviewing the transcript from the final hearing and considering the new

testimony, the trial court found that in fifteen months A.O. had not been able to maintain her sobriety and did not present any proof that she had successfully completed a treatment program and could maintain her sobriety. Based on those findings, the trial court affirmed the termination order.

ISSUE ONE—TERMINATION OF PARENTAL RIGHTS BEFORE DISMISSAL DATE

A.O. presents a novel argument alleging the trial court erred in terminating her parental rights before the expiration of the extended deadline of December 18, 2021. She contends doing so was unconstitutional and deprived her of additional time to work her services. Under the circumstances of this case, we disagree.

APPLICABLE LAW

Section 263.401(b) of the Texas Family Code authorizes the trial court to retain a termination proceeding on its docket for not longer than 180 days after the statutory deadline provided in paragraph (a) of the statute. § 263.401(b). That deadline is the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator. § 263.401(a). The trial court may grant the extension when it finds that extraordinary circumstances necessitate a child remaining in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the best interest of the child. In 2019, the Legislature amended section 263.401 by adding that the trial court shall consider whether the parent made a good faith effort to successfully complete a substance abuse treatment program in determining whether to

find extraordinary circumstances for a child to remain in the temporary managing conservatorship of the Department. § 263.401(b-1).[3]

Section 263.401 does not provide a standard for appellate review but some courts, including this court, have applied the abuse-of-discretion standard comparing the statutory extension to a motion for continuance. *In re H.M.M.*, No. 11-20-00026-CV, 2020 Tex. App. LEXIS 5383, at *2 (Tex. App.—Eastland July 16, 2020, no pet.) (mem. op.); *In re A.B.*, No. 07-19-00180-CV, 2019 Tex. App. LEXIS 9110, at *10 (Tex. App.—Amarillo Oct. 15, 2019, no pet.) (mem. op.); *In re D.W.*, 249 S.W.3d 625, 647 (Tex. App.—Fort Worth 2008), *pet. denied*, 260 S.W.3d 462 (Tex. 2008) (per curiam).

A possible reason for allowing a 180-day extension may be to consider a situation in which a parent is actively working to address the concerns giving rise to the Department's action and, hopefully, obviating the need to permanently sever the parent-child relationship. *See In re J.G.K.*, No. 02-10-00188-CV, 2011 Tex. App. LEXIS 4836, at *106 (Tex. App.—Fort Worth June 23, 2011, no pet.) (mem. op.). *See generally In re C.T.*, 491 S.W.3d 323, 329 (Tex. 2016) (Guzman, J. dissenting on denial of rehearing of denial of petition for writ of mandamus). In her dissent, Justice Guzman conceded that the Supreme Court has provided little guidance on the rationale for the statutory extension. *Id.* She also noted that at least one intermediate appellate court has concluded that the trial court's inability to set a jury trial until after the one-year dismissal date qualified as an extraordinary circumstance. *Id.* (citing *In re T.T.F.*, 331 S.W.3d 461, 478 (Tex. App.—Fort Worth 2012, no pet.)).

[3] *See* Act of May 22, 2019, 86th Leg., R.S., ch. 783, § 1, 2019 Tex. Gen. Laws 2228.

ANALYSIS

The Department filed its original petition on June 17, 2020, and was appointed temporary managing conservator on that same date. With a dismissal deadline of December 12, 2021, pending, the final hearing commenced on August 3, 2021, and recessed to serve the children's biological father. The final hearing resumed on October 5, 2021. Thereafter, on October 25, 2021, the trial court signed the final termination order, less than two months before the extended deadline.

During the final hearing, the caseworker was asked if A.O. would be logistically able to complete her services by December 18, 2021. She responded that although it was possible, A.O. would not have time to sustain her sobriety and demonstrate stability. She expressed the Department's concern with A.O.'s constant relapses and that even if A.O. could sustain her sobriety, it would not change the Department's recommendation for termination. She explained that A.O. would need more time to demonstrate sobriety and stability given that her preferred method of drug use is intravenous. Although the caseworker answered affirmatively when asked if A.O. could possibly be named possessory conservator while completing her services, the caseworker declared that any success by A.O. was hypothetical.

The statutory extension provided in section 263.401 is a legislatively imposed deadline. Nowhere in the statute did the Legislature express intent to permit a parent the entire 180 additional days in which to complete the required services. Legislatively imposed deadlines in termination cases are to provide expediency to the proceedings and bring resolution to the parties involved. *See In re T.C.*, No. 10-10-00207-CV, 2010 Tex. App. LEXIS 9685, at *19 (Tex. App.—Waco Dec. 1, 2010, pet. denied) (mem. op.)

