

Opinion filed May 18, 2020



In The

Eleventh Court of Appeals

No. 11-19-00363-CV

IN THE INTEREST OF S.T., A CHILD

**On Appeal from the 326th District Court
Taylor County, Texas
Trial Court Cause No. 9046-CX**

MEMORANDUM OPINION

This is an appeal from an order in which the trial court terminated the parental rights of the mother and the father of S.T. Both parents filed an appeal. On appeal, the mother presents a single issue in which she challenges the legal and factual sufficiency of the evidence to support the trial court's best interest finding. The father presents three issues in which he challenges the legal and factual sufficiency of the evidence to support three of the trial court's findings. He also complains of the admission of evidence related to prior criminal convictions and a previous parental termination. We modify the trial court's order and affirm as modified.

Termination Standards and Findings

The termination of parental rights must be supported by clear and convincing evidence. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2019). 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. *Id.*

In this case, the trial court found that the mother had committed four of the acts listed in Section 161.001(b)(1)—those found in subsections (D), (E), (O), and (P). Specifically, the trial court found that the mother had knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered the child’s physical or emotional well-being; that the mother 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; that the mother had failed to comply with the provisions of a court order that specifically established the actions necessary for her 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; and that the mother had used a controlled substance in a manner that endangered the child and either failed to complete a substance abuse treatment program or abused a controlled substance after completing such a program. The trial court also found, pursuant to Section 161.001(b)(2), that termination of the mother’s parental rights would be in the best interest of the child.

The trial court found that the father had committed three of the acts listed in Section 161.001(b)(1)—those found in subsection (D), (E), and (M). Specifically, the trial court found that the father had knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered the child’s physical or emotional well-being, that the father 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, and that the father had previously had his parental rights terminated to another child under subsection (D) or (E). 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.

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).

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.

Background Facts

The record reflects that S.T. was removed from her mother's care when the mother was arrested for possession of methamphetamine with intent to deliver. S.T. was less than eight months old at that time. Upon removal, the Department had S.T. tested for drugs; the results of a hair follicle test revealed that S.T. was positive for methamphetamine at a level greater than 50,000 pg/mg. The father of S.T. was not known at that time, and S.T. was placed in foster care. The mother was ordered to work services and to comply with the provisions of her family service plan.

The mother continued to use methamphetamine after her substance abuse treatment, but she progressed fairly well in her other services and had a negative hair follicle test in February 2019—a little over one year after the initial removal. As a result, S.T. was returned to the mother in a monitored return. Unfortunately, the monitored return lasted only two months. The monitored return ended because both S.T. and the mother tested positive for methamphetamine. S.T. was returned to the care of the foster parents with whom she had been placed prior to the monitored return. S.T. remained in that foster home at the time of trial. She was twenty-nine months old at that time.

Not long before trial, and after three other men were excluded by DNA tests as being S.T.'s biological father, the mother provided the name of the father at issue in this appeal as a person who could possibly be S.T.'s father. Approximately two weeks prior to trial, DNA test results indicated that the father at issue in this appeal was S.T.'s biological father. The trial court granted the Department's motion to find aggravated circumstances with respect to the father, and the termination hearing proceeded against both parents. *See* FAM. § 262.2015.

With respect to the father, the record reflects that he had previously had his parental rights terminated to seven children. In October 2016, the father's parental rights to six of his children were terminated on grounds (E) and (O). In May 2019, just six months prior to the trial in this cause, the father had his parental rights terminated to a one-year-old child based on ground (O). Additionally, a ninth child had been removed from the father's care on the morning of the trial related to S.T., who was the eighth of Appellant's children to be involved in termination proceedings. The ninth child, an infant, was removed from the care of the father because that child had recently tested positive for drugs; the initial intake related to methamphetamine use by the father and that child's mother (S.T.'s mother is not that child's mother and is not involved in that case).

The conservatorship caseworker believed that it would be in the best interest of S.T. for the mother's and the father's parental rights to be terminated. The caseworker explained that the mother continued to test positive for methamphetamine and that the father was unable to provide a safe, stable, and sober environment for S.T.

