

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00073-CV

D. B., Sr., Appellant

v.

Texas Department of Family and Protective Services, Appellee

**FROM THE DISTRICT COURT OF BELL COUNTY, 146TH JUDICIAL DISTRICT
NO. 246,324-B, HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellant D.B., Sr. (“Father”) appeals from the trial court’s decree terminating his parental rights to his children, T.B., D.B., and D.L.B. *See* Tex. Fam. Code § 161.001. In two issues, Father challenges the legal and factual sufficiency of the evidence to support the termination of his parental rights. We will affirm the trial court’s decree of termination.

BACKGROUND

The record shows that the Department of Family and Protective Services (“the Department”) initially took custody of Father’s three children in 2010 based on allegations of physical neglect, neglectful supervision, and physical abuse of the children by Father and the children’s mother, as well as domestic violence between Father and the children’s mother.¹ A

¹ The children’s mother signed an affidavit of relinquishment of parental rights in 2014, and the trial court terminated her rights based on the affidavit. This appeal involves only Father’s

psychologist conducted a psychological evaluation of Father at the time and diagnosed him with schizoaffective disorder and “parent-child relational problem.” The psychologist also noted that Father indicated that he had previously been diagnosed with schizoaffective disorder and borderline personality disorder and that he had twice been placed in psychiatric hospitals due to him making suicidal and homicidal threats.

Ultimately, the Department placed the children back in Father’s custody in July 2011 and monitored Father and the children for six months before closing the case. In approximately February 2013, Father placed the children in a children’s home because he was having financial difficulties. The children stayed in the home until April 2014, when an employee of the home notified Father that his children could no longer stay there due to their behavior, including the youngest son exhibiting behavior indicating he was at risk of harming himself. Father picked up the children and briefly took them home with him before placing them in another children’s home. He then checked himself into a residential treatment facility for alcohol abuse. Shortly after he began residing at the facility, an employee of the children’s home in which the children were then residing indicated to Father that the home was planning to discharge the children because it could not manage the children’s behavioral and mental-health issues. At the same time, the employee at the children’s home also contacted the Department to alert it to the situation.

A Department caseworker went to Father’s treatment facility to discuss placement options for the children. Father made phone calls to try to find someone who could take the children, and when he was unsuccessful, he became angry, throwing chairs and throwing a phone that bounced

parental rights to the children.

off the floor and hit the caseworker. He was arrested and served six months in jail. The Department took custody of the children and eventually moved for termination of Father's parental rights. At the time of trial, Father had a pending criminal charge for allegedly assaulting his former girlfriend in a bar three months before the trial began.

At the conclusion of a bench trial, the trial court found that Father (1) knowingly placed and knowingly allowed the children to remain in conditions and surroundings that endangered the physical and emotional well-being of the children and (2) engaged in conduct and knowingly placed the children with people who engaged in conduct that endangered the physical and emotional well-being of the children. The trial court also found that termination of Father's parental rights to the children was in the children's best interest. This appeal followed.

DISCUSSION

To terminate the parent-child relationship, a court must find by clear and convincing evidence that (1) the parent has committed one of the enumerated statutory grounds for termination and (2) termination of the parent's rights is in the children's best interest. *See id.* § 161.001(b). Here, the trial court found that both grounds were satisfied and terminated Father's parental rights. On appeal, Father challenges the legal and factual sufficiency of the evidence to support both grounds.

“The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed.” *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). When reviewing the legal sufficiency of the evidence in a parental-rights-termination case, we consider all the evidence in the

light most favorable to the finding and determine whether a reasonable fact-finder could have formed a firm belief or conviction that its finding was true. *Id.* We assume that the fact-finder resolved disputed facts in favor of its finding if a reasonable person could do so, and we disregard evidence that a reasonable fact-finder could have disbelieved or found incredible. *Id.* When reviewing the factual sufficiency of the evidence, we view all of the evidence in a neutral light and determine whether a reasonable fact-finder could form a firm belief or conviction that a given finding was true. *See id.*; *In re C.H.*, 89 S.W.3d 17, 18–19 (Tex. 2002). Evidence is factually insufficient only if a reasonable fact-finder could not have resolved the disputed evidence in favor of its finding and if that disputed evidence is so significant that the fact-finder could not reasonably have formed a firm belief or conviction that its finding was true. *See In re J.F.C.*, 96 S.W.3d at 266.

