

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00337-CV

P. M. and I. F., Appellants

v.

Texas Department of Family and Protective Services, Appellee

**FROM THE DISTRICT COURT OF COMAL COUNTY, 274TH JUDICIAL DISTRICT
NO. C2015-1408C, HONORABLE CHARLES A. STEPHENS, II, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellants P.M. and I.F. appeal from the district court's order terminating their parental rights.¹ We affirm the district court's order.

Procedural Background

P.M. is the mother of "Jenny," born in November 2010, "Jack," born in March 2012, and "Jill," born in March 2014. I.F. is the father of Jenny and Jack. Jill's father, "Victor," is not a party to this appeal. In September 2015, the Texas Department of Family and Protective Services filed a petition seeking "non-emergency removal" of the children, alleging that in May 2015, law enforcement was called to a report of domestic violence between P.M. and Victor that left her with a black eye, bruised chin, and possible broken rib; that the children were present during that incident,

¹ To protect the parties' identities, we will refer to P.M. and I.F. by their initials and to the children and other involved individuals by aliases. *See* Tex. R. App. P. 9.8 (related to protection of minor's identity in cases involving termination of parental rights).

and that P.M. admitted to having taken half an unprescribed Xanax pill for pain and asserted that Victor was “high on Xanax” during the violence. Three days later, a Department investigator spoke to P.M., who admitted to recent marihuana use and to using methamphetamines a year earlier; P.M. tested negative in an initial drug screening. The case was referred to a Department caseworker, and in mid-June, P.M. admitted that she had used methamphetamines two days earlier. P.M. underwent a drug and alcohol assessment, was diagnosed with Methamphetamine Dependency, and was referred to an outpatient treatment program but was discharged because she missed too many sessions. The Department also feared P.M. was continuing to have contact with Victor, in violation of her safety plan, and in late August, the Department received a report alleging medical neglect of the children. As a result of P.M.’s history, the Department sought non-emergency conservatorship, and in late October or early November 2015, the children were placed in the Department’s care.

In October 2016, an associate judge signed an order recommending that the parental rights of P.M., I.F., and Victor be terminated.² P.M. and I.F. requested a de novo hearing, and following a de novo hearing,³ the district court signed an order terminating their parental rights.

Evidence of I.F.’s Paternity

In his sole issue on appeal, I.F. argues that the evidence is insufficient to support a determination that he is Jenny and Jack’s “parent” for purposes of section 161.001. We disagree.

² See Tex. Fam. Code §§ 201.005 (cases referred to associate judge), .007 (powers of associate judge), .012 (right to de novo hearing), .015 (de novo hearing before referring court).

³ The de novo hearing started in late January 2017, with two days of testimony on January 30 and 31. At that point, P.M. raised concerns about the judge’s impartiality, and the proceeding was paused for several months while those issues were addressed. The hearing concluded on May 5.

I.F. and P.M. were never married, and the Department's petitions referred to him as Jenny and Jack's "alleged father." In the portion of its petition addressing the identification of I.F. as Jenny and Jack's father, the Department asked the trial court to determine whether I.F. was their father; asked the trial court to immediately order genetic testing if I.F. denied paternity; and stated that if I.F. admitted the allegation of parentage, the trial court should waive any testing and enter temporary orders. I.F., who was incarcerated throughout this proceeding, filed a pro se "Motion for Issuance of Bench Warrant" in which he stated that he wished "to participate in his children['s] custody hearing . . . and to determine whether [I.F.'s] parental rights with respect to his children['s] care [should] be modified." He further stated that he wanted to present testimony on his behalf "concerning his desire to care, love and provide for his natural children." Several months later, I.F.'s appointed attorney filed an original answer stating that I.F. was "the father of" Jenny and Jack and asking that the children be returned to his possession. The proceeding was first heard by an associate judge, who recommended termination of the parental rights of I.F. as Jack and Jenny's "adjudicated father." I.F. filed a request for a de novo hearing as "Respondent Father," complaining of the associate judge's "decision on all recommendations, decisions and findings as to the children, including but not limited to the decisions to terminate Respondent Father's parental rights . . . and the decision that termination was in the best interest of the children." He did not state that he was contesting the fact that the associate judge's order referred to I.F. as an "adjudicated father."

