Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-19-00374-CV

IN THE INTEREST OF I.C., III, A CHILD

On Appeal from the 91st District Court
Eastland County, Texas
Trial Court Cause No. CV1845071

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 father of I.C., III. Both parents filed a notice of appeal. The parents each present the same two issues for this court's review. In those issues, the parents challenge the sufficiency of the evidence to support the trial court's findings. We affirm the trial court's order.

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 each of the parents had committed two of the acts listed in Section 161.001(b)(1)—those found in subsections (D) and (E). Specifically, the trial court found that the parents had knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being and that the parents had engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the child's physical or emotional well-being. *See* FAM. § 161.001(b)(1)(D), (E). The trial court also found that termination of both parents' parental rights would be in the best interest of the child. *See* FAM. § 161.001(b)(2).

In their first issue on appeal, the parents contend that the evidence is legally and factually insufficient to support the trial court's findings under subsections (D) and (E). In their second issue, the parents challenge the trial court's findings with respect to the child's best interest.

The record reflects that the Department of Family and Protective Services became involved in this case when I.C., III was an infant. The Department initiated family based safety services when I.C., III was diagnosed as "failure to thrive." During the FBSS case, the parents were supposed to record the child's formula intake on a feeding log, but they overreported the amount of formula that the child was drinking.

I.C., III was subsequently hospitalized, treated for "failure to thrive" because he was not gaining weight, and removed from the parents' care. At that time, I.C., III was five months old and, according to the father, weighed only eleven pounds when he should have weighed sixteen to eighteen pounds. I.C., III would not drink from a bottle, so doctors eventually had to resort to a G-button to feed him. Medical personnel taught the parents how to use the G-button, but both parents struggled with

its use. The Department's caseworker testified that the child was "very severely sick" when he came into the Department's care.

At the time of trial, the child "ha[d] more than 50 percent delay." The child's doctors were not sure what kind of disabilities the child would have as he developed, but they believed he was on the autism spectrum. The child was sixteen months old at the time of trial. Yet, despite extensive therapy for his mouth and legs, the child still had a G-button because he was not responding whatsoever to the oral intake of food, and he was not yet walking.

The parents, particularly the mother, had limited mental abilities. This fact was apparent during the mother's direct examination. She did not comprehend basic finances or other concepts necessary to raise a child. According to the father, he and the mother both had ADHD, and the mother also suffered from "mild retardation." Although the father was employed at a local convenience store, he did not appear to be capable of handling the family's finances. Both parents received MHMR services.

The parents' counselor testified that she had worked with the parents on "parenting" and on "coping strategies" and had attempted to help them understand their mental deficiencies. She had addressed topics such as hygiene and discipline with the parents. The mother was unable to retain and comprehend things she had learned from the counselor, such as how often should a parent brush a child's teeth or how often should she change undergarments like socks and underwear. The counselor testified that the father did better than the mother but that the father also struggled with the homework assigned by the counselor.

The counselor testified that, based on her observations and on the parents' inability to retain what she had taught them, she had "significant concerns" about the parents' abilities to take care of their child. Although the counselor did not

believe that the parents would purposefully harm their child, she was concerned about the parents' struggles with the child's feeding process, the parents' failure to comprehend the "sanitary level" that was needed in their home due to the child's G-button, and the parents' own personal hygiene.

The caseworker described the condition of the parents' home as "deplorable." When the case began, bugs in the parents' home were a major problem. The bug situation improved while the case was pending below, but the conditions of the home remained unsanitary. There was not a sanitary place to store baby bottles or the G-button equipment or for the child to crawl. The floor was covered in "dirt and dinge," as was the baby bed and the parents' bedroom. Chemicals were being stored on low shelves. The litterboxes were overflowing with cat feces. Even though the caseworker talked to the parents all the time about the conditions of their home, the home remained an unsafe environment for a child, especially a medically fragile child.

The mother testified that she understood that her child was medically fragile and that it was important to keep the home really clean. The mother indicated that she cleaned house when the father was at work, and the father testified that he cleaned house when he got home from work. The father indicated that the floors at his house were hardwood and that they were clean. The parents apparently did not understand the level of cleanliness that was needed in their home. In addition to the concerns about the conditions of the home, the Department had concerns about the parents' personal hygiene and lack of transportation.

The parents' counselor testified that the parents "[a]bsolutely" loved their child and that the parents loved each other and worked together fairly well. She indicated that the father "does a lot of helping [the mother] to try to understand things and taking care of things for her specifically due to her developmental disorder."

When asked whether she thought the parents' parental abilities would improve with another year of counseling and classes, the counselor responded in the negative. The parents' counselor believed that a one-year-old child would be at risk in the parents' care and that a medically fragile child such as I.C., III would be at an increased risk. The counselor indicated that she would nonetheless encourage continued supervised visits between the parents and I.C., III.

Like the counselor, the caseworker believed that the parents lacked the ability to care for their child long-term. The child's attorney ad litem agreed; she indicated that the parents would never be able to take care of the child. She believed that termination of both parents' parental rights would be in the child's best interest because the child would then be eligible for adoption. The child's guardian ad litem, a CASA volunteer, agreed with the Department and the attorney ad litem that termination of the parents' rights would be in the best interest of the child.