Enumerated Statutory Grounds for Termination

The trial court found that Father “knowingly placed and knowingly allowed the children to remain in conditions and surroundings [that] endanger[ed] the physical and emotional well-being of the children” and “engaged in conduct and knowingly placed the children with persons who engaged in conduct [that] endanger[ed] the physical and emotional well-being of the children.” *See* Tex. Fam. Code § 161.001(b)(1)(D), (E). We will focus our analysis on the ground stated in subsection (E), which provides that parental rights may be terminated if the parent “engaged in conduct . . . [that] endangers the physical or emotional well-being of the child.” *Id.* § 161.001(b)(1)(E); *see Spurck v. Texas Dep’t of Family & Protective Servs.*, 396 S.W.3d 205, 221 (Tex. App.—Austin 2013, no pet.) (“Only one statutory ground is necessary to support a judgment in a parental-rights-termination case.”).

To constitute endangerment under subsection (E), the parent's conduct need not be directed at the children. *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012). Conduct may endanger children even if it does not cause the children to suffer actual injury. *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996). In addition, domestic violence may constitute endangerment, even if the violence is not directed at the children. *See D.N. v. Texas Dep't of Family & Protective Servs.*, No. 03-15-00658-CV, 2016 WL 1407808, at *2 (Tex. App.—Austin Apr. 8, 2016, no pet.) (mem. op.); *In re C.J.O.*, 325 S.W.3d 261, 265 (Tex. App.—Eastland 2010, pet. denied); *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.). A parent's criminal activity or incarceration can also constitute endangerment under subsection (E), especially if the parent engages in criminal activity while knowing that his parental rights are in jeopardy. *See Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 534 (Tex. 1987); *In re C.A.B.*, 289 S.W.3d 874, 885 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *In re AWT*, 61 S.W.3d 87, 89 (Tex. App.—Amarillo 2001, no pet.) (per curiam); *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied).

Here, the evidence shows that Father had an extensive criminal history and that he continued engaging in alleged criminal acts even after he knew his parental rights were in jeopardy. Specifically, criminal records and psychological evaluations admitted into evidence at trial show that Father's criminal history from 1989 through 2014 included two convictions for assault causing bodily injury, five convictions for criminal mischief, and one conviction for each of the following: sexual assault, criminal trespassing, organized criminal activity, terroristic threat, failure to register as a sex offender, deadly conduct, and driving while intoxicated. After the Department became

involved with Father in 2014, he engaged in further alleged criminal acts. Specifically, a Department caseworker testified that she went to the treatment center where Father resided in 2014 to ask him about options for where the children could be placed because the children's home was discharging them. The caseworker testified that Father was calm at first but then began to get "very angry" after he called people and was unable to find anyone to take the children. She testified that he "started throwing chairs around in the room" and "started using profanity and start[ed] cussing everyone out." He then threw a phone, which hit the floor and bounced up and hit the caseworker in the foot. In Father's 2015 psychological evaluation, the psychologist stated that Father "report[ed] getting a visit while in the hospital but threw a phone on the floor. He was arrested and served 6 months." The psychologist's report stated that Father was released from jail in December 2014.

The evidence further shows that Father was involved in another incident in August 2015 that resulted in a criminal charge for assault causing bodily injury against a family member for allegedly assaulting his former girlfriend in a bar. The charge was still pending at the time of the trial in this case. At trial, the former girlfriend testified that she was at the bar at a birthday party with friends when Father came into the bar. She testified that after Father walked in and ordered a beer, he said to her: "I'm going to mess with somebody." She testified that the next thing she knew, she was thrown to the ground, and people around her were fighting. She testified that she got into the fetal position and covered her head with her hands in an effort to protect her head and face. Photographs of her injuries were admitted at trial and showed extensive bruising on her legs, buttocks, feet, arm, and back. The photographs also show that she was placed in a neck brace after the incident. Another man present at the bar on that day testified that he heard Father say,

“I come [sic] here to F with somebody” to the former girlfriend and that he and Father then got into a fight during which the former girlfriend was pushed to the ground. Father testified that he went to the bar that day to confront his former girlfriend because he was “upset with her.” He testified that he had gone to an alcohol-abuse-treatment center at her request to learn to “control [himself] when [he was] drinking,” and she had agreed that she, too, would work on her drinking, so he was upset that she was at a bar.

In addition to Father’s involvement with the criminal-justice system, the evidence shows that he was also verbally abusive and threatening to the Department’s staff members during the pendency of the Department’s case. Specifically, one caseworker testified that she was informed by the Department’s administration that Father had threatened to shoot someone at the Department. She testified that the Department “was put on a lockdown” for nearly a month as a result of the threat. Another caseworker testified that Father had been “very uncooperative” during the case. He further testified that Father called him in December 2014 and cussed at him and used vulgar language. In addition, a program director at the Department testified that Father called her in January 2015 and told her that the Department “need[ed] to suck some dick.” Father also testified that he called one of the caseworkers a “whore” and cussed at her.

