



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00896-CV

IN THE INTEREST OF P.G.D. JR. and J.J.D., Children

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2019PA00361
Honorable Charles E. Montemayor, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: May 20, 2020

AFFIRMED

Pedro¹ appeals the trial court's order terminating his parental rights, arguing insufficient evidence supports the trial court's finding that termination is in the children's best interest. We affirm the trial court's order.

BACKGROUND

In February 2019, the Department of Family and Protective Services filed an original petition for conservatorship of P.G.D. Jr. (born in 2012) and J.J.D. (born in 2014). The Department sought emergency removal of the children after receiving a referral that the children's father had been arrested and the children were being neglected. The trial court signed emergency temporary

¹To protect the identity of the minor children, we refer to appellant by his first name and to the children by their initials. *See* TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

orders and appointed attorneys ad litem for the children and their parents. Appellant, the children's father, appeared at the March 2019 adversary hearing. The trial court's temporary orders required him to obtain a psychological evaluation, participate in counseling, complete a parenting class, obtain drug and alcohol assessments, submit to drug testing, and comply with the Department's service plan. The court authorized Pedro to have weekly supervised visitation with the children and ordered him to pay \$100 per month in child support. Pedro reviewed and signed a Family Service Plan on April 1, 2019, and the plan was filed with and approved by the court.

Although Pedro appeared at the various hearings in the case, the trial court repeatedly found he demonstrated inadequate compliance with the court's orders and the Family Service Plan. The trial court suspended Pedro's visits with the children in its initial permanency hearing order on August 22, 2019.

The case proceeded to trial in December 2019. The witnesses at the trial were the Department's caseworker, a service provider, the court-appointed CASA volunteer, and Pedro. At the conclusion of the bench trial, the trial court terminated both parents' rights and appointed the Department the children's permanent managing conservator. The trial court found by clear and convincing evidence that Pedro had knowingly endangered the children, failed to comply with the provisions of a court order that established the actions necessary for return of the children, and used a controlled substance in a manner that endangered the children and failed to complete a substance abuse program. *See* TEX. FAM. CODE § 161.001(b)(1)(D), (E), (O), (P). The trial court also found that termination of Pedro's parental rights is in the children's best interest. *See id.* § 161.001(b)(2). Pedro timely filed this appeal in which he argues the evidence is legally and factually insufficient to support the trial court's finding that termination of his rights is in the children's best interest.

GROUND FOR TERMINATION AND STANDARD OF REVIEW

To terminate parental rights under section 161.001 of the Texas Family Code, the Department must prove by clear and convincing evidence one of the grounds in subsection 161.001(b)(1) and that termination is in the best interest of the child. *See id.* § 161.001. In assessing the legal and factual sufficiency of the evidence to support the trial court’s findings, we employ a heightened standard of review to determine whether the trial court could have formed a firm belief or conviction about the truth of the Department’s allegations. *In re J.F.C.*, 96 S.W.3d 256, 266–67 (Tex. 2002). To determine whether this heightened burden of proof was met, we employ a heightened standard of review to determine whether a “factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). “This standard guards the constitutional interests implicated by termination, while retaining the deference an appellate court must have for the factfinder’s role.” *In re O.N.H.*, 401 S.W.3d 681, 683 (Tex. App.—San Antonio 2013, no pet.). We do not reweigh issues of witness credibility but defer to the factfinder’s reasonable credibility determinations. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam).

Under Texas law, there is a strong presumption that the best interest of a child is served by keeping the child with a parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, a court must also presume that “the prompt and permanent placement of the child in a safe environment is . . . in the child’s best interest.” TEX. FAM. CODE § 263.307(a). In making a best-interest determination, the factfinder looks at the entire record and considers all relevant circumstances. *See C.H.*, 89 S.W.3d at 27-29. And, in determining whether the child’s parents are willing and able to provide the child with a safe environment, a court should consider the factors

set out in section 263.307 of the Family Code.² In addition to these statutory factors, a court may also consider evidence about 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 parental abilities of the individuals seeking custody; the programs available to assist these individuals to promote the best interest of the child; the plans for the child by these individuals or by the agency seeking custody; the stability of the home or proposed placement; the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976); *see C.H.*, 89 S.W.3d at 27. These factors are not exhaustive, and not every factor must be proved to find that termination is in the child's best interest. *C.H.*, 89 S.W.3d at 27. Evidence of only one factor may be sufficient for a factfinder to form a reasonable belief or conviction that termination is in the child's best interest—especially when undisputed evidence shows that the parental relationship endangered the child's safety. *Id.* at 28. And, although the mere fact that an act or omission occurred in the past does not establish that termination is currently in the child's best interest, a parent's past conduct is probative of his future conduct when evaluating the child's best interest. *See O.N.H.*, 401 S.W.3d at 684.

