NUMBER 13-17-00318-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN THE INTEREST OF A.G., A CHILD

On appeal from the County Court at Law
Of Aransas County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez, Justices Contreras and Hinojosa
Memorandum Opinion by Justice Contreras

Appellant P.G. challenges the termination of his parental rights to A.G., a child.[1] By five issues, P.G. contends that the evidence was legally and factually insufficient to support findings under parts (D), (E), (O), and (P) of subsection 161.001(b)(1) of the Texas Family Code, or to support a finding that termination is in the child's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O), (P), (b)(2) (West, Westlaw through

[1] We refer to the child and her parents by their initials in accordance with the rules of appellate procedure. *See* TEX. R. APP. P. 9.8(b)(2).

2017 R.S.). We affirm.

I. BACKGROUND

A.G. was born on September 4, 2015 to her biological mother, S.P., and her biological father, P.G. On May 10, 2016, the Department of Family Protective Services (the Department) filed a petition seeking termination of both parents' parental rights under various provisions of family code subsection 161.001(b)(1). *See id.* The petition was accompanied by an affidavit by Department caseworker Veronica Chapa stating that, on April 23, 2016, the Department received a report alleging neglectful supervision and physical neglect of the child by both parents. According to Chapa, the report indicated that P.G. got into a physical altercation with an "unknown person" outside the family's home, S.P. left the child alone and did not return until the altercation was over, and the "unknown person" later died from an asthma attack. The report, as described in Chapa's affidavit, also indicated that there was heroin and marijuana in the home, that S.P. and P.G. had been involved in family violence and substance abuse, and that the conditions in the home were "hazardous" and "unlivable" because of animal waste. A service plan was instituted for both parents containing various requirements for the parents to reunite with the child, and the plan was adopted as an order of the court.

Two witnesses testified during a bench trial on May 31, 2017. Valerie Moretich, a Department caseworker, testified that P.G. last visited the child the previous Saturday but overall, P.G.'s visits were "[m]ostly inconsistent." Moretich stated that P.G. completed "most" of the requirements set forth in the Department's service plan, including undergoing individual counseling, a psychological assessment, and parenting and anger management classes. However, she stated that P.G. once informed her that he had not

paid child support, though she did not know if P.G. had since started paying. Further, Moretich testified that P.G. tested positive for amphetamines and methamphetamines in May 2016 and on January 11, 2017. In June and August of 2016, P.G.'s urinalysis was negative but his hair follicles tested positive, which suggested to Moretich that he "tried to basically rinse his body out taking in a lot of fluids so he can get the drug out of his system." Since January 2017, P.G. has not appeared for drug tests as requested by Moretich. Overall, Moretich agreed that P.G. has "made some steps" to comply with the service plan but that he was not in "substantial compliance."

Moretich stated that P.G. was homeless at the beginning of the case, and that he currently "does not have a place to live as far as I know." She recalled that she asked him on May 3, 2017, whether he had a place to live "and what he told me was that he was staying I guess with a friend but it wasn't appropriate for [A.G.], so he wasn't going to waste my time with that information." P.G. told Moretich that he was employed but did not provide her with any documentation to substantiate that.

Moretich recommended termination of both parents' parental rights. She stated that A.G. has been in a foster home since May 10, 2016, where the child is well-bonded with the foster parents and is "doing excellent." The child is healthy, though she has asthma which is being "very well controlled." Moretich stated that it is Department policy to place children with family members if possible, and that the only appropriate family member that the Department could locate was the child's paternal great-grandmother. The great-grandmother is a certified foster parent and has successfully undergone a home study, but the home study needed to be redone because it was outdated. Additionally, the great-grandmother's ex-husband had previously spent time in jail for

domestic violence committed against her, and the great-grandmother's adult children have histories of drug use and incarceration. The great-grandmother has not seen the child in the past year and has made no effort to arrange visitation. Moretich stated that another option would be to keep the child with her current foster parents.

On cross-examination by P.G.'s counsel, Moretich clarified that she believed P.G. was not in substantial compliance with the service plan because he had not paid child support and did not appear for drug tests. She also stated that P.G. missed two scheduled visits with the child between October 2016 and January 2017, and that he has missed five scheduled visits since then. In February 2017, he missed a visit because he was arrested for assaulting his girlfriend. However, Moretich stated that, when P.G. did visit with the child, the visits were "very appropriate" and A.G. was "always happy to see him." When P.G.'s counsel asked Moretich why P.G. should not continue to have supervised visitation with the child, Moretich replied: "I mean, I don't know, that's something that whoever she's with would be willing to do, but, again, the visits are appropriate. I don't have any problem with the interaction."