The evidence also shows that Father suffered from mental-health problems and was not always consistent with taking prescribed medications. A psychologist testified that he conducted two psychological evaluations of Father, one when the children were first removed from Father’s custody in 2010, and the other in 2015 after the children were removed from Father’s custody a second time. The psychologist’s written evaluations, which were admitted into evidence at trial,

showed that Father had been diagnosed with schizoaffective disorder, “parent-child relational problem,” and borderline personality disorder and that he had twice been placed in psychiatric hospitals due to him making suicidal and homicidal threats. In the 2010 evaluation, the psychologist noted that Father stated that he had “been taking his medication on a more consistent basis for the past two years” but that he “admit[ted] to stopping his medications periodically [in the past] which would have a big influence on his instability.” In the 2015 evaluation, the psychologist noted that Father “admit[ted] inconsistency in taking his medications.”

Further, the evidence shows that Father placed the children in two children’s homes because he was not able to properly care for them. The 2015 psychological evaluation states that Father told the psychologist that the reason he put the children in the first home was that he “was again behind on probation fees.” The report further states that Father told the psychologist that he had to remove the children from the home but took them to another children’s home because he “did not have the resources to provide for them.” At trial, Father testified that he placed the children in the first home, where they stayed “for over a year,” and that he then placed them in another home after they were discharged from the first home because his home “really wasn’t ready for them to be there.” Father testified that he then went into an alcohol-treatment facility, and that when the second children’s home notified him that they were discharging the children, he “had no way to get out of there and get them.”

Although there was evidence that Father loves the children and that the children love him, that he completed anger-management and parenting classes, and that he was taking his medications properly at the time of trial, there is extensive evidence in the record showing that he

placed the children in children's homes because he could not properly care for them, that he did not consistently take his medications while the Department's case was pending, and that he continued to engage in violent, verbally abusive, and criminal behavior even when he knew his parental rights were in jeopardy and even at the risk of being put in jail and once again not being able to care for his children. Considering all of the evidence in the light most favorable to the trial court's determination and in a neutral light, we conclude that the trial court could have formed a firm belief or conviction that Father engaged in conduct that endangered the physical or emotional well-being of the children. See *Boyd*, 727 S.W.2d at 534 ("We hold that if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under [predecessor to subsection (E)] is supportable."); *In re D.J.H.*, 381 S.W.3d 606, 613 (Tex. App.—San Antonio 2012, no pet.) ("As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child."); *In re C.A.B.*, 289 S.W.3d at 885 (mother's previous convictions combined with continued criminal activity and positive drug test after parental rights in jeopardy established "clear and convincing proof of voluntary, deliberate, and conscious course of conduct that endangered [child's] well-being"); *In re AWT*, 61 S.W.3d at 89 ("Authority holds that intentional criminal activity which exposed the parent to incarceration is relevant evidence tending to establish a course of conduct endangering the emotional and physical well being of the child."); *In re S.D.*, 980 S.W.2d at 763 (routinely subjecting children to probability that they will be left alone because parent is in jail or rehabilitation program endangers children's physical and emotional well-being).

Because we find the evidence legally and factually sufficient to support the trial court's determination, we overrule Father's first issue.

Best Interest of Children

In a parental-termination case, the best interest of the children is assessed using a non-exhaustive list of factors. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include (1) the children's wishes, (2) their emotional and physical needs now and in the future, (3) emotional or physical danger to the children now and in the future, (4) the parenting abilities of the parties seeking custody, (5) programs available to help those parties, (6) plans for the children by the parties seeking custody, (7) the stability of the proposed placement, (8) the acts or omissions of the parent that indicate that the existing parent-child relationship is not proper, and (9) any excuses for the acts or omissions of the parent. *Id.* The Department need not prove all nine *Holley* factors as a "condition precedent" to termination, and the absence of evidence related to some factors does not preclude the factfinder from finding by clear and convincing evidence that termination is in the children's best interest, especially when there is undisputed evidence that the parental relationship endangered the child. *See In re C.H.*, 89 S.W.3d at 27.

In addition to the evidence detailed above showing that Father engaged in conduct that endangered the physical or emotional well-being of the children, application of the *Holley* factors shows considerable further support for the trial court's finding that termination of Father's parental rights was in the children's best interest. For example, the record contains extensive evidence that the children had behavioral and mental-health problems that mirrored some of Father's behavior and that required stability and special care. To begin with, the record shows that the

children were discharged from two children's homes due to their behavioral and mental-health issues. In addition, a caseworker's 2014 status report that was admitted at trial indicated, consistent with the caseworker's testimony, that the oldest child had to be admitted to a residential treatment facility due to his behavior, which included "outbursts" and "uncontrollable tantrums." The report and caseworker's testimony also indicated that the other two children had to be admitted to psychiatric hospitals for a period of time in 2014 because the middle child had an extended "uncontrollable tantrum" in which she "flailed at and bit" her foster mother, and the youngest child had attempted to strangle himself with the straps of his car seat. Another caseworker testified that at the time of trial, all three children were together in one foster home but that the oldest child was still exhibiting behavior problems, including incidents in which he smeared feces on a wall, cussed at his foster parent, and kicked a hole in a wall. The caseworker testified that the other two children had similar anger issues but to a lesser degree. She testified that she believed that the children were acting out aggressive behaviors they learned from their father.