I.F. testified at the de novo hearing before the district court. Asked how many children he had, I.F. said he had two, identifying Jenny and Jack as his children. I.F. testified that he and P.M. began their relationship in 2008 or 2009, that he and P.M. were living with P.M.'s mother when Jenny was born in late 2010, and that he was incarcerated when Jack was born in

March 2012. P.M. testified that I.F. is “[t]he father of” Jenny and Jack, explaining that she and I.F. were in a relationship for several years and broke up when she was about two months pregnant with Jack because I.F. was sentenced to prison. P.M. said that she lived with her mother during the time she had Jack and Jenny and that I.F. lived with them “[o]n and off, back and forth, in and out of jail; but he was there kind of most of the time.” I.F.’s father testified that Jack and Jenny were his grandchildren and that he had had a relationship with them “[s]ince they were born.” At no point during the hearing did I.F. raise any issue as to whether he was Jack and Jenny’s father—he did not ask whether P.M. had been in a sexual relationship with anyone else at the time the children were conceived; he did not challenge the allegations that he was their father; and he, P.M., and I.F.’s parents all testified to the contrary, stating that he was the children’s father.

On appeal, I.F. states that he was referred to as an “alleged” or “presumed” father leading up to the associate judge’s hearing but then was “miraculously transmogrified into an ‘adjudicated father’” in that judge’s order, expressing surprise at how or why that change took place. However, testimony was presented at that hearing, and although a transcript of that hearing is not before us, based on the record from the de novo hearing, we gather that there was testimony by P.M., I.F., and I.F.’s father to the effect that he was in fact Jack and Jenny’s father. In his request for a de novo hearing, I.F. did not challenge his “transmogrification” into an “adjudicated father” and instead challenged the recommendation that his parental rights should be terminated. Further, the testimony by I.F., P.M., and I.F.’s father, coupled with the Department’s repeated allegations that I.F. was the children’s father, its statement that genetic testing would be sought only if I.F. denied paternity, and I.F.’s pleadings asserting paternity, support the district court’s final order stating that

I.F. was the children’s father.⁴ See *In re K.P.*, No. 09-13-00404-CV, 2014 WL 4105067, at *12-13 (Tex. App.—Beaumont Aug. 21, 2014, no pet.) (mem. op.). We overrule I.F.’s sole issue on appeal.

Evidence Related to the Children’s Best Interest

P.M. asserts that the evidence is legally and factually insufficient to support the determination that termination was in the children’s best interest. We disagree.

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

⁴ We appreciate counsel’s acknowledgments that I.F.’s filings “appear to contain an ersatz admission of being a ‘father’ to the Subject Children” and that his testimony included “what might appear to be a singular ‘testimonial admission’ of his paternity.” We disagree with the argument that I.F.’s repeated use of the term “father” might have been in a colloquial context and should not be considered “a deliberate, clear, and unequivocal statement of a legal parental relationship.”

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 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 a child’s present and future physical and emotional needs. *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *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.). Although a parent’s rights 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

The testimony and other proffered evidence that might be relevant to the district court’s best-interest determination was as follows:

- Dr. Ann Marie Hernandez, a psychologist who evaluated P.M. in March 2016, testified that P.M. described her relationship with Victor as “toxic” and acknowledged that the children were affected by the violence between her and Victor. P.M. admitted to first using marihuana at eight years old and methamphetamines when she was fourteen and said she used methamphetamines “[s]everal times a week.” Dr. Hernandez diagnosed P.M. with depression, “Personality Disorder [not otherwise specified] with antisocial traits,” and marihuana and methamphetamine use. Dr. Hernandez testified that P.M.’s IQ tested “high 70,” which is in the fifth percentile. Dr. Hernandez recommended ongoing drug testing, individual counseling, and “remaining free of at-risk relationships.”
- P.M. testified that she was unsuccessfully discharged from the outpatient drug-treatment program because “of lack of attendance because I couldn’t make it to each and every one because of transportation.” In December 2015, she was ordered to another program, this time an inpatient program. She successfully completed that treatment program in late February 2016 but relapsed three days later and tested positive for methamphetamine on February 25, 2016. On September 2, 2016, P.M. tested positive for methamphetamine in a hair-follicle test. She admitted that she had used in August 2016 and also said she relapsed once after September 2016 but could not recall when that occurred. On January 30, 2017,

P.M. testified she was “about to hit my 50 day in March,” and at the conclusion of the hearing in May 2017, P.M. testified that she had been clean since December 2016. P.M. also said she had started attending AA and NA meetings three weeks earlier.

