Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-19-00362-CV

IN THE INTEREST OF O.W. AND C.J., CHILDREN

On Appeal from the 326th District Court
Taylor County, Texas
Trial Court Cause No. 8275-CX

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

This is an appeal from an order in which the trial court terminated the parental rights of the mother and the fathers of O.W. and C.J. The children's mother and O.W.'s father filed a notice of appeal. The mother later filed an *Anders* brief, and O.W.'s father filed a brief on the merits in which he challenges the sufficiency of the evidence. We affirm.

Mother's Appeal

The mother's court-appointed counsel has filed a motion to withdraw and a supporting brief in which he professionally and conscientiously examines the record

and applicable law and concludes that the appeal is groundless. The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See In re Schulman*, 252 S.W.3d 403, 406–08 (Tex. Crim. App. 2008); *High v. State*, 573 S.W.2d 807, 812 (Tex. Crim. App. [Panel Op.] 1978). In light of a holding by the Texas Supreme Court, however, an *Anders* motion to withdraw "may be premature" if filed in the court of appeals under the circumstances presented in this case. *See In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016). The court in *P.M.* stated that "appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief." *Id.* at 27–28.

The mother's counsel provided her with a copy of the brief, the motion to withdraw, and an explanatory letter. Counsel also informed the mother of her right to review the record and file a pro se response to counsel's brief. In compliance with *Kelly v. State*, 436 S.W.3d 313, 318–20 (Tex. Crim. App. 2014), counsel provided the mother with a form motion for pro se access to the appellate record. We conclude that the mother's counsel has satisfied his duties under *Anders*, *Schulman*, and *Kelly*.

Following the procedures outlined in *Anders* and *Schulman*, we have independently reviewed the record in this cause, and we agree that the mother's appeal is without merit. However, in light of *P.M.*, we deny the motion to withdraw that was filed by the mother's court-appointed counsel. *See P.M.*, 520 S.W.3d at 27.

Father's Appeal

In both of his issues on appeal, O.W.'s father challenges the sufficiency of the evidence to support the trial court's findings in support of the termination of his parental rights. The termination of parental rights must be supported by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2019). To determine if the evidence is legally sufficient in a parental termination case, we

review all of the evidence in the light most favorable to the finding and determine whether a rational trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). To determine if the evidence is factually sufficient, we give due deference to the finding and determine whether, on the entire record, a factfinder could reasonably form a firm belief or conviction about the truth of the allegations against the parent. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). To terminate parental rights, it must be shown by clear and convincing evidence that the parent has committed one of the acts listed in Section 161.001(b)(1)(A)–(U) and that termination is in the best interest of the child. FAM. § 161.001(b).

With respect to the best interest of a child, no unique set of factors need be proved. *In re C.J.O.*, 325 S.W.3d 261, 266 (Tex. App.—Eastland 2010, pet. denied). But courts may use the non-exhaustive *Holley* factors to shape their analysis. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These include, but are not limited to, (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 parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by these individuals or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may indicate that the existing parent–child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *Id.* Additionally, evidence that proves one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *C.J.O.*, 325 S.W.3d at 266.

In this case, the trial court found that O.W.'s father (the father) had committed two of the acts listed in Section 161.001(b)(1)—those found in subsections (N) and (O). Specifically, the trial court found that the father had constructively abandoned O.W. (the child) and that the father had 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 had been in the 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 for abuse or neglect. *See* FAM. § 161.001(b)(1)(N), (O). The trial court also found, pursuant to Section 161.001(b)(2), that termination of the father's parental rights would be in the best interest of the child. *See id.* § 161.001(b)(2).

