TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00715-CV

M. R., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. C2016-1421B, HONORABLE MELISSA MCCLENAHAN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

After a bench trial, the trial court signed an order terminating the parental rights of appellant M.R. ("Matt") to his son "Mason,"[1] who was almost two at the time of trial. Matt appeals, contending that the evidence is insufficient to support the trial court's finding that termination was in Mason's best interest. We affirm the trial court's order.

STANDARD OF REVIEW

A trial court may terminate a parent's rights to his 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 his 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

[1] We will refer to the child and his family members by aliases. *See* Tex. R. App. P. 9.8 (related to protection of minor's identity in cases involving termination of parental rights).

evidence in such a case, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *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 assume that the factfinder resolved disputed facts in favor of the finding if a reasonable factfinder could do so, and we disregard all evidence that a reasonable factfinder could have disbelieved or found to be incredible. *Id.*; *see In re K.M.L.*, 443 S.W.3d 101, 112–13 (Tex. 2014). 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 (requiring reviewing court to 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").

SUMMARY OF THE EVIDENCE

Mason was born in late December 2015, while his mother ("Julie") was incarcerated.[2] After he was born, Julie voluntarily placed Mason with family of hers until she was released from jail. Some months later, the Department removed Mason from Julie's care when she was incarcerated again and ultimately placed Mason with a foster family, the "Moores." The Moores had previously adopted Mason's full biological sister, "Minnie," when the parental rights of Matt and Julie to Minnie were terminated.

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

- Matt has been incarcerated throughout the pendency of the case, with a maximum release date of 2023 and a possible projected release date of December 2018.

- Matt testified that he was under review for parole at the time of trial (which occurred on October 24, 2017) and that he could be released as early as three months after trial. His plan was to live in a halfway house for about 90 days, after which he would probably live in an apartment in Austin.

- In explaining why it is in Mason's best interest that he retain his parental rights, Matt testified: "I want to do the right thing with [Mason] . . . and be a part of his life"; "I'm paying for [my mistakes], and I'm going to be doing the best I can in the programs I've took [sic]"; and "I have got opportunities to, you know, be able to take care of [Mason] and work and a place to go and all that."

- Mason has never been in Matt's care or control, and Matt has seen his son only once, when Julie brought him to prison for a visit.

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[2] While not entirely clear from the record, it appears that Matt was also incarcerated at the time of Mason's birth. In any event, the record shows that Matt has been incarcerated since Mason was two months old.

- Mason has lived with the Moores since August 2016, along with his biological sister, Minnie, who has lived with the Moores since she was four months old.

- Caseworker Jennifer Hamilton testified that the Moore family was providing for all of Mason's physical and emotional needs.

- Mr. Moore testified that Mason has bonded with the Moore family and especially with Minnie, that Mason was meeting all his major milestones, and that he and his wife planned to adopt Mason.

- Mr. Moore further testified that his family is willing to continue Mason's and Minnie's relationship with their older half-sister, Jocelyn, and that he was interested in keeping Matt and Julie informed about the children.

- Caseworker Hamilton further testified that Matt never provided any documentation to show compliance with his service plan.

- Matt's service plan included requirements that he (1) complete a drug and alcohol assessment and follow all recommendations and (2) participate in a psychological evaluation and follow all recommendations.

- Matt testified that he completed a parenting class, a drug and alcohol program, and a faith-based program but that the prison would not let him bring the certificates of completion to court.

- Department caseworker Asenath Sandy McCabe testified that, prior to Mason's birth, Matt was involved in a Department parental-termination suit regarding Minnie because of concerns with drug use and criminal activity and that, to her knowledge, Matt did not complete services in that case.

- Caseworker Hamilton testified that Matt never provided the Department with the names of any other potential family members who could have cared for Mason.

- Caseworker Hamilton testified that she believed it was in Mason's best interest to terminate Matt's parental rights because he was not able to provide a safe and stable home or meet Mason's present or future needs and because the Department had found a permanent placement for him with the Moores, who would adopt Mason.

