

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00245-CV

S. W. J.-B., Appellant

v.

Texas Department of Family and Protective Services, Appellee

**FROM THE DISTRICT COURT OF BELL COUNTY, 146TH JUDICIAL DISTRICT
NO. 280,352-B, HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

MEMORANDUM OPINION

Following a bench trial in March 2017, the district court signed a decree terminating the parental rights of appellant S.W.J.-B. (“Mother”) to her son “Brian,”¹ who was born in September 2015.² Mother appeals, contending that the evidence is insufficient to support the trial court’s finding that termination was in Brian’s best interest. We affirm the district court’s decree.

¹ In order to protect the parties’ identities, we will refer to S.W.J.-B. as “Mother” and to the children by aliases. *See* Tex. R. App. P. 9.8 (related to protection of minor’s identity in cases involving termination of parental rights).

² In September 2016, an associate judge held a hearing and signed a decree of termination. Mother appealed, and a de novo hearing was held before the district court in March 2017, after which the court signed a decree of termination. *See* Tex. Fam. Code §§ 201.005 (cases that may be referred to associate judge), .007 (powers of associate judge), .012 (right to de novo hearing), .015 (de novo hearing before referring court).

Standard of Review

A trial court may terminate a parent's rights to her child if clear and convincing evidence shows that (1) a parent has committed conduct that amounts to a statutory ground for termination and (2) termination of her rights would be in the child's best interest. Tex. Fam. Code § 161.001; *In re S.M.R.*, 434 S.W.3d 576, 580 (Tex. 2014). In reviewing the legal sufficiency of the evidence in such a case, we credit evidence that supports the determination if a reasonable factfinder could have done so and disregard contrary evidence unless a reasonable factfinder could not have done so. *In re K.M.L.*, 443 S.W.3d 101, 112-13 (Tex. 2014); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). We "should not disregard undisputed facts that do not support" the determination, and "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." *K.M.L.*, 443 S.W.3d at 113. In evaluating factual sufficiency, we view the entire record and uphold the finding unless the disputed evidence that could not reasonably have been credited in favor of a finding is so significant that the factfinder could not reasonably have formed a firm belief or conviction that the Department's allegations were true. *In re A.B.*, 437 S.W.3d 498, 502-03 (Tex. 2014) (quoting *J.F.C.*, 96 S.W.3d at 266; *In re C.H.*, 89 S.W.3d 17, 25-26 (Tex. 2002)). We defer to the factfinder's reasonable determination on issues of credibility that involve an evaluation of appearance or demeanor. *J.P.B.*, 180 S.W.3d at 573 (quoting *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 625 (Tex. 2004)); see *A.B.*, 437 S.W.3d at 503 (reviewing court must defer to "factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses").

A factfinder's best-interest determination is reviewed in light of the non-exhaustive list of considerations set out in *Holley v. Adams*: the child's wishes, if the child is of an appropriate age to express such wishes; the child's present and future emotional and physical needs; present and future emotional and physical danger to the child; the parenting abilities of the individuals seeking custody; programs available to assist those people to promote the child's best interest; plans for the child by the people seeking or agency seeking custody; the stability of the home or proposed placement; the parent's acts or omissions that may indicate that the parent-child relationship is improper; and any excuse for the parent's acts or omissions. 544 S.W.2d 367, 371-72 (Tex. 1976). The State is not required to prove all of the *Holley* factors "as a condition precedent to parental termination," and a lack of evidence about some does not "preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child." *C.H.*, 89 S.W.3d at 27. The need for permanence is the paramount consideration when determining the child's present and future physical and emotional needs. *Robert T. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00061-CV, 2013 WL 812116, at *12 (Tex. App.—Austin Mar. 1, 2013, no pet.) (mem. op.); *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Although a parent's rights to her child may not be terminated merely because the child might be better off living elsewhere, "a factfinder can consider that a child's best interest may be served by termination of parental rights so that adoption may occur rather than the impermanent foster-care arrangement that would result if termination were not ordered." *Robert T.*, 2013 WL 812116, at *12.