The foster parents intervened in the termination proceedings, and the foster mother testified at trial that the child has a routine and is doing well in daycare. She stated she and the foster father wanted to become A.G.'s permanent parents, and that it was so important to them that they hired counsel and intervened in the case to protect their interests. She stated that, in the event P.G.'s parental rights are terminated and A.G. is permanently placed with her, she would "not necessarily" forbid P.G. from ever seeing or interacting with the child.

On cross-examination, the foster mother stated that she has observed P.G. with

the child on a few occasions and that the interaction has been appropriate. A.G. recognizes P.G. and reaches her arms out to go to him. The foster mother acknowledged that, if P.G.'s rights were terminated and A.G. was placed with her, she could decide at any time for any reason to stop giving P.G. access to the child, and P.G. would have no recourse.

The parties rested and the trial court heard recommendations and argument. The Department and the court-appointed special advocate (CASA) recommended termination of parental rights and placement with the paternal great-grandmother. The attorney ad litem and the attorney for S.P. recommended termination and placement with the foster parents. The trial court found that both parents' parental rights should be terminated and the child should remain with the current foster parents.

Accordingly, the trial court signed a written judgment terminating both parents' parental rights and appointing the Department as permanent managing conservator of the child.[2] The judgment stated in relevant part that termination of P.G.'s parental rights was in the child's best interests and that P.G. had: (1) knowingly placed or knowingly allowed A.G. to remain in conditions or surroundings which endangered the child's physical or emotional well-being; (2) engaged in conduct or knowingly placed A.G. with persons who engaged in conduct which endangered the child's physical or emotional well-being; (3) failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of the child who has been in the Department's custody for not less than nine months as a result of removal for abuse or neglect; and (4) used a controlled substance in a manner that endangered A.G.'s health

[2] S.P. is not a party to this appeal.

or safety and either failed to complete a substance abuse treatment program or continued to use a controlled substance despite having completed such a program. *See id.* § 161.001(b)(1)(D), (E), (O), (P), (b)(2). This appeal followed.

II. DISCUSSION

A. Standard of Review and Applicable Law

Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties and powers normally existing between them, except for the child's right to inherit from the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re L.J.N.*, 329 S.W.3d 667, 671 (Tex. App.—Corpus Christi 2010, no pet.). "Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the 'death penalty' of civil cases." *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring). Accordingly, termination proceedings must be strictly scrutinized. *Id.* at 112. In such cases, due process requires application of the "clear and convincing" standard of proof. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002)). This intermediate standard falls between the preponderance of the evidence standard of civil proceedings and the reasonable doubt standard of criminal proceedings. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *In re L.J.N.*, 329 S.W.3d at 671. It is defined as the "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West, Westlaw through 2017 R.S.).

In reviewing the legal sufficiency of evidence supporting termination, we "look at all the evidence in the light most favorable to the finding to determine whether a

reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.L.*, 163 S.W.3d at 85; *In re L.J.N.*, 329 S.W.3d at 671. We must assume that the fact finder resolved disputed facts in favor of its finding if it was reasonable to do so and must disregard all evidence that a reasonable fact finder could have disbelieved or found to be incredible. *In re L.J.N.*, 329 S.W.3d at 671. We must also consider undisputed evidence, if any, that does not support the finding. *In re K.M.L.*, 443 S.W.3d at 113; *see In re J.F.C.*, 96 S.W.3d at 266 ("Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.").

When reviewing the factual sufficiency of the evidence supporting termination, we determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the [Department]'s allegations." *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). In conducting this review, we consider whether the disputed evidence is such that a reasonable finder of fact could not have resolved the disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that: (1) the parent committed an act or omission described in family code subsection 161.001(b)(1); and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b); *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

B. Subsection 161.001(b)(1)

Under part (O) of family code subsection 161.001(b)(1), parental rights may be terminated upon a finding that the parent

> failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child[.]

TEX. FAM. CODE ANN. § 161.001(b)(1)(O). Part (O) does not provide a means of evaluating partial or substantial compliance with a plan, and it does not "make a provision for excuses" for the parent's failure to comply with the service plan. *In re D.N.*, 405 S.W.3d 863, 877 (Tex. App.—Amarillo 2013, no pet.); *In re J.S.*, 291 S.W.3d 60, 67 (Tex. App.—Eastland 2009, no pet.). Therefore, "substantial compliance is not enough to avoid a termination finding" under this statute. *In re C.M.C.*, 273 S.W.3d 862, 875 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

The Department must provide some evidence that the service plan with which the parent must comply is incorporated in a court order which "specifically establishes the actions necessary" for the return of the child. *Id*. (citing *In re C.L.*, 304 S.W.3d 512, 517 (Tex. App.—Waco 2009, no pet.); *In re D.M.F.*, 283 S.W.3d 124, 133–34 (Tex. App.—Fort Worth 2009, pet. granted, judgm't vacated w.r.m.)).