- Julie testified that she believed it was in Mason's best interest to be adopted by the Moores.

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. 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 of some of the factors 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. Evidence presented to satisfy a predicate statutory-ground finding may also be probative of the child's best interest. *Id.* at 28. Here, Matt does not contest the trial court's three statutory-grounds findings: (1) that he engaged in conduct or knowingly placed Mason with persons who engaged in conduct that endangered Mason's physical or emotional well-being, (2) that he executed an unrevoked or irrevocable affidavit of relinquishment of parental rights, and (3) that he knowingly engaged in criminal conduct that has resulted in his conviction of an offense

and confinement or imprisonment and inability to care for the child for not less than two years from the date of filing of the petition. *See* Tex. Fam. Code § 161.001(b)(1)(E), (K), (Q).

Most of the *Holley* factors are implicated in this case. Although Mason was too young to articulate his desires, the court could consider evidence of his relationship with the Moores, who planned to adopt him. *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.). A factfinder may consider that a child has bonded with the child's current placement, is well cared for by them, and has spent minimal time with a parent. *See id.*

The need for permanence is the paramount consideration when determining a 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.). 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." *Id.* A parent's current and future incarceration is relevant to his ability to meet the child's present and future physical and emotional needs, and the parent's incarceration at the time of trial "makes his future uncertain." *In re M.D.S.*, 1 S.W.3d 190, 200 (Tex. App.—Amarillo 1999, no pet.); *see In re M.A.N.Z.*, No. 04-17-00381-CV, 2017 WL 6032539, at *7 (Tex. App.—San Antonio Dec. 6, 2017, no pet. h.) (mem. op.) (concluding that parent's plan for child to remain where he is "until his uncertain release [from prison] fails to comply with the ultimate goal of providing [the child] with a stable and permanent home").

A factfinder may infer that past conduct endangering a child's well-being may recur in the future if the child is returned to the parent, *Robert T.*, 2013 WL 812116, at *12, and may infer that a parent who did not provide documentation for completing a service did not complete that service, *see In re A.L.W.*, No. 01-14-00805-CV, 2015 WL 4262754, at *10 (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.) (mem. op.). A factfinder may also give "great weight" to the "significant factor" of drug-related conduct, *Dupree v. Texas Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ), and a parent's repeated incarcerations may reasonably suggest that his "parenting skills are seriously suspect." *In re A.W.*, No. 06-07-00118-CV, 2008 WL 360825, at *3 (Tex. App.—Texarkana Feb. 1, 2008, no pet.) (mem. op.).

In sum, the evidence showed that Matt has an extensive criminal history, some of which was drug-related; was incarcerated during the pendency of the proceedings below (including at the time of trial), with a maximum release date of 2023; committed the offense of theft after having two or more theft convictions at a time when his parental rights to Minnie were in jeopardy; was arrested and later convicted for delivering or manufacturing a controlled substance while on bond for two prior theft charges; failed to complete court-ordered services in the case concerning Minnie, in which case the Department had concerns about his drug use and criminal activity; failed to provide documentation of completing court-ordered services in the present case; did not have a parenting plan with respect to Mason except to "be a part of his life"; and had not established or maintained a parental relationship with Mason. Based on this record, the trial court could have reasonably concluded that Matt, when released from prison, would continue to expose Mason to emotional and physical danger; would be unable to meet Mason's emotional and physical needs now

and in the future; and had inadequate parenting skills and little motivation in availing himself of resources to improve them. The evidence further showed that Mason had bonded with the Moores and his sister, whom the Moores had previously adopted, and that Mason was doing well in the Moores' care, with whom he had been living since he was about eight months old. Caseworker Hamilton and Julie both opined that placement with the Moores was in Mason's best interest. Under both the legal- and factual-sufficiency standards, 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 Mason's best interest. *See K.M.L.*, 443 S.W.3d at 112–13; *A.B.*, 437 S.W.3d at 502–03. We therefore overrule Matt's issue on appeal.

CONCLUSION

Having overruled Matt's sole issue on appeal, we affirm the district court's order terminating his parental rights.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

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