Summary of the Evidence

Mother has two other children—“Steven,” who was born in 2011, and “Lucy,” who was born in late 2013 or early 2014.³ According to the affidavit attached in September 2015 to the Texas Department of Family and Protective Services’s petition for conservatorship over Brian, the Department received a report in April 2014 alleging the neglectful supervision and medical neglect of Lucy. The Department “found Reason to Believe” for both neglectful supervision, because Mother’s “mental issues posed a threat” to Lucy’s well-being and Mother had not sought assistance, and for physical neglect, because Mother’s home was “unsanitary” and Lucy was seriously underweight. While that investigation was pending, Mother gave custody of Lucy to a friend, with whom Lucy remained at the time of trial; the Department’s affidavit stated that Mother did so because she “was mentally and financially unable to care for” the child.

The Department’s affidavit further stated that in August and November 2014, while Lucy’s case was still open, the Department received two reports alleging that Steven had been physically neglected by his father, with whom Steven was living. In March 2015, Mother underwent a psychological evaluation, which concluded that Mother “did not appear to be able to independently parent at that time,” had issues with poor hygiene and anger management, did not have suitable housing, had no independent means of financial support, and was pregnant. At the time of that investigation, Mother had not had contact with Steven in more than a year. Mother relinquished her parental rights, and a jury terminated Steven’s father’s rights.

³ The record does not provide Steven and Lucy’s birth dates, and the estimates above are gleaned from various documents and evidence in the record.

In September 2015, immediately after Brian’s birth, the Department sought and obtained conservatorship of him, alleging in its affidavit that Mother “has mental health issues and is very depressed,” had a “history of suicide attempts,” was unable to care for herself, and refused to be evaluated by a doctor. Brian was placed in a foster home when he was two days old, and he has been in that same home ever since. Caseworker Kayla Gamble testified that Brian is very bonded to his foster mother and that his foster parents had very good parenting abilities and could provide Brian with a stable home now and in the future, handle any medical issues that might arise, and meet his emotional and physical needs. Brian’s half-brother Steven is in the same foster home, and the foster parents hoped to adopt Brian and Steven.

Gamble testified that the Department sought custody of Brian because of concerns “about the mental status of Mom during the time of birth. She was battling depression and suicide attempts.” Gamble agreed when asked whether the Department had concerns about Mother’s “mental health issues” and “some hygiene issues and not being able to appropriately care for herself.” Mother was on disability at the inception of this case, and Gamble believed that was due to “extreme anxiety,” depression, and a sleep disorder. Before Mother got pregnant with Brian, she had not been taking medication. Mother underwent two psychological evaluations—one in March 2015 during the investigation into Steven’s care, and one in December 2015 during the proceeding related to Brian; both reports were introduced into evidence. The first evaluation noted issues related to domestic violence between Mother and Steven’s father and stated that Mother had “poor hygiene and grooming” and a “pronounced body odor” and did not have a means of independent living at that time. Gamble testified that Mother’s second evaluation, by Dr. Michael Campbell, showed “[a]

little bit of progress” from the first, that Gamble was no longer aware of hygiene or body odor issues, and that she had not seen Mother’s home or any further therapy reports since September 2016. However, Dr. Campbell also reported that Mother’s “capacity to appropriately parent her children is impaired by her anxiety and depressive disorders, as well as her Borderline intellectual functioning and low achievement scores,” and that although her “motivation to meet [Brian’s] needs appears to be minimally adequate,” her “functional ability to do so is impaired by her emotional disabilities and her Borderline intellectual functioning.” Dr. Campbell recommended that Mother continue individual counseling and take her medications, and Gamble testified that Mother had complied with the therapy requirement. Gamble said that Mother’s therapist “didn’t talk to the Department” and did not know the specifics of the case or the Department’s concerns and that when she was finally able to discuss her concerns with him, “he was stuck with his recommendations. He wasn’t going to change them.” Mother’s therapist recommended monitored return, but the trial court declined to order such an arrangement.

