Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00807-CV

IN THE INTEREST OF J.M.T., a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-PA-00140
Honorable Charles E. Montemayor, Associate Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 1, 2020

REVERSED AND RENDERED

William S.[1] appeals the trial court's order that terminated the parent-child relationship between him and the child, J.M.T. William challenges the sufficiency of the evidence to support a finding that termination of his rights is in the child's best interest. Because we conclude the evidence is legally insufficient to support the finding, we reverse the part of the trial court's order that terminated William's parental rights and render judgment denying the petition for termination. Because William does not challenge the appointment of the Department as J.M.T.'s permanent managing conservator, we do not disturb that part of the order.

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

BACKGROUND

On January 24, 2019, the Department of Family and Protective Services filed an original petition for protection of a child, conservatorship, and termination of parental rights. The petition sought emergency removal of J.M.T., who was then two months old, and sought termination of the parents' rights if reunification with them was not achievable. The trial court granted the request for emergency removal, and J.M.T. was placed in foster care. The trial court appointed attorneys ad litem for J.M.T. and for each of the parents.

William appeared at the Chapter 262 full adversary hearing on February 5, 2019. After the hearing, the trial court signed an agreed temporary order listing William as J.M.T.'s presumed father and naming him a temporary possessory conservator. On February 19, William signed a family service plan that was filed with the court. The case was tried to the court on October 29, 2019. William did not appear. His appointed attorney announced "not ready," stating he had lost contact with his client and had been told the morning of trial that William was incarcerated in Comal County. The trial court "denied" the "not ready" announcement and proceeded to trial, during which a Department investigator and a caseworker testified.

Witness – Department Investigator

Investigator Christina Slaughter testified the Department received a referral about J.M.T. after the parents had been arrested for theft in San Marcos. She testified the child had been with the parents at the time of their arrest. However, when the referral was made, J.M.T. was in the care of an aunt. No evidence was presented about what was alleged in the referral, who made the referral, how long after the arrest it was made, or what the specific allegations were that led to the arrest. Slaughter testified she located J.M.T. at her maternal aunt's house, which Slaughter testified smelled of marijuana at the time of the visit. She testified the occupants denied smelling anything. Slaughter testified J.M.T.'s mother arrived at the house about five minutes after she did and

Slaughter was able to interview her. Slaughter testified the mother admitted to using marijuana and amphetamines at that time. She submitted to a drug test, which returned positive for amphetamines and methamphetamines. Slaughter testified she then sought emergency removal of J.M.T. She stated she attempted to find William by going to the addresses listed on the Department report, checking with utility providers, and checking with jails, but "[h]e didn't make himself available." Slaughter testified her first contact with William was approximately twelve days later when he appeared at the Chapter 262 hearing. Slaughter also testified without elaboration that she did not find any appropriate family members with whom she could place the child.

Witness – Department Caseworker

The only other witness at trial was Jeanna Obermayr, who testified she was the caseworker for this case from the time it was filed in late January until March and from August until the trial in October.

Obermayr testified her first contact with William was in January 2019 at a parent-child visit. She testified she had a conversation with William and the mother about placing the child in danger by engaging in criminal activity with the child present. Obermayr stated the parents did not acknowledge having engaged in such activity and instead they "minimized" their criminal activity.[2] Obermayr also testified that "the parents" had "other criminal history, including theft and possession of controlled substances." However, she did not specify which parent or elaborate on the specifics of the "criminal history." She testified that William admitted methamphetamine use to her and submitted to her request for drug testing, which was positive for methamphetamines.[3]

[2] No evidence was presented at trial regarding the circumstances of the parents' arrest, whether any charges were brought against either parent as a result, or the disposition of any charges.

[3] In light of Obermayr's testimony that her only contacts with William were in January and February 2019, the conversation about drug use and the drug test presumably occurred at that time.

Obermayr testified she later met with William to review his family service plan. The clerk's record reflects William signed a plan on February 19, 2019, which was then filed and made an order of the court. The plan required William to: (1) participate in a psychological evaluation and follow any recommendations made by the provider; (2) participate in individual counseling to address the issues surrounding the allegations that led to the Department's involvement and follow recommendations of the provider; (3) complete a parenting class; and (4) complete a substance abuse assessment and follow all recommendations from the assessment, including inpatient or outpatient treatment, counseling, or drug testing.

Obermayr testified William did not complete any services. However, upon further questioning, she conceded she did not know whether he had completed a drug assessment and did not know what the recommendations of the assessment were. She also acknowledged she did not know whether William had completed a parenting class. She testified he began a parenting class in February while she was still the caseworker, but does not know if he completed it. She stated only that she had not received a certificate stating he had successfully completed the program. The service plan also contained referrals for a psychological evaluation and for individual counseling. Obermayr did not testify about these parts of the plan and there is no evidence of whether William engaged in those services or to what extent. The only evidence presented was Obermayr's blanket statement that William did not complete services or provide certification to her that he completed services.