P.G. does not dispute that A.G. was in the Department's custody for not less than nine months as a result of her removal for abuse or neglect, nor does he dispute that the service plan was incorporated in a court order specifically establishing the actions necessary for the return of the child.[3] *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O). He

[3] Following a status hearing on July 8, 2016, the trial court rendered an order stating that "the plan

contends only that the evidence was factually insufficient to support a finding that he failed to comply with the service plan because "for a long period of time, [he] was fully compliant with all tasks in the service plan as well as not testing positive for drugs."

We disagree. The service plan explicitly required P.G. to "demonstrate his ability to stay off drugs" and it stated that "[a]ll drug tests shall produce a negative" and "[a]ny refusal to drug test will be an assumed positive." Moretich testified that P.G. tested positive for amphetamines and methamphetamines on January 11, 2017 and that he did not appear for drug tests as requested by Moretich from January 2017 until the date of trial on May 31, 2017. Additionally, the service plan required P.G. to pay child support of $100 per month, and Moretich testified that P.G. informed her he had not paid child support. Finally, although the service plan required P.G. to provide a safe and stable home environment for the child and to report any change of address to the Department, Moretich testified that P.G. "does not have a place to live as far as I know." P.G. seemed to indicate to Moretich on May 3, 2017 that he was staying with a friend at a location that was inappropriate for the child.

Even though P.G. completed many of the tasks called for by the service plan, the aforementioned evidence was legally and factually sufficient to support a finding that he failed to comply with the provisions of a court order under part (O) of family code subsection 161.001(b)(1). *See id.*

Having found sufficient evidence to support the trial court's finding under part (O), we need not address whether the evidence was sufficient to support findings under parts

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of service for the parents, filed with the Court on June 30, 2016, is APPROVED and MADE an ORDER of this Court." The order warns both parents that "parental and custodial rights and duties may be subject to restriction or to termination unless the parent or parents are willing and able to provide the children with a safe environment."

(D), (E), or (P). *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) ("Only one predicate finding under section 161.001[(b)](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."); *see also* TEX. R. APP. P. 47.1.

C. Best Interest of the Child

There is a strong, though rebuttable, presumption that keeping a child with a parent is in the child's best interest. TEX. FAM. CODE ANN. § 153.131 (West, Westlaw through 2017 R.S.); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). Factors that we consider in determining whether termination of parental rights is in the child's best interest include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parenting abilities of the parties seeking custody; (5) the programs available to assist the parties seeking custody; (6) the plans for the child by the parties seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions committed by the parent which may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions committed by the parent. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976). The party seeking termination is not required to prove all nine *Holley* factors; in some cases, undisputed evidence of just one factor may be sufficient to support a finding that termination is in the best interest of the child. *In re C.H.*, 89 S.W.3d at 25, 27. Evidence that proves one or more statutory grounds for termination may also constitute evidence illustrating that termination is in a child's best interest. *Id*. at 28.

As to the first *Holley* factor, the evidence established that A.G. was happy to see

P.G. during his supervised visits. Still, we find that the child—under two years old at the time of trial—is too young to credibly express her desires. *See In re R.S.D.*, 446 S.W.3d 816, 818, 820 (Tex. App.—San Antonio 2014, no pet.) (finding that the child, who was "almost four years old" at the time of trial, was "too young to have stated his desires"). As to the second *Holley* factor—needs of the child—the evidence showed that A.G. has asthma which is currently well-controlled while she is in custody of the foster parents. There was no evidence adduced relevant to the fifth and ninth *Holley* factors, regarding programs available to assist the parties seeking custody and any excuses for the acts or omissions of the parent.