Gamble testified that Mother initially believed that a man named Jason was Brian’s father, although testing later revealed he was not. Jason sent Mother about \$200 or \$300 a month for about ten months, until he learned he was not Brian’s father, and Gamble testified that Mother only gave the Department \$100 of that money as support for Brian. Gamble said that during the underlying proceeding, Mother married Francois, and the Department incorporated him into the Department’s safety plan. Francois complied with his requirements. Francois was employed at a prison, but was out on disability for some period of time during the case after he injured his foot.

Gamble testified that during the pendency of the case, Mother had worked for a short period of time but could not maintain the job because of anxiety and “not being able to be

around large crowds.” While Mother was unemployed, the trial court ordered that she do community service in lieu of paying child support, and Mother opted to foster dogs. Gamble testified that when she made unannounced visits, there were sometimes up to three dogs and two guinea pigs in the home, as well as a strong smell in the living room. Gamble did not believe Mother’s home was appropriate and safe at that time because of the multiple dogs and because the house was cluttered and not child-proofed. When Gamble spoke to Mother about fostering dogs versus caring for a child, Mother made a comment about putting the dogs outside if they misbehave, and Gamble told Mother that “with a kid, you know, you can’t just put the kid outside. You have to, kind of, have some kind of parenting, you know, if they’re not listening or whatever.”

Gamble had concerns about Mother’s ability to appropriately care for Brian, explaining that when he was an infant, Brian had “a lot of medical concerns,” including “very bad acid reflux.” Brian’s foster mother took him to the doctor every week or two because he couldn’t keep milk down, and she noticed when he was not feeling well because his eyes “would start looking droopy” or he would “sleep a little longer” than usual. Gamble said the Department was concerned that Mother would not notice subtle signs that Brian might need medical attention both because Mother had not lived with Brian and thus did not have a bond with him and because Mother’s comment about the dogs made Gamble feel like “she was kind of comparing them.”

Gamble testified that although Mother said she had completed parenting classes in El Paso, where she lived when she had Steven, she never produced a certificate. Gamble observed visits between Mother, Francois, and Brian, and she said that Mother and Francois “didn’t appear to have a bond to” Brian and that Mother would “talk to [Brian] a little bit, but other than that it

was—there was nothing.” Mother last visited with Brian in August or September 2016. Gamble did not believe Mother had demonstrated an ability to ensure Brian’s safety or meet his basic needs.

Natalie, Brian’s foster mother, testified that she had been married to her husband David for almost fourteen years. Brian and Steven both lived with them, along with their two other children, who were eight and two at the time of trial. She testified that all of the children were very close—Brian and Steven were “a set now,” the “big boys are just very attentive and protective of the little ones,” and Brian and the younger of Natalie’s other children were “like little twins now.” Natalie testified that she had a group of families that met weekly for play-dates and that some new children had recently moved into the neighborhood. Brian had his own bedroom in the house.

Natalie testified that Brian had special medical needs at first because he had terrible reflux and could not keep formula down. He has since grown out of that problem. Natalie testified that she and David could and would provide for Brian’s emotional and physical needs and would provide him with a stable, nurturing home. Natalie said she had spoken to Mother about child-rearing, and Mother said that it was “like having puppies” and that “she knew how I felt having a newborn and a ten-month-old because she had puppies.” Asked whether Mother was seriously equating the two or just “try[ing] to communicate and . . . to bond,” Natalie said, “I wonder, because she hasn’t been involved with all of her children, if she really understands what it requires, and [Brian] is pretty needy. And there have been, apparently, more than one comment about equating children with dogs.” Natalie said that she and David wanted to adopt Brian and that “[i]f I were confident that [Mother] would do well by him, then I might be okay, but I just—I don’t think he’s going to be okay with her. I don’t.” Natalie believed it was in Brian’s best interest to stay with her

and David. Natalie believed Mother had been very passive, occasionally asking if the boys needed anything but rarely contributing when told “they don’t need anything, but if you want to give them something, by all means, please do.” She said,

[P]arenting isn’t a passive thing; it’s an active thing. And if you’re not being active at all, what are you going to do when that very needy, screaming child is in your face and you have to do something and you have to think about it and take care of it all the time? And I just—I don’t see that happening, especially equating it with taking care of dogs.