An adoption specialist with the Department testified that the foster home in which the children were currently residing was not a potential adoptive home but was helping them learn to improve their behavior. She testified that the Department had treatment programs for the children, including intensive therapy, that were designed to remove barriers to adoption. She further testified that her goal if Father's parental rights were terminated was to find one adoptive home for all three children. She testified that the best chance the children had for adoption was at their current ages because, generally speaking, the younger the children, the more likely they were to be adopted.

Regarding Father's ability to effectively parent the children and whether his acts or omissions indicate a proper parent-child relationship, considerable evidence shows that he was unable to effectively parent or provide a proper parent-child relationship. As described above, he placed the children in two children's homes, one of which they stayed in for fourteen months, because he was unable to care for them. He also became involved in at least two criminal cases after the children were removed from his custody, one of which caused him to spend six months in jail and the other of which subjected him at the time of trial to the possibility of going back to jail. Further, the 2010 and 2015 psychological evaluations indicated that Father did not always consistently take his medications despite knowing that he was diagnosed with several mental-health conditions and that his parental rights were in jeopardy. In addition, both psychological evaluations also pointed out that Father did not take responsibility for his conduct or acknowledge how it negatively affected his children but rather blamed others for causing his and the children's problems. In the 2015 evaluation, the psychologist concluded that Father lacked "the basic skills necessary to provide proper parental care to the children" and further stated: "I could not at this time nor in the future, foresee this parent will become competent or minimally adequate to parent a child."

Considerable evidence shows that Father loves his children, that his children love him, and that he wants to be able to take care of his children. Specifically, Father acknowledged that he had "been bad to other people," but testified that he had not "been bad to [his] children." He testified that the Department did not have any evidence that he had abused or mistreated the children, that he loved the children, and that he had never done anything to jeopardize their safety when they were with him. He testified that he currently had a one-bedroom apartment but was planning to

move to a larger one. Two of his friends testified that they would help take care of the children whenever he needed it. The guardian ad litem assigned to the case testified that the children loved their father and would choose to be with him if they could. In addition, the attorney ad litem stated in closing arguments that regardless of what had occurred due to their father's actions, the children still wanted to be with their father.

However, the children's wishes are only one factor in the best-interest analysis, and evidence of the other factors—including the special needs of the children; the programs available to the children through the Department; the Department's plans to try to keep the children together, whether in a foster or adoptive home; Father's lack of mental and financial stability; and Father's continued violent, verbally abusive, and alleged criminal conduct, which subjects him to possible future incarceration—weighs in favor of the trial court's determination. *See T.M. v. Texas Dep't of Family & Protective Servs.*, No. 03-14-00784-CV, 2015 WL 3393943, at *6 (Tex. App.—Austin May 21, 2015, no pet.) (mem. op.) (evidence of mother's criminal activity, incarceration, and mental-health issues supported fact-finder's determination that termination of her parental rights was in children's best interest); *In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.) (fact finder may measure parent's future conduct by past conduct in determining whether termination in best interest of children); *In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.) (evidence of parent's unstable lifestyle supports conclusion that termination is in children's best interest).

The trial court assessed the situation well when it stated the following:

I don't have to tell the parties and the attorneys here that this is a difficult decision that has to be made . . . I think there's absolutely no doubt [of] several things: one, is that [Father] loves his children very much and, number two, that his children love him, and if given their choice they would want to go back home with their father. This Court's obligation in these cases is really one thing. It's not easy or simple, but it is one thing, and that is to determine what is in the best interest of these children.

....

[Terminating Father's parental rights] sounds terrible and harsh because there are cases that I hear in which that's a very easy decision to make because the parents don't care about their kids and they don't have their best interest in mind, and that's not the case with [Father]. But despite that, I do believe that the evidence is that for [the children's] best interest this is the right ruling to make.

We conclude that when viewing the evidence in the light most favorable to the judgment and in a neutral light, the trial court could have formed a firm belief or conviction that the best interest of the children would be served by termination of Father's parental rights. *See In re J.F.C.*, 96 S.W.3d at 266; *In re C.H.*, 89 S.W.3d at 18–19. Accordingly, we find the evidence legally and factually sufficient to support the trial court's finding, and we overrule Father's second issue.

CONCLUSION

Having overruled both of Father's issues, we affirm the trial court's decree of termination.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: July 8, 2016