²These factors include: the child's age and physical and mental vulnerabilities; the frequency and nature of out-of-home placements; the magnitude, frequency, and circumstances of the harm to the child; whether the child has been the victim of repeated harm after intervention by the department; whether the child is fearful of returning to the child's home; the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home; whether there is a history of abusive conduct by the child's family or others who have access to the child's home; whether there is a history of substance abuse by the child's family or others who have access to the child's home; the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; whether the child's family demonstrates adequate parenting skills; and whether an adequate social support system consisting of an extended family and friends is available to the child. *See* TEX. FAM. CODE § 263.307.

EVIDENCE

Angela Christman was the Department caseworker throughout the case. Christman testified the Department received a referral in February 2019 about possible neglect of P.G.D. Jr. and J.J.D., whose father, Pedro, had been arrested two days earlier on a warrant for failing to appear to answer a charge of driving under the influence. The investigator who went to Pedro's house found the boys, aged five and six, outside in a yard full of trash and junk. The children appeared filthy, and it was noticeable they had not bathed because their bodies smelled and had feces and urine on them. They were very hungry. The house did not have electricity or running water, and the children said they bathed every few days by pouring bottled water on themselves. The investigator found people passed out from drug use inside the house. The person Pedro had left in charge of the children, Edna, admitted to using methamphetamines while caring for them and tested positive on the day the children were found and removed.

Christman testified Pedro said Edna was the only person with whom he could leave the children, and he believed she was an appropriate caregiver. At trial, Pedro denied any knowledge that Edna was a drug user. He acknowledged that the water and electricity had been cut off and testified he had been in the process of getting help to have them reconnected when he was arrested. He disagreed with Christman's testimony that the children were hungry or dirty. He testified he kept the children fed and took them to a friend's nearby apartment to shower.

Christman testified the boys are developmentally delayed. When they were removed from Pedro's home, they did not use silverware and were not fully toilet trained. Neither of them had ever been enrolled in school and did not know any of their letters. Christman testified both boys started attending school after being placed in foster care, and their foster mother is helping them with academic exercises after school to try to make up for lost time. She testified that J.J.D., who was nearly six at the time of trial, had learned some of his letters and how to write his name.

However, he did not know the letter sounds. She testified that P.G.D. Jr. was very behind academically. He had just turned seven at the time of trial and he did not know any of the letter sounds and could only count to ten. She also testified that Pedro had never been to the school or talked to the teachers or administrator about the boys' progress.

Christman testified both boys lack social skills and have behavioral issues. They are both receiving trauma-based therapy. P.G.D. Jr. has tantrums when he does not get his way. At home, he fights over toys. At school, he has thrown things, including chairs. He threatens and strikes other children, usually girls. He once knocked a girl to the ground for touching his pencil. According to Christman, P.G.D. Jr. has said he behaves this way because his father was mean to girls. P.G.D. Jr. has been diagnosed with ADHD and takes medication to help him with impulse control and focus. He also has a tic disorder and the results of a recent EEG led his doctors to believe he may be having seizures. At the time of trial, he was scheduled for further testing.

Christman testified that J.J.D. also lacks social skills and, although not as aggressive as P.G.D. Jr., has done things such as knocking down a child who was in his way. The CASA volunteer testified about a conversation he had with J.J.D. when he had taken the boys to a Missions game. While a player was warming up to bat in front of them, J.J.D. said, "I wish I could have a bat." The volunteer asked him if he wanted to play baseball and J.J.D. responded, "No. I want to hit somebody with it, man!" J.J.D. explained that his father had told him that if someone "messed with" him, he was "supposed to hit them with a baseball bat."

Christman testified she has tried unsuccessfully to discuss the boys' behavioral issues with Pedro. She testified that as she was telling him how the boys had been acting he "got extremely angry. His fists balled up, he was shaking, he was yelling. . . . He didn't want to hear anything about it." Pedro asserted his children would never behave like that and that they were "just fine."

About a month after the case was filed, Pedro reviewed and signed a Family Service Plan. The Plan, together with the trial court's temporary orders, specified the tasks and services in which Pedro needed to engage and complete so he could better parent the boys and reduce the risk to them. The Plan required Pedro, who had tested positive for methamphetamines at the beginning of the case, to undergo a drug assessment and to follow any recommended course of treatment. He was required to remain drug free and to comply with random drug testing throughout the case. He was advised that any failure to appear for a test or refusal to take a test would be considered a positive result. Pedro was required to complete a psychological evaluation and to regularly and actively participate in individual counseling sessions to address the issues that led to the removal of the children and any additional issues identified in the psychological evaluation or in therapy. Pedro was required to begin therapy in April and to participate until discharged by the provider. Pedro was also required to successfully complete a parenting class. Finally, he was required to obtain and maintain safe housing and legal and verifiable income and to pay \$100 per month in child support while the children were in the Department's custody.

Christman testified she obtained verification that Pedro had obtained full time employment doing maintenance for an apartment complex. However, he did not pay any child support during the case. His employer provides him an apartment, but Christman has not been able to inspect it. The CASA volunteer testified he visited the apartment, that it was clean, and that when it was completely furnished, it would be appropriate for the children.

Christman testified Pedro submitted to a psychological evaluation several days after signing the plan, but did not engage in or successfully complete any other part of the plan. Between April and October, Christman scheduled counseling for Pedro with three different providers. He repeatedly failed to attend and was dropped. At the time of trial, he had not attended a single individual therapy session.