William was allowed weekly one-hour visits with J.M.T. Obermayr believes he attended eight visits, with the last one being in August. No evidence was presented about how William interacted with the child during his visits. She stated William did not give her a reason for missing visits.

Obermayr testified her last contact with William was in February 2019. She was not the caseworker from March to August. She did not testify whether another caseworker was assigned to work with J.M.T. and William during that period, what contacts the Department had with William during that period, or what efforts were made to assist him to complete his service plan. Obermayr also did not testify she had reviewed the Department's file or was otherwise familiar with what occurred in the case during her absence. Obermayr testified that in September, after she was again the assigned caseworker, William texted a caseworker assistant and provided a new telephone number. Obermayr testified she unsuccessfully tried to reach William at that number. Finally, she testified she "heard . . . from an individual" that William had been incarcerated in Comal County. She did not provide any testimony indicating whether she confirmed the information, ascertained the reason for the alleged incarceration, attempted to speak with him at the jail, or determined what services were available to prisoners at that jail. She testified she did not visit him.

Obermayr testified J.M.T. has been in the same foster home since January 2019. She testified the "the foster home has been able to meet all of [her] short-term and long-term needs," J.M.T. is thriving, and she has bonded with the foster parents. The Department's permanency plan is for these foster parents to adopt her. Obermayr further stated she "believe[s] it would be contrary to the child's best interest to return [her] to her . . . father at this time . . . [and] that it would put the child in a dangerous situation." Obermayr did not elaborate on these beliefs.

The trial court admitted into evidence the Agreed Temporary Order and the Status Hearing Order, and the court took judicial notice of the goals and tasks listed in the family service plan.

The Trial Court's Rulings

At the conclusion of the trial, the court orally terminated William's parental rights to J.M.T.[4] The court ruled William is J.M.T.'s legal father, found that termination of William's rights is in J.M.T.'s best interest, and granted the request for termination pursuant to section 161.001(b)(N), (O), and (P) of the Family Code. The written termination order, which was signed more than two months after trial, recites William is an "alleged" father and terminates his parental rights only on grounds that he constructively abandoned the child and failed to comply with the court-ordered provisions of the family service plan. *See* TEX. FAM. CODE § 161.001(b)(1)(N), (O). On appeal, William does not contest the statutory grounds for termination, but argues there is legally and factually insufficient evidence to support the trial court's finding that termination of his parental rights is in J.M.T.'s best interest.

STANDARD OF REVIEW

To terminate parental rights under section 161.001 of the Texas Family Code, the Department must prove 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, 161.206(a). "Because the natural right between a parent and his child is one of constitutional dimensions," proceedings to terminate parental rights must be strictly scrutinized. *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014). The Department must therefore meet its burden with "clear and convincing proof." *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012). Clear and convincing evidence is "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 § 101.007.

[4] The trial court also terminated the parental rights of J.M.T.'s mother. She did not appeal the order. No evidence was presented about the relationship between William and the mother or whether they continued to have any contact with each other after the case was filed.

On appeal, we review the evidence to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). "In determining whether the evidence is legally sufficient to support a best-interest finding, we 'consider the evidence that supports a deemed finding regarding best interest and the undisputed evidence,' and ignore evidence a fact-finder could reasonably disbelieve." *E.N.C.*, 384 S.W.3d at 807 (quoting *J.F.C.*, 96 S.W.3d at 268). If we determine from our review of the evidence that no reasonable factfinder could form a firm belief or conviction that termination of a parent's rights is in the children's best interest, then we must conclude the evidence is legally insufficient. *See id.*

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). 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 In re C.H.*, 89 S.W.3d 17, 27-29 (Tex. 2002). And, in determining whether the child's parent is 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.[5] 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

[5] These 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 ANN. § 263.307.

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.

DISCUSSION

The Department relies on the following evidence and asserts it is sufficient to support a finding that termination of William's parental rights is in J.M.T.'s best interest: (1) testimony the parents were arrested for theft with J.M.T. in their possession and the parents later minimized their criminal activity; (2) the investigator's testimony that she located J.M.T. at a house that smelled like marijuana; (3) evidence the child's mother came to the house where the investigator had located the child and the mother admitted drug use; (4) the investigator's testimony that she was unable to contact William from the date she filed the petition until the chapter 262 hearing; (5) William's positive drug test result and admission of using methamphetamines; (6) the caseworker's testimony that William did not complete services or regularly visit the child and did not give her any reason or explanation; (7) the caseworker's testimony that her attempt to contact William at a telephone number he provided in September was unsuccessful; and (8) evidence J.M.T. is placed in a foster-to-adopt home, she has bonded with the foster parents, and they are meeting her needs.