The record reflects that, at the end of the termination hearing, two options were being considered by the trial court and the Department as potential permanent options for S.T. First, the foster parents wanted to adopt S.T. S.T. was very bonded with her foster family, and the foster parents provided a loving, safe, and appropriate home for S.T. Second, by the time of trial, the father's sister had agreed to be a placement for S.T. The Department was in the process of requesting a home study on the father's sister's home. Some of the father's other children had been placed there and were among the eight children that lived in the father's sister's home at the time of trial.

Analysis

Father's First and Second Issues

In his first two issues, the father challenges the legal and factual sufficiency of the evidence to prove grounds (D) and (E). *See* FAM. § 161.001(b)(1)(D), (E). The father does not challenge the sufficiency of the evidence to support ground (M), and that ground will itself support the termination of the father's parental rights as long as termination is in the best interest of the child. *See id.* § 161.001(b)(1)(M), (b)(2). However, we will nonetheless address the father's first and second issues because these issues may implicate due process. *See In re N.G.*, 577 S.W.3d 230, 234–35 (Tex. 2019) (addressing due process and due course of law with respect to appellate review of grounds (D) and (E) and holding that an appellate court must provide a detailed analysis if affirming the termination on either of these grounds); *see also In re R.S.C.*, No. 09-19-00174-CV, 2019 WL 5996358, at *4–6 (Tex. App.—Beaumont Nov. 14, 2019, no pet.) (mem. op.) (determining that it is appropriate to review challenges to (D) and (E) despite an unchallenged finding as to (M)); *In re L.C.*, No. 12-19-00137-CV, 2019 WL 4727826, at *1–2 (Tex. App.—Tyler Sept. 27, 2019, no pet.) (mem. op.) (reviewing (D) and (E), despite a finding based on (M)).

With respect to the first issue, we note that the Department concedes that the evidence is insufficient with respect to subsection (D) because the evidence failed to show that the father was aware that S.T. even existed, that S.T. was his child, and that S.T. had been placed in an endangering environment. Accordingly, we sustain the father's first issue and modify the order of the trial court to strike the finding made pursuant to subsection (D) of Section 161.001(b)—that the father had knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being.

In his second issue, the father challenges the trial court's finding under Section 161.001(b)(1)(E). Under this issue, the father argues that the trial court erroneously

admitted evidence of the father’s prior criminal convictions and of a prior parental termination and that, without the complained-of evidence, the evidence would be insufficient to support the trial court’s finding under subsection (E). We disagree. The evidence about which the father complains are the following exhibits: a 2010 judgment of conviction for the offense of forgery, a 2004 judgment of conviction for the offense of burglary of a habitation, a 2009 judgment revoking the father’s community supervision in the burglary case and sentencing him to confinement for a term of seventy-eight months, and the May 2019 order of termination in which the father’s parental rights were terminated as to one child based on ground (O). The father objected to the relevancy of these exhibits, and the trial court overruled those objections.

Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and if “the fact is of consequence in determining the action.” TEX. R. EVID. 401. A trial court is vested with broad discretion to determine whether to admit evidence. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) (citing *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985)). To determine if the trial court abused its discretion, we must determine whether the trial court acted without reference to any guiding rules or principles. *Id.* (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). Here, it was within the trial court’s discretion to find that the recent termination of the father’s parental rights for failing to comply with the provisions of a court order—provisions that related to the father’s ability to adequately and safely parent a child—was relevant to the issue of his present ability to adequately and safely care for S.T. and to the issue of S.T.’s best interest. The trial court could also have determined that evidence of the father’s criminal history was relevant to the issue of S.T.’s best interest and also to ground (E)—to help prove that the father had engaged in an endangering course of conduct over a period of

several years. Accordingly, we hold that the trial court did not abuse its discretion when it determined that these four exhibits were relevant to the issues before the trial court.