Amy Ellis, Brian’s CASA volunteer, testified that she had been assigned to Brian since November 2015. She believed it was in Brian’s best interest to stay with his foster family, providing the following anecdote as explanation:

So one time I visited and [Brian] was asleep. He wasn’t awake yet from his nap. And I got to go get him and brought him down. And he wasn’t—this little boy does not stop. He’s always just walking around very busy, but yet he was just very—you know, he was just kind of laying on me. And the foster mom immediately thought that that was odd and checked his temperature, made an appointment and took him to the physician. And so during that time I was questioning if that had been with the mother, would she have thought he was just tired from his nap or, you know, would she understand that there was something wrong? And he ended up having a really bad ear infection that required him to go back again to get another antibiotic on top of that, so it was very serious.

Ellis observed several visits between Brian and Mother. She said that at one, Mother and Francois “just kind of passed him back and forth” and were sometimes on their phones when they were not holding him. She said she would have expected Mother to be more excited to see Brian, but she did not see anything inappropriate. Ellis had spoken to Lucy’s caretaker and testified that that woman had negative feelings about Mother. “[B]ased on the conversations with [Lucy’s]

caregiver,” Ellis thought Mother had only known the caregiver for between two weeks and one month when Mother gave her custody of Lucy.

Mother testified that she had been diagnosed with anxiety and that she suffered from panic attacks. She had been taking medication for that condition, but her doctor had recently taken her off of the medication because her anxiety had improved. At the time of trial, Mother was taking a daily anti-depressant, and she testified that she started that medication about a week after Brian was born. She explained that she stopped taking it in 2014 because she could not afford it and because she had concerns about side effects to Brian while she was pregnant. Mother also suffered from agoraphobia, and she testified that she was working on it and that her condition had improved.

Mother testified that Jason “voluntarily” gave her money “to help me and the baby until we found out whether or not the baby . . . was determined to be his or not” and that she used the money to buy things for Brian and “paid child support with it.” She explained that she paid \$100 and was prepared to pay another \$100 but did not once the Department determined that her rights should be terminated. Mother also disputed Gamble’s testimony about the friend to whom she gave custody of Lucy, explaining that she had known that woman for a year, knew she could trust her to take care of her daughter, and placed Lucy there to keep her from entering the foster care system.

Mother had been seeing her therapist for over a year, and he had recommended that Brian be returned to her care under a monitored return plan. She testified that she and Francois lived in a three-bedroom, two-bath house and had lived there for seven months. She also said that Francois’s family and their friends were in the area and that she therefore had a good support network. Mother and Francois married in November 2015 after dating for about eleven months, Francois was employed as a correctional officer, and Mother received \$735 a month in disability

payments. Mother testified that she had worked in a retail store for three months during the pendency of the case and had provided proof of that employment to the Department. She further testified that although she had “applied everywhere for work,” she stopped looking for work in September 2016, and that she and Francois had agreed that she would “stay at home with the child until they’re [sic] school-age appropriate and then I would get a job while they’re at school.” Mother explained that she would be Brian’s primary caretaker on the days her husband was at work and that they would share parenting responsibilities when he was off of work.

Mother testified that the last time she “knew for sure,” she owed \$6,000 in child support to the woman who was caring for Lucy. She further testified that although her disability payments had increased from about \$200 to \$735 a month, that additional money had been used to make payments on Francois’s \$17,000 bill from having surgery in late 2016. She admitted that she had not paid any child support for Lucy or Brian since receiving more disability money.

Mother was asked about a note in her first evaluation about recent suicide attempts, and she said it was inaccurate, explaining, “I talked to my OB-GYN in regard to feeling down, but I wouldn’t say they were suicidal attempts. I learned my lesson. I’ve—I watched my sister try to kill herself, and after trying at age 13, I vowed to myself to never do it again.” Mother produced a certificate showing she had completed parenting classes in September 2014 and testified that she had given that certificate to her caseworker and that Gamble was incorrect in stating otherwise.