Circumstances of the initial referral and removal

The Department places great emphasis on the circumstances of the original referral and removal, arguing these facts prove William's endangerment of the child sufficient to support a

finding that termination of his rights is in J.M.T.'s best interest. *See In re D.M.*, 452 S.W.3d 462, 470-73 (Tex. App.—San Antonio 2014, no pet.). The trial court did not find William engaged in conduct that endangered J.M.T. and we disagree the evidence presented by the Department established such endangerment. With respect to the parents' arrest, the only evidence presented was investigator Slaughter's testimony that the parents were arrested for theft in San Marcos. Obermayr testified the parents later denied having committed a crime. The Department criticizes this as "minimizing" their "criminal activity," but the Department did not present any evidence that any crime occurred. There is no evidence of the circumstances of the arrest, and no evidence of whether any criminal charges were pursued or what the outcome of any prosecution was. *See E.N.C.*, 384 S.W.3d at 804-05 (Department has burden to introduce evidence concerning facts of alleged criminal offense and show that conduct endangered child); *see also In re A.L.R.*, 04-19-00349-CV, 2019 WL 5765793, at *6 (Tex. App.—San Antonio Nov. 6, 2019, no pet.) (mem. op.) (general statement that parent is "violent" and has "extensive" "criminal history of assault, burglary and theft" does not, alone, support best interest finding; nor does mere fact that parent is incarcerated).

Slaughter testified that when the Department received the referral, J.M.T. was in the care of a maternal aunt. She testified she located J.M.T. at the aunt's house and she smelled marijuana in the house. But there is no evidence that she saw any marijuana or that the aunt was or appeared to be under the influence of any substance. Slaughter conclusorily testified she did not believe the house was a safe or appropriate placement for J.M.T., but did not provide any further factual basis for her belief. The testimony presented was not sufficient evidence to support a finding that the home was a clear danger to J.M.T. or that William endangered the child by leaving her in the aunt's care. *See id.* 2019 WL 5765793, at *5 (holding Department's belief, unsupported by facts, that home was a "clear danger" and unsuitable for meeting child's needs was wholly conclusory).

The Department also contends the trial court could infer from the mother's admitted drug use, her presence at the aunt's house, and Slaughter's inability to contact William, "that appellant left J.M.T. in the care of the mother despite her drug use." We disagree. Slaughter testified J.M.T. was in the care of her maternal aunt. No evidence contradicted that testimony. Slaughter testified J.M.T.'s mother arrived at the aunt's house shortly after Slaughter arrived, and that the mother admitted then to using illegal drugs. However, there is no suggestion in the evidence that the mother was living at the house, that she was caring for J.M.T., or that William had left J.M.T. in the mother's care. We conclude the evidence regarding the circumstances attending the referral and emergency removal of J.M.T. do not weigh in favor of a best interest finding.

William's drug use

Obermayr testified William admitted to her he used methamphetamines and testified he submitted to a drug test that was positive for methamphetamines. We agree that a parent's drug use can support a best interest finding, particularly when the parent's abuse of illegal drugs has placed the child in danger or when the parent has continued to abuse drugs throughout the case. *See, e.g.*, *In re J.M.T.*, 519 S.W.3d 258, 269 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). However, Obermayr did not have any contact with William after February 2019, and she testified she did not know whether William took a drug assessment, what the recommendations were, or whether he undertook to follow the recommendations, if any. The Department also did not present any evidence that William refused to submit to a drug test or failed a drug test any time after February 2019. Finally, there is no evidence William was ever under the influence of drugs in the child's presence or that he used drugs any time between February and the October 2019 trial. The Department's evidence about William's drug use is insufficient to weigh strongly in favor of a best interest finding.

Failure to complete services or provide excuse

The remaining evidence the Department relies on—Obermayr's testimony that William did not complete the services in his plan or give her an explanation for the failure—must be reviewed in the context of the other evidence, or lack thereof. This case was filed January 24, and William signed his service plan on February 19. Obermayr testified her last contact with William was in February, and she was not the caseworker from March until sometime in August. Obermayr testified that after she returned to her role as caseworker, she made one attempt to call William at a new telephone number he provided to the Department in September. Obermayr did not testify about any other attempts by her to communicate with William. Nor did she testify whether the Department's records reflect any other attempts by William to communicate with them. Although Obermayr testified she learned William was in jail in Comal County, she testified she did not visit him and provided no evidence that she attempted to confirm whether the information was true.