The week before trial, Pedro completed a parenting class offered by Compadre y Compadre, a program of the San Antonio Children's Shelter. The person who led the class testified Pedro attended eleven of the fourteen classes, but did not complete the program. He testified participants are assessed before and after the program. In order to receive a certificate of completion, they must show improvement in three out of five areas. Pedro did not show improvement in any of the areas.

Christman testified she scheduled two appointments for Pedro to have a drug assessment after he tested positive in March. He missed both appointments. The assessor told her they would not schedule another appointment until Pedro had another drug test. Pedro missed thirteen drug tests and was not tested for the duration of the case. Pedro told Christman he missed the tests because he did not have a vehicle and was not able to catch a bus. Christman noted there is a bus stop right outside his apartment complex. Pedro admitted at trial that he has a drug problem. He testified he began seeing a drug counselor in November and had seen her three times at the time of trial. Christman testified she had no knowledge of this and had not verified it.

The children have been in the home of a single foster mother throughout the case. Christman testified the foster mother and the boys have developed a strong bond and she has worked with them extensively to help them make up for some of their developmental and academic delays. She is willing and able to continue fostering them, but lacks confidence in her ability to fully meet their needs. In particular, she is concerned about adopting P.G.D. Jr. because of his aggression and outbursts toward girls. Christman testified the Department is setting her up with further services in an effort to raise the foster mother's confidence level. Christman testified the boys' mother, whose rights were also terminated, did not visit the boys at all. She spoke with the mother once and thereafter was unable to locate her. The CASA volunteer testified he found the mother and met with her once. He testified the mother was high on methamphetamines at the time

and refused to go into rehabilitation. Christman further testified about the Department's unsuccessful efforts to place the boys with other family members or friends.

Pedro regularly visited the boys until mid-August, when the trial court ceased visitations because of Pedro's failure to engage in services. Christman testified the visits were appropriate at times. Other times, Pedro would simply sketch on a pad and not interact with the children. Christman testified Pedro also sometimes gave the boys inappropriate direction, such as telling them they did not need to listen to their foster mother and telling them that, although he did not want them to fight, if they needed to hit someone, they should do it.

Pedro testified he is very close to his boys and they are and always have been his "first priority." He testified he has always been their primary caregiver. He stated he was willing to re-take the parenting class and that he would stop doing all drugs and continue to seek treatment for his drug problem. He did not acknowledge the boys' ongoing need for therapy and extra academic support and did not explain how he would ensure they continued to receive services.

The CASA volunteer testified he spent a considerable amount of time with the boys and the foster mother, consulted with the boys' teachers, and spoke with Pedro on occasion. He testified that the last time he had a conversation with Pedro, he tried to encourage him to engage in services. However, an unidentified person took the telephone from Pedro, demanded confidential information, and then ended the telephone connection. The volunteer had been unable to reach Pedro since then. The volunteer testified Pedro has not learned how to meet the boys' physical and emotional needs, and he does not believe he would be able to do so in the future. The caseworker and the children's attorney ad litem concurred in that opinion and stated termination of Pedro's rights was in the best interest of the children.

BEST INTEREST

The Department established that under Pedro's care, the children were living in unsafe conditions and had been severely neglected. Pedro's testimony at trial did not demonstrate an appreciation of the circumstances the children were found in, their developmental and behavioral issues, or of his role in creating the situation. The evidence also demonstrated that Pedro failed to take advantage of the services offered to him that would assist him to learn the skills to appropriately parent and provide a safe environment for the boys. And, although Pedro testified he was willing to take a drug test and to stop doing all drugs, he had not shown any such willingness throughout the 9 ½ months of the case. He acknowledged he still had a drug problem and his unverified attendance at three counseling sessions is no evidence he could provide a drug-free environment for the children.

Although the boys are not in a home where permanency is assured, they are in a loving home where their needs are being met and they are making developmental and academic progress. Despite the lack of permanency, Pedro, on the other hand, showed no effort to provide financially for the children. He did not pay any child support, even after becoming employed and the court having ordered him to do so. Pedro did not show any interest in their progress in school. He denies their behavioral problems, denies they have suffered trauma, and believes they are "just fine." He was unable or unwilling to secure transportation or ride the bus to take required drug tests, and the trial court could have reasonably inferred Pedro would not take the boys to their trauma-based therapy appointments or take P.G.D. Jr. for further testing regarding his possible seizure disorder. *See O.N.H.*, 401 S.W.3d at 684 (holding court may properly gauge parent's future conduct by his past conduct to determine whether termination is in the child's best interest). The evidence established Pedro lacked adequate parenting skills and showed an inability or unwillingness to

participate in the individual therapy and drug counseling services made available to him so he could protect and care for his children.

We conclude that, considering all the relevant circumstances, the trial court could reasonably have formed a firm belief or conviction that termination of Pedro's parental rights is in the children's best interest. *See J.F.C.*, 96 S.W.3d at 266-67. We therefore affirm the trial court's order.

Luz Elena D. Chapa, Justice