In his first issue, the father argues that the evidence is insufficient to support the trial court's finding under subsection (N) because the evidence failed to meet the elements required to prove constructive abandonment. We will not address the merits of this issue because the father has not also challenged the finding made by the trial court pursuant to subsection (O). Only one finding under Section 161.001(b)(1) is required to support termination as long as termination is in the child's best interest. FAM. § 161.001(b). Because the father challenges only one of the two findings made by the trial court under Section 161.001(b)(1), the unchallenged finding is binding on this court and is sufficient to support termination. *See In re E.A.F.*, 424 S.W.3d 742, 750 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see also* FAM. § 161.001(b)(1). Therefore, we need not address the father's first issue.[1] *See* TEX. R. APP. P. 47.1.

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[1]We note that neither of the trial court's findings under Section 161.001(b)(1) are encompassed within the supreme court's ruling in *In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019) (requiring review of findings under subsections (D) and (E) if challenged on appeal).

In his second issue on appeal, the father challenges the sufficiency of the evidence to support the trial court's finding that termination of the father's parental rights is in the best interest of the child.

The record reflects that the Department had been involved with O.W. and C.J. since 2015. At that time, O.W. would have been approximately two years old. Two monitored returns to the mother had been attempted in the interim, but both failed miserably. No monitored return was ever attempted with the father because he was in jail for a portion of the case below and because he made no attempt to comply with the court-ordered family service plan.

After the child was removed from the parents' care, a family service plan was prepared, signed by the father, and made an order of the trial court. The uncontroverted evidence reflects that the father failed to comply with the provisions of his service plan. He tested positive for methamphetamine on two hair-follicle tests, also tested positive for cocaine on one of those two tests, refused to submit to additional drug testing as requested by the Department and ordered by the trial court, and failed to obtain stable housing or employment. Additionally, the father refused to give his attorney or the Department an address where he could be located.

At the time of trial, the father had not seen O.W., his then six-year-old daughter, in approximately one year. He failed to exercise visitation with the child even after the caseworker arranged a special visitation on the father's request. The caseworker testified that O.W. was heartbroken when her father failed to show up for visitation. According to the caseworker, the father had abandoned an older daughter who had been returned to the father's custody in a previous case involving the Department; that daughter currently lived with her former foster parents. Furthermore, the father did not bother to appear for the final hearing in this case even though he had been notified of the hearing.

The Department's goal for O.W. was termination of the parents' rights and adoption by O.W.'s longtime foster parents. The caseworker believed that it would be in O.W.'s best interest to terminate the parental rights of both parents. Although the caseworker believed that the father loved the child, he did not believe that the father was capable of caring for the child. At the time of trial, O.W. and her half-sister, C.J., had been placed in the same foster home on and off for four years. O.W. was bonded with her foster family, and she was doing well in their care. The foster parents "are mom and dad" to O.W., and they provided the only safe and stable home that O.W. had ever had. The foster parents had already adopted one of O.W.'s younger brothers and were in the process of adopting another one of O.W.'s and C.J.'s younger brothers; the foster parents wished to also formally adopt O.W. and C.J. The guardian ad litem recommended that the parents' parental right be terminated.

We note that the trier of fact is the sole judge of the credibility of the witnesses at trial and that we are not at liberty to disturb the determinations of the trier of fact as long as those determinations are not unreasonable. *J.P.B.*, 180 S.W.3d at 573. Based upon the *Holley* factors and the evidence in the record, as set forth above, we cannot hold that the trial court's best interest finding is not supported by clear and convincing evidence. *See Holley*, 544 S.W.2d at 371–72. Upon considering the record as it relates to the desires of the child; the emotional and physical needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the emotional and physical needs of the child; the parental abilities of the father and the foster parents; the caseworker's belief that the father would never be able to take care of the child; the father's unstable housing and employment; the father's conviction for assault family violence; the stability of the foster parents' home; and the Department's plans for O.W., the trial court could reasonably have

formed a firm belief or conviction that it would be in O.W.'s best interest for the father's parental rights to be terminated. We hold that the evidence is both legally and factually sufficient to support the trial court's best interest finding. The father's second issue is overruled.

We affirm the trial court's order of termination.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

May 29, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2] Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.