Obermayr did not purport to provide testimony about anything that occurred from March to August, and the Department did not present any evidence whether another caseworker was assigned to the case during Obermayr's five-month absence. Obermayr stressed she had not been given any certificates proving completion of items on the service plan, but conceded William began a parenting class and she did not know whether he had completed the class. She also did not know whether William had taken a drug assessment. No evidence was presented about whether William engaged in the other services in the plan.

There is no evidence anyone in the Department made any effort to assist William in obtaining the return of his child after he signed the service plan. And the absence of any evidence about the degree to which William engaged in services does not constitute evidence or support an inference that William did not engage in services, did not have an explanation or excuse, or did not attempt to communicate with the Department. *See E.N.C.*, 384 S.W.3d at 808. The meager

evidence introduced at trial about the details of William's contact with the Department during the case, the Department's efforts to facilitate services, and William's efforts to engage in services is insufficient, alone, to support a best interest finding and does not weigh strongly in favor of the finding.

Child's desires, emotional and physical needs of the child, and plans for child

J.M.T. was eleven months old at the time of trial. Obermayr testified J.M.T. had lived with the same foster family during the entire case and J.M.T. had bonded with them. She testified the foster parents were meeting J.M.T.'s physical and emotional needs and want to adopt her. Obermayr testified William visited with J.M.T. eight times, the last time being two months before trial. However, the Department did not provide any evidence about how William interacted with J.M.T. during his visits or whether they developed a bond. Moreover, there is no evidence J.M.T. has any particularized needs and no evidence William is unable or unwilling to meet J.M.T.'s physical and emotional needs or provide her a safe and stable home. J.M.T.'s young age, her bond with her foster family, and the relatively little amount of contact she has had with William weigh in favor of the best interest finding. *See In re U.G.G.*, 573 S.W.3d 391, 402 (Tex. App.—El Paso 2019, no pet.). However, the Department's failure to meet its burden to show that William is unable or unwilling to meet her J.M.T.'s emotional and physical needs or that he poses any kind of danger to her weighs against the finding. And the Department's conclusory belief J.M.T. will be better off living elsewhere is not clear and convincing evidence that termination of William's rights is in J.M.T.'s child's best interest. *See In re B.R.*., 456 S.W.3d 612, 617-18 (Tex. App.—San Antonio 2015, no pet.).

The other factors

Although the Department is not required to present evidence on every *Holley* factor, *see C.H.*, 89 S.W.3d at 27, the lack of evidence in this case about any of the other *Holley* factors or

the factors enumerated in section 263.307 of the Family Code is notable. There is no evidence J.M.T. had been the victim of prior or repeated harm; no evidence of the results of any examinations or evaluations of William or the child; and no evidence William has any history of abusive conduct. Although there is evidence William was tested positive for drugs at the beginning of the case, there is no evidence about whether he addressed his drug use issue and no evidence he continued to use drugs during the case. And, although there is evidence William did not give Obermayr a certificate stating he had completed and been discharged from counseling, there is no evidence he failed to seek and engage in counseling services. There is no evidence the Department ever attempted to facilitate services for William after the plan was signed or attempted to closely supervise him. The Department did not offer any evidence about William's parenting ability or skills, whether he has other children, his history, if any, with the Department, whether he is employed, whether he has housing that is stable and appropriate for children, whether he has family and community support, or whether he provided any support for J.MT. during the case.

It is possible that even without Department assistance, William engaged in drug treatment and counseling, maintained employment and housing, and established a safe and stable environment to which J.M.T. may return. It is also possible William actively evaded the Department, continued drug use, and engaged in repeated criminal activity. In the absence of any such evidence, the trial court was left to speculate. "The Department is required to support its allegations against a parent by clear and convincing evidence; conjecture is not enough." *E.N.C.*, 384 S.W.3d at 810. We conclude that based on the evidence introduced at trial, no reasonable fact-finder could have formed a firm belief or conviction that termination of William's parental rights was in J.M.T.'s best interest. *See* TEX. FAM. CODE § 161.001(2); *J.F.C.*, 96 S.W.3d at 272. The evidence is therefore legally insufficient and rendition of judgment in favor of the parent is proper. *See In re A.B.R.*, No. 04-18-00634-CV, 2019 WL 287349, at *1 (Tex. App.—San Antonio Jan. 23,

2019, no pet.). We reverse the trial court's order terminating William's parental rights[6] and render judgment denying the petition for termination.

Luz Elena D. Chapa, Justice

[6] We do not disturb other parts of the trial court's order, including the appointment of the Department as J.M.T.'s permanent managing conservator, because William does not challenge any part of the order other than the termination of his parental rights. *See In re J.A.J.*, 243 S.W.3d 611, 617 (Tex. 2007).