The evidence in support of termination in this case centers principally on P.G.'s amphetamine and methamphetamine use.[4] P.G. asserts that he never failed a urinalysis drug test, but Moretich testified that his urinalysis results were positive on May 24, 2016 and January 11, 2017. She stated that the level of amphetamine and methamphetamine in the January 11, 2017 test had "almost tripled" from his last test in October 2016. Moretich further stated that P.G. had negative urinalysis results but positive hair follicle test results in June 2016 and on August 1, 2016, and she speculated that this was because he was attempting to "basically rinse his body out" by "taking in a lot of fluids." She further stated that P.G. had not submitted to any drug tests between January 2017 and the date of trial, despite her requests. A reasonable trier of fact could conclude from this testimony that P.G. used amphetamines and methamphetamines throughout the

[4] During closing argument at trial, the Department's counsel urged the trial court to consider the facts stated in Chapa's affidavit, including allegations of domestic violence, drug use, and hazardous living conditions. However, the trial court did not take judicial notice of the affidavit, and the facts alleged therein were not supported by any other evidence adduced at trial. Accordingly, we do not consider the affidavit in our sufficiency analysis.

pendency of this case and that he continues to do so. A parent's drug use supports a finding that termination is in the best interest of the child. *See In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.); *In re K.C.*, 219 S.W.3d 924, 927 (Tex. App.—Dallas 2007, no pet.) (noting that the fact-finder can give "great weight" to the "significant factor" of drug-related conduct by a parent).

P.G. asserts that there was "no evidence" of his drug use other than the hearsay testimony of Moretich. But her testimony was not hearsay; rather, it was based on her personal observation of P.G.'s drug test results. *Cf*. TEX. R. EVID. 801(d) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). Even if the testimony was hearsay, we would consider it in our sufficiency analysis because P.G.'s trial counsel did not object to it. *See* TEX. R. EVID. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.").

The evidence of ongoing amphetamine and methamphetamine use by P.G. is relevant to the third, fourth, and eighth *Holley* factors, regarding danger to the child, parenting abilities of the parent, and propriety of the parent-child relationship, respectively. *See* 544 S.W.2d at 372. Also relevant to those factors is Moretich's testimony that P.G. does not have a stable residence, did not provide proof of employment, and was arrested for assaulting his girlfriend. P.G. was homeless as of May 2016, and a year later, he told Moretich that he was living with a friend at a location that was, by his own admission, inappropriate for A.G.

Finally, we consider the sixth and seventh *Holley* factors—plans for the child by the parties seeking custody and the stability of the home or proposed placement. *See id*. The evidence established that A.G. is strongly bonded with the current foster parents and is thriving in their custody. The foster parents hired counsel and intervened in the trial court proceedings to protect their interests and to ensure that they would be able to adopt the child. On the other hand, P.G.'s plans for the child, should his rights not be terminated, were unclear. P.G.'s counsel conceded that he should not have immediate custody of the child but instead should continue to have visitation rights. However, a child's need for permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in determining best interest. *In re G.A.C.*, 499 S.W.3d 138, 141 (Tex. App.—Amarillo 2016, pet. denied); *In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.); *see In re R.S.-T.*, 522 S.W.3d 92, 113 (Tex. App.—San Antonio 2017, no pet.); *see also In re J.L.J.*, No. 13-16-00562-CV, 2017 WL 711644, at *5 (Tex. App.—Corpus Christi Feb. 23, 2017, no pet.) (mem. op.). A factfinder may consider the consequences of failure to terminate parental rights and may also consider that the child's best interest may be served by termination so that adoption may occur, rather than the impermanent foster-care arrangement that would result in the absence of termination. *See In re K.C.*, 219 S.W.3d at 931; *D.O. v. Tex. Dep't of Human Servs.*, 851 S.W.2d 351, 358 (Tex. App.—Austin 1993, no writ), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d at 267 & n.39; *see also J.R. v. Tex. Dep't of Family & Protective Servs.*, No. 03-15-00108-CV, 2015 WL 4603943, at *6 (Tex. App.—Austin July 30, 2015, pet. denied) (mem. op.).

There was some undisputed evidence contrary to the trial court's best interest finding—in particular, evidence showed that P.G.'s interactions with A.G. during the supervised visits were appropriate and that P.G. completed several of the tasks called for by the service plan. Nevertheless, considering all the *Holley* factors, we conclude that the evidence was legally and factually sufficient to rebut the strong presumption that keeping A.G. with her biological father is in her best interest. Instead, a reasonable trier of fact could have formed a firm belief or conviction that termination of P.G.'s parental rights was in A.G.'s best interests, and the contrary evidence was not so significant as to preclude such a finding. *See In re J.L.*, 163 S.W.3d at 85; *In re J.F.C.*, 96 S.W.3d at 266.

III. CONCLUSION

We overrule P.G.'s issues on appeal and affirm the judgment of the trial court.

DORI CONTRERAS
Justice

Delivered and filed the
12th day of October, 2017.