("By enacting the deadlines that exist in cases where the Department has conservatorship of children, the Legislature has demonstrated its intent to achieve permanence for children as promptly as possible.").

A.O.'s complaint that she should have been given full advantage of the 180-day extension to complete her services conflicts with her conduct throughout the history of her case. Even if A.O. had been given more time (October 25 through December 18) to complete her substance abuse treatment program, her caseworker testified that the Department prefers to see a period of stability from the parent, something A.O. had been unable to do in her previous six attempts in substance abuse programs. She had not focused on her sobriety until her boyfriend was arrested and was no longer an influence on her. She had over fifteen months to complete a substance abuse program and had previously failed at other programs. A.O. had a history of intravenous methamphetamine use and a history of not completing her treatment programs or relapsing quickly after completion. Also, her past history indicates it was highly unlikely that she would have been able to provide a suitable home for the children and maintain stable employment. In June 2021, she was residing in a sober living home in Midland, and thereafter, she moved in with a friend. The only evidence of employment throughout the case was A.O.'s self-reporting to her caseworker that she worked at a motel for three weeks. Despite being requested to furnish proof of her employment, no documentation of employment was offered. There was also no evidence that A.O. had a support system to assist her with the children.[4]

[4] When the children were removed, A.O. advised the Department that she had no one with whom to place them.

At the *de novo* hearing, the trial court allowed testimony showing that since the final hearing in October, A.O. was living as a resident at Martha's Home. Although the program's case manager testified that A.O. had a good attitude and was a model resident, the Department presented testimony recommending termination based on A.O.'s prior history with the Department, her continued drug use, and her inability to remain sober after numerous programs.

Given A.O.'s history of relapses, the trial court reasonably could have found that she had not made a good faith effort to successfully complete her most recent program (which she did not even begin until termination proceedings had been pending for thirteen months). *See In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009) (noting that a parent's recently improved conduct, "especially of short-duration does not conclusively negate the probative value of a long history of drug use and irresponsible choices"). *See also In re A.C.B.*, 198 S.W.3d 294, 298 (Tex. App.—Amarillo 2006, no pet.) (observing that a "recent turnaround" and compliance with a service plan is not determinative of best interest). Too often in situations such as this, that old adage is true—too little, too late.

Additionally, as the Department points out, at no time did A.O. file a motion for continuance requesting additional time to complete her treatment program. Although some courts have compared the 180-day extension to a motion for continuance, a formal motion for continuance is a prerequisite to preserving the issue for appeal. TEX. R. APP. P. 33.1(a). Even if A.O. had filed a motion for continuance to complete her treatment program, it is reasonable to presume the trial court would have denied it given the entire procedural history of the case—the numerous failed attempts at completing other treatment programs and A.O.'s inability to maintain her sobriety. *See In re A.L.H.*, No.

04-20-00452-CV, 2021 Tex. App. LEXIS 2199, at *4-5 (Tex. App.—San Antonio March 24, 2021, pet. denied) (mem. op.) (denying motion for continuance by a parent seeking to comply with services within the statutory twelve-month time frame). We find no abuse of discretion in the trial court signing the termination order before the expiration of the dismissal deadline. Issue one is overruled.

ISSUE TWO—BEST INTEREST FINDING

A.O. does not challenge any of the statutory grounds for termination, and as a result, the trial court's findings related to those grounds are final. However, she does challenge the sufficiency of the evidence to support the trial court's finding that termination of her parental rights was in her children's best interests.

APPLICABLE LAW

The Texas Family Code permits a court to terminate the relationship between a parent and a child if the Department establishes one or more acts or omissions enumerated under section 161.001(b)(1) of the Code and 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). "'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.

The clear and convincing evidence standard does not mean the evidence must negate all reasonable doubt or that the evidence must be uncontroverted. *In re R.D.S.*, 902 S.W.2d 714, 716 (Tex. App.—Amarillo 1995, no writ). The reviewing court must recall

that the trier of fact has the authority to weigh the evidence, draw reasonable inferences therefrom, and choose between conflicting inferences. *Id.* The fact finder also enjoys the right to resolve credibility issues and conflicts within the evidence and may freely choose to believe all, part, or none of the testimony espoused by any witness. *Id*. Where conflicting evidence is present, the fact finder's determination on such matters is generally regarded as conclusive. *In re B.R*., 950 S.W.2d 113, 121 (Tex. App.—El Paso 1997, no writ).