The Department's goal for the child was termination of the parents' parental rights and adoption by a nonrelative. Although the foster parents with whom the child was placed were not able to adopt the child, the foster parents in a respite home in which the child had stayed had informed the Department that they would like to adopt the child.

The parents love their child and want to be part of their child's life. The Department was amenable to an open adoption in this case and wanted the parents to continue to have visitation. The caseworker did not believe that the parents' visits were detrimental to the child, even though the father had acted inappropriately at a couple of the visits. The counselor explained that the father never displayed any aggressive behavior but that he had autism and anxiety and exhibited some inappropriate mannerisms or thought processes at times, including delusional or disorganized speech. The caseworker testified, "[W]e love this family."

The parents wanted their child to be safe, and they believed that they were capable of taking care of their child and providing for his many medical needs. Unfortunately, the evidence also reflects that the parents were not capable of raising their medically fragile child in a safe manner and that the parents had no relatives or close friends who would be willing to be a placement for I.C., III.

The record contains clear and convincing evidence that the parents had knowingly placed or knowingly allowed I.C., III to remain in conditions or surroundings that endangered his physical or emotional well-being and that the parents had engaged in conduct that endangered I.C., III's physical or emotional well-being—as required to support findings under Section 161.001(b)(1)(D) and (E). Under subsection (D), we examine evidence related to the environment of the child to determine if the environment was the source of endangerment to the child's physical or emotional well-being. *In re D.T.*, 34 S.W.3d 625, 632 (Tex. App.—Fort Worth 2000, pet. denied). Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child's well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *In re D.O.*, 338 S.W.3d 29, 33 (Tex. App.—Eastland 2011, no pet.). Additionally, termination under subsection (E) must be based on more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required. *D.T.*, 34 S.W.3d at 634; *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—Eastland 1999, no pet.). The offending conduct does not need to be directed at the child, nor does the child actually have to suffer an injury. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). Mental illness or incompetence of a parent, alone, will not support a finding under subsection (E); however, if a parent's mental state causes the parent to engage in conduct that endangers the physical or emotional well-being of a child, that conduct can support a termination under subsection (E). *In re T.G.R.-M.*, 404 S.W.3d 7, 14

(Tex. App.—Houston [1st Dist.] 2013, no pet.). Endanger means "to expose to loss or injury; to jeopardize." *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (quoting *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)).

The parents argue that, due to their limited intelligence and mental capacities and their lack of training, they could not have acted "knowingly" and did not have the requisite scienter to support the findings under subsections (D) and (E). We disagree. Under subsection (E), scienter is not required for the parents' own acts; scienter is required under subsection (E) only when a parent places his child with others who engage in endangering acts. *In re U.P.*, 105 S.W.3d 222, 236 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see* FAM. § 161.001(b)(1)(E).

The evidence at trial revealed that the parents' home was unsanitary and unsafe and constituted an endangering environment for a child and that the parents had endangered I.C., III by failing to ensure that he consumed enough formula so that he gained weight. When the Department removed I.C., III, he was "near death." The father seemed to think that I.C., III was just skinny because the father himself was "ultra skinny." Although the bug problem at the parents' home had improved, other dangerous conditions remained despite the Department's efforts. The parents believed that they had cleaned their home and that it would be appropriate to have I.C., III returned home even with his G-button; however, according to the caseworker, the parents' home remained unsafe for I.C., III. The parents failed to appreciate the risk of harm that their conduct and their home posed to their child. *See, e.g.*, *Maxwell v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-0242-CV, 2012 WL 987787, at *10–11 (Tex. App.—Austin Mar. 23, 2012, no pet.) (mem. op.).

Accordingly, we hold that the record contains clear and convincing evidence to support the findings under subsections (D) and (E). The trial court could reasonably have formed a firm belief or conviction that both parents had knowingly

placed or knowingly allowed I.C., III to remain in conditions or surroundings that endangered his physical or emotional well-being and that both parents had engaged in conduct that endangered I.C., III's physical or emotional well-being. Consequently, the evidence is legally and factually sufficient to support the trial court's findings under Section 161.001(b)(1)(D) and (E). We overrule the mother's and the father's first issue.

The parents next challenge the sufficiency of the evidence to support the findings that termination of their parental rights would be in the best interest of the child. 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. We hold that, based on clear and convincing evidence presented at trial and the *Holley* factors, the trial court could reasonably have formed a firm belief or conviction that termination of each parent's parental rights would be in the best interest of the child. *See Holley*, 544 S.W.2d at 371–72. Upon considering the record as it relates to the desires of the child (who was too young to express a desire); 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 parental abilities of the mother, the father, and the respite foster parents who had expressed an interest in adopting the child; the parents' inability to provide a safe home for the child; the condition of the parents' home; the parents' inability to appreciate the risk of harm to their child; the counselor's belief that the parents' parental abilities would not improve with additional counseling and classes; the belief of the child's attorney ad litem that the parents would never be able to take care of the child; and the Department's plans for the child, we hold that the evidence is sufficient to support the trial court's findings

that termination of the mother's and the father's parental rights is in the best interest of the child. *See id.* We overrule the mother's and the father's second issue.

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.[1]

Willson, J., not participating.

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