- In her testimony in January, P.M. testified that she was ordered to attend parenting classes and counseling sessions and that she attended each “[p]robably just twice.” She admitted that she had missed some drug tests “[e]ither by personal choice or I didn’t have a ride.” She also admitted that she had not attended AA or NA meetings as recommended for her, had not contacted her caseworker weekly, and had not found steady employment. P.M. testified that she had not worked any services since March 2016 and that she “chose to just work instead.” In her testimony in May, P.M. said she enrolled in a domestic-violence class in April and was “in line to do my individual . . . counseling.”
- P.M. testified that she had lived with her mother when Jenny and Jack were babies and that she worked at various fast-food or retail businesses to support her children. At the time of the de novo hearing, P.M. was living with her mother again, and in May she testified that she was working full time as a manager of a fast-food restaurant. P.M. had not paid any child support and said she was not aware that the court order had included that requirement.
- P.M. testified that I.F. lived with her and the children at her mother’s house “[o]n and off” and that he was not in the family’s lives consistently because he was “going to be locked up most of the time” due to his criminal behavior. P.M. said Victor abused her and was not a good man and, “My thing was putting up with it for too long.” She denied that the children were present for the incidents of violence, although she admitted that Jack witnessed it once and that his seeing the violence adversely affected his behavior.
- P.M. said that she understands Dr. Hernandez’s recommendations that she avoid “at-risk relationships” and acknowledged that her safety plan ordered her to avoid people involved with drugs or criminal activity. Asked about Ruben, a man with whom she had a relationship for about six months, until at least November 2016, P.M. testified that she did not consider that a “serious relationship” because “I don’t know too much about this guy” and that she had recently ceased contact with him. P.M. denied knowing that one of Ruben’s tattoos indicated a gang affiliation and denied knowing his criminal history, including a drug-possession charge from January 2017, his history with the Department, or whether he uses drugs.
- P.M. denied that she ever used illegal substances in front of the children. She said that the last time she had seen the children was in February or March 2016, about a year earlier, because she tested positive for drug use after finishing her treatment program.
- Ester Regalado, the children’s CASA volunteer, testified that the three children were “exceptionally kind and loving” but that “you can tell they have been traumatized.” Jill was living with her aunts, where she had been placed in late January 2016. Jack and Jenny had

been placed in several foster families before being placed in their current foster-to-adopt home on December 25, 2016. Regalado testified that Jill was placed separately from Jenny and Jack and that visits between the siblings were eventually halted because “when we observed the children interacting together, we saw that they would revert back to old and sort of bad behaviors from being traumatized.” Regalado said that the sibling visits were “reverting their process” and that the children acted out and had bad dreams for “[d]ays or weeks after”—“it was just making them go backwards instead of advancing forward.”

- Regalado testified that Jenny and Jack were happy in their foster home, which she described as “peaceful, calm, orderly, stable, loving.” The family has two other children, there was “a lot of encouragement in learning,” and the children get along with their foster parents and siblings. Regalado testified that she had seen “dramatic” change in Jack and Jill since their placement and that Jack especially had “just advanced and progressed into understanding rules, understanding his feelings, being able to talk about them, and even being able to appropriately get along with” the other children. Asked about Jack’s and Jenny’s behavior and school performance since their removal, Regalado said “they began pretty low on the scale and then plateaued once things got stable. Once they settled after the second, third placement, once they were in San Antonio, they started progressing pretty well. It was slow. And possibly even plateaued a little bit toward the end of the year, but since they have been placed in this new placement, they have just skyrocketed.”
- Regalado testified that both children were flourishing in their foster home. Jenny was doing “very well” in school, and Jack was “doing excellent” and receiving “glowing reports” from his teacher. Regalado said, “It’s just amazing what I have seen in the last four to five months.” Regalado explained that Jack and Jenny’s foster parents were “doing everything they can to provide not only for their emotional needs; of course, their physical needs, but they have dreams for them. And they have educational opportunities all around them now that I know they will become different people than what I would have envisioned a year ago.”
- As for Jill, Regalado testified that she was in “a very loving, comfortable home with pets. She’s in the center of the home with her toys and everything right in the middle.” Her aunts “do everything with her”—“it’s just a loving place.” Regalado testified that Jill was happy and well-adjusted and said that Jill’s progress had been “[v]ery stable. I mean, her line graph, in my mind, would be just a steady progression, because she’s, you know, through her second and third year of life. Lots of activity. They’ve dealt with the terrible twos, but her home has been stable and very progressive growth through that time.”
- Regalado testified that both placements were meeting the children’s needs and that both placements have expressed a desire to adopt the children. Regalado believed that termination and adoption was in the children’s best interest. Asked about the *Holley* factors, Regalado said she had considered those factors in making her best-interest determination. Regalado did not believe P.M. could meet the children’s physical and emotional needs now and in

the future because she had not seen her “progress in [her] service plans.” She also believed returning the children to P.M.’s care would place the children in danger.