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). Consequently, termination proceedings are strictly construed in favor of the parent. *In re 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 are not sacrificed merely to preserve those rights. *In re 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 re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In re 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 re 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 re J.F.C.*, 96 S.W.3d at 266 (citing *In re 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 re J.F.C.*, 96 S.W.3d at 266. When faced with conflicting evidence, we must also consider whether the disputed evidence is such that a reasonable fact finder could not have resolved that 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.*

A determination of best interest necessitates a focus on the child, not the parent. *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). When conducting an appellate review of a *best interest* finding, the court should keep in mind that 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).

To assess the trial court's best interest finding, we consider factors enumerated in the non-exhaustive list set forth in section 263.307(b) of the Family Code. We also consider other factors 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.* "[T]he State need not prove all of the factors as a condition precedent to parental termination, 'particularly if the evidence were [sic] 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)). 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 id.* at 28. But such evidence does not relieve the Department of its heightened burden of proof

to show that termination is in a child's best interest. *In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.).

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 re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

ANALYSIS

The evidence established that A.O. had a history of drug abuse, domestic violence, and an inability to consistently provide her children with a stable home. Here, the desires of the children were not expressed in the record; however, the children's counselor testified about the complications of I.O.'s autism and the children's issues with stress and changes. The counselor expressed that A.O.'s behavior could result in future neglect of the children as well as physical or emotional harm to them. According to the counselor, she conducted psychological evaluations on the children, and through counseling, they had made "quite a bit of progression." According to her testimony, I.O. was smiling more, had become more verbal, and could describe his feelings.

The Department's caseworker testified that A.O. did not regularly maintain contact with the Department until her boyfriend was arrested. At the time of the final hearing, she did not have stable housing, and at times she was either homeless or participating in a treatment program. Occasionally, she lived with friends.

The caseworker testified that she had monthly visits with A.O. and described her as looking unhealthy. She had needle tracks on her arms and an abscess between her toes from injecting methamphetamine. When the caseworker was asked if it was in the children's best interests to terminate A.O.'s parental rights, she answered, "I believe that at this time it is." When asked to give details on her answer, she added that A.O. struggles with drug addiction, engages in relationships that involve domestic violence, and can barely protect herself, much less her children. She also testified that A.O. had charges pending for hiding a fugitive.

Regarding the children's current living arrangement, the caseworker indicated they are doing very well in their placement but that their placement is unsure on whether to pursue adoption. She indicated that she had located relatives in Missouri, as well as the maternal grandmother and a paternal aunt, who had expressed interest in the children.

The children's paternal grandfather was also interested in adopting the children. When the case was initiated, the grandfather's home study was declined due to his criminal history and his wife's criminal history. However, during his testimony at the final hearing, he explained that he was released from prison in 2006 for aggravated assault and had been sober for seven years. His wife of three years had successfully completed deferred adjudication community supervision for a possession charge. Both of them were employed and have "a fairly good size" two-bedroom house on a ranch. He is employed at Faith City Mission as a case manager and prior to the pandemic, he worked with the Amarillo Police Department in CIT training. His wife works at a fast-food restaurant and they have the financial ability to care for the children.

The grandfather further testified that in the past, he and his wife have helped take care of the children. The children have stayed overnight with them. They have spent holidays and birthdays together. Additionally, they have spent some time in visitation with the children during the pending case. The grandfather considered himself bonded with the children and believed their best interests would be served by being with family.

At the *de novo* hearing, A.O. presented brief testimony from two witnesses involved with her treatment at Martha's Home. They offered favorable testimony. The Department's witness reiterated, however, that she felt termination was in the children's best interests based on A.O.'s inability to refrain from methamphetamine use despite her participation in multiple treatment programs during the course of the proceedings. Martha's Home was her seventh attempt at rehabilitation. During cross-examination, A.O.'s counsel asked, "Does it appear that she's got it right this time?" The caseworker responded, "She hasn't been sober long enough to -- to remain -- to show stability."

In evaluating the *Holley* factors, we find the Department presented clear and convincing evidence on which a reasonable fact finder could have formed a firm belief or conviction that termination of A.O.'s parental rights was in the children's best interests. Issue two is overruled.

CONCLUSION

The trial court's *Order of Termination Following De Novo Hearing* is affirmed.

Patrick A. Pirtle
Justice