Discussion

Brian was days old when he was removed from Mother’s care and placed with his foster family, and at the time of trial, he was not yet two. Thus, there was no direct evidence as to

his wishes. However, the evidence was that Brian has been well-cared for by his foster family, that they ensured he had proper medical care when he suffered from severe reflux, that they were very alert to subtle signs that he might be feeling unwell, that his half-brother is also a member of that family, that he has bonded with the family, that he is happy in the home and loves the other family members, that he has spent little time with Mother and Francois, and that during at least one visit, Mother seemed somewhat disengaged from Brian. *See L.Z. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00113-CV, 2012 WL 3629435, at *10 (Tex. App.—Austin Aug. 23, 2012, no pet.) (mem. op.) (child was too young to articulate desires, so Court considered evidence of child's relationships with prospective placements); *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist] 2003, pet. denied) (same). Brian's foster parents went through training to become foster parents, and Natalie is currently home-schooling the older children while caring for the younger boys. Natalie testified that she and David had a stable home and marriage, that they loved Brian, and that they hoped to adopt him. Their home is large, with room for all four children. Natalie, Gamble, and Ellis all testified that Brian's best interests would be served by the termination of Mother's rights and being adopted by his foster parents.

Mother completed a parenting class following Steven's birth, and she testified that she would care for Brian while Francois was at work and that they would both care for him when Francois was off-duty. Mother had struggled with depression, anxiety, panic attacks, and agoraphobia in the past. However, she was attempting to manage those issues currently with the help of medication, and at the time of trial, her conditions seemed to have improved. Mother and Francois testified that their home was large enough and appropriate for a toddler.

Mother's two older children required Department intervention—Lucy because she was significantly underweight as an infant and Steven because of neglect or abuse by his father, with whom he was living—and when Mother was unable to care for Lucy, she placed her with an acquaintance whom she had known for somewhere between two weeks and a year. During the Department's investigation into Steven's situation, at a time when she was suffering from severe depression and had issues with hygiene and body odor, Mother became pregnant with Brian. Psychological evaluations conducted during the underlying proceedings raised concerns about Mother's intellectual functioning and indicated that she has borderline intellectual capacity. Gamble and Natalie were concerned that Mother would not notice subtle changes in Brian's behavior that might indicate a need for medical attention.

Gamble had concerns about the safety and cleanliness of Mother and Francois's home. Both Gamble and Brian's foster mother noted that Mother seemed to equate caring for a toddler with caring for a puppy, which raised concerns for both of them. Mother had not been able to maintain employment, in part due to her anxiety. Mother and Francois testified that they were in a stable living situation and had sufficient funds available, but there was also evidence that money was tight and that Mother had resorted to setting up a "GoFundMe" site seeking financial assistance while Francois was out of work following surgery. Mother and Francois had one car between the two of them, and his work hours started very early in the day. Mother testified that it would not be problematic for her to wake up early to drive him to work, and Francois testified that he could arrange to ride with co-workers if need be.

The trial court, as factfinder, was entrusted with weighing the evidence, resolving evidentiary conflicts, and determining the credibility to give to the witnesses. *See A.B.*, 437 S.W.3d

at 503; *J.P.B.*, 180 S.W.3d at 573. We may not second-guess those determinations. *See A.B.*, 437 S.W.3d at 503; *J.P.B.*, 180 S.W.3d at 573. Considering the evidence under the appropriate standards of review, we conclude that the trial court could reasonably have reached a firm belief or conviction that termination of Mother's parental rights is in Brian's best interest. *See J.F.C.*, 96 S.W.3d at 266-67, *C.H.*, 89 S.W.3d at 25-26. We therefore must overrule Mother's issue on appeal.

Conclusion

Having overruled Mother's sole issue related to the trial court's best-interest finding, we affirm the trial court's decree of termination.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: August 15, 2017