- Regalado believed that P.M. had only had two visits with the children while the case was pending and that she had not seen them since March 2016.
- Tara Garza has been Jack and Jenny’s counselor since January 2016. She testified that Jenny was referred to counseling “due to fear, especially at nighttime; defiant behaviors; and some sexual play.” Jenny was initially “very timid and fearful, often tearful during the sessions. She was immediately able to verbalize sadness and loss and loneliness.” Jenny made outcries about domestic violence between Victor and P.M. and told Garza that she had seen pornography while in the care of P.M. and P.M.’s mother. Jenny reported that she learned “about touching herself in her private parts by a cousin,” who demonstrated those behaviors but did not actually touch Jenny. Garza said that Jenny “made progress early on and then really regressed in one of the foster homes and then had lots of acting out, even in the most recent foster home for first probably two or three weeks that she was there, and then the progress that she’s made since then has been significant. She’s had cessation of all night terrors and bad dreams. She’s confident, happy, playful. Her interaction is completely different than it had been even during her best times prior to this placement.”
- Garza testified that when she first started seeing Jack, he displayed “developmental delays, lots of aggression, biting, hitting.” She explained that Jack “demonstrates a lot of symptoms of complex development trauma.” Since being placed with his current foster family, “There’s been a significant decrease, actually almost total cessation of aggression in defiance in the home. He still has some acting out at school, but with his secure base, he—in terms of family, he responds almost always with self-regulation and the ability to stop even when he’s frustrated and angry.” Garza said both children had flourished in their foster home, but Jack “even more so” than Jenny—“It’s pretty exceptional how much he’s made up in such a short amount of time there.”
- Garza said that both Jenny and Jack had developed secure attachments with their foster parents and that the foster parents had been responsive in implementing Garza’s recommendations.
- Garza also testified that she started treating Jill in January 2017 due to issues with “defiance and limit testing” and because her aunts “identified her as kind of being oblivious or unaware of her surroundings. Sometimes she would just become destructive or aggressive with biting or hitting. She also was having night terrors, screaming, not being consolable during the night.” Garza said Jill’s behavior had improved in the home environment, that they “haven’t had as much success in her school environment,” and that they were working on those issues. Garza believed Jill had “significant sensory proceeding disorder needs” and would benefit from ongoing therapy, and she said that Jill’s aunts were receptive and doing what they could to arrange for occupational-therapy intervention.

- Garza said that both Jack and Jenny’s foster home and Jill’s aunts’ home were safe, stable, and healthy placements for the children and that those placements were meeting the children’s physical and emotional needs. Garza believed it would be detrimental to the children to remove them from their current placements.
- Department caseworker Rita Cuellar testified that P.M. was discharged for non-compliance from the first treatment program, did not attend individual counseling that was arranged for her, and tested positive for drug use throughout the proceeding. Cuellar said that the concerns that caused the Department to seek to remove the children from P.M.’s care had not been alleviated during the proceeding.
- Department caseworker Jennifer Hamilton also testified about requirements placed on P.M. by the district court. She said P.M. had completed parenting classes, a psychological evaluation, and in-patient rehab treatment but she did not complete the violence intervention program or individual therapy, she lost contact with the Department from April 2016 through June 2016, she tested positive for drugs several times, had not made any child-support payments, had not provided a stable home, did not attend all court dates, and missed a number of appointments the Department had made with service providers. Hamilton expressed concern about P.M.’s relationship with Ruben because he has an “extensive criminal history as well as [Department] history, and his parental rights were terminated in 2015 because of domestic violence and drug use.”
- Hamilton did not believe P.M. could meet the children’s needs or provide them a safe and stable home. She believed that P.M. had been given a chance and had not “alleviated the Department’s concerns in regard to either the drug use or domestic violence” and that it was in the children’s best interests to remain in their current, stable placements.

Discussion

We have reviewed the record, the relevant portions of which are summarized above.

We must defer to the district court’s evaluation of the witnesses’ credibility and its resolution of any evidentiary conflicts. *See A.B.*, 437 S.W.3d at 503; *J.P.B.*, 180 S.W.3d at 573. The evidence was that Jack, and perhaps the girls, witnessed at least one incident of domestic violence between P.M. and Victor; that P.M. has a history of forming relationships with abusive partners; that P.M., although she had maintained her sobriety for several months leading up to the conclusion of the hearing in May, had been a regular user of methamphetamines for many years, including while she

had custody of the children; that P.M. relapsed shortly after finishing an inpatient treatment program and tested positive for drugs several times while the proceeding was pending; that the children showed signs of stress and trauma when first removed and through some of Jack and Jenny's earlier foster placements but had been thriving in their current placements; that those caregivers were willing and able to provide for all of the children's emotional and physical needs; and that the caregivers wanted to adopt the children. The children's therapist, caseworkers, and guardian ad litem all believed it was in their best interests for P.M.'s rights to be terminated and for the children to be adopted by their current caregivers. Whether viewed through the lens of legal or factual sufficiency, we cannot conclude that the evidence was such that the district court could not have reached a firm belief or conviction that termination was in the children's best interests. *See K.M.L.*, 443 S.W.3d at 112-13; *A.B.*, 437 S.W.3d at 502-03. We overrule P.M.'s issue on appeal.

Conclusion

We have overruled the issues raised by I.F. and P.M. We therefore affirm the district court's order terminating their parental rights.

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: October 4, 2017