With respect to the father's challenge to the sufficiency of the evidence to support a finding under subsection (E), we note that "endangering conduct is not limited to actions directed towards the child." *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) (citing *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)). Nor does the child actually have to suffer an injury. *Id.* The endangering conduct may include the parent's actions before the child's birth and may relate to the parent's actions while the parent had custody of other children. *Id.* Drug use may constitute evidence of endangerment. *Id.* 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. *In re D.T.*, 34 S.W.3d 625, 634 (Tex. App.—Fort Worth 2000, pet. denied); *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—Eastland 1999, no pet.).

Based upon evidence that an infant had recently been exposed to methamphetamine while in the father's care, evidence that the father had continued in a course of conduct involving the use of illegal drugs, evidence that the father's parental rights to six of his children had previously been terminated for engaging in conduct that endangered those children, and evidence of the father's criminal history, the trial court could have found by clear and convincing evidence that the father engaged in a course of conduct that endangered S.T. We hold that the evidence is legally and factually sufficient to uphold the trial court's finding as to the father under subsection (E). Accordingly, we overrule the father's second issue.

Mother's Sole Issue and Father's Third Issue: Best Interest of the Child

Both parents challenge the legal and factual sufficiency of the evidence to support the trial court's finding that termination of the parents' parental rights was in the best interest of the children.

The father acknowledged that his infant son had recently been exposed to methamphetamine while in the father's care. The father, who had refused to submit to a hair follicle test, explained: "Well, me and [that child's mother], like I said, like we barely started doing the ministry thing. . . . I mean, a lot of women, they pick up my son. And, I mean, a lot of them are homeless, and probably about seventy percent of the homeless people does use drugs." The father's parental rights to six of his children were terminated because he had engaged in conduct or knowingly placed those children with someone who engaged in conduct that endangered the well-being of those children. Additionally, in both of the previous termination cases against the father, he failed to comply with the provisions of a court order as necessary to obtain the return of those children. Despite having had his rights to seven children terminated, the father thereafter continued to use drugs and to endanger another child in his care.

S.T.'s mother, who was still on probation at the time of trial, acknowledged that she used methamphetamine while this case was pending. She claimed that she had last used methamphetamine approximately four and one-half months prior to trial. However, the mother continued to test positive in the tests that were conducted shortly before the final hearing—though these tests did show decreasing levels of methamphetamine. It was clear from the testimony at trial that the mother loved S.T., wanted to be a part of S.T.'s life, and was trying to stay drug free. However, it was also clear that the mother had continued to use methamphetamine while this case was pending, even when given the chance at a monitored return—during which both she and S.T. tested positive. It was also clear that the mother had endangered

S.T. by the mother's criminal conduct and by exposing S.T. to methamphetamine such that S.T. tested positive at a high level at the time of removal.

The conservatorship caseworker believed that termination of both parents' parental rights would be in S.T.'s best interest. The child was doing well at the time of the final hearing, and the trial court had two options for permanency.

Based upon the evidence presented in this case, we defer to the trial court's findings as to S.T.'s best interest. *See C.H.*, 89 S.W.3d at 27. We hold that, based on the evidence presented at trial and the *Holley* factors, the trial court could reasonably have formed a firm belief or conviction that termination of the mother's and the father's parental rights would be in S.T.'s best interest. *See Holley*, 544 S.W.2d at 371–72. Upon considering the record as it relates to 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 those involved, the plans for the child by the Department, the mother's use of methamphetamine, the reasons for the termination and removal of the father's other children, and the stability of the proposed placements, we hold that the evidence is legally and factually sufficient to support the findings that termination of the mother's and the father's parental rights is in the best interest of the child. *See id.* We cannot hold that the findings as to best interest are not supported by clear and convincing evidence. We overrule the mother's sole issue and the father's third issue.

This Court's Ruling

We modify the order of the trial court to delete ground (D) with respect to the father, and as modified, we affirm the order of the trial court.

KEITH STRETCHER

JUSTICE

May 18, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.¹

Willson, J., not participating.

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