Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-19-00865-CV

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

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2019-PA-00060
Honorable Richard Garcia, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 1, 2020

I respectfully dissent because the Department has not met its burden to present clear and convincing proof that termination of Mother's parental rights is in J.M.G.'s best interest. The three prior judgments and the nineteen pages of relevant trial testimony cannot support the majority's inferences, which combine to justify termination. On this thin record, I would hold the evidence is legally insufficient.

STANDARD OF REVIEW

To terminate parental rights pursuant to section 161.001 of the Texas Family Code, the Department has the burden to prove by clear and convincing evidence: (1) one of the predicate grounds in subsection 161.001(b)(1); and (2) that termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. §§ 161.001, 161.206(a-1); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). The standard of clear and convincing evidence "is an intermediate standard that falls between

'preponderance of the evidence' used in ordinary civil proceedings and 'reasonable doubt' used in criminal proceedings." *In re J.G.S.*, 574 S.W.3d 101, 114 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (citing *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam)). The clear-and-convincing standard renders the typical standards of review for legal and factual sufficiency challenges inadequate. *See In re J.F.C.*, 96 S.W.3d 256, 264–68 (Tex. 2002). To assess legal sufficiency of the evidence, we look at "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *Id.* at 266. To give appropriate deference, "a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id.* A reviewing court should disregard "all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* A reviewing court considers "evidence favorable to termination if a reasonable factfinder could," and disregards "contrary evidence unless a reasonable factfinder could not." *In re D.M.*, 452 S.W.3d 462, 469 (Tex. App.—San Antonio 2014, no pet.) (citing *In re J.P.B.*, 180 S.W.3d 570, 573–74 (Tex. 2005) (per curiam)). "Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence." *In re J.F.C.*, 96 S.W.3d at 266. Evidence is legally insufficient if the reviewing court determines "no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true." *Id*.

BEST INTEREST

In determining the best interest of a child, courts apply the non-exhaustive *Holley* factors to shape their analysis. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The *Holley* factors include: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future emotional and physical danger to the child; (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 held by the individuals seeking custody of the child; (7) the stability of the home of the parent and the individuals seeking custody; (8) the acts or omissions of the parent which 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.* The foregoing factors are not exhaustive, and "[t]he absence of evidence about some of [the factors] would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Some cases "present . . . complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* [does] not suffice to uphold the [factfinder's] finding that termination is required." *Id.*

Trial Record

The trial record consists of three exhibits and approximately nineteen pages of relevant testimony by the Department's caseworker and Mother. Although the trial court and the parties had many hearings before trial, the only evidence that can support the termination order is the evidence admitted at trial. *See In re E.F.*, 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.) (urging the trial court and the parties to more completely develop the evidence at trial when the relevant evidence on appeal consisted of 34 pages of transcribed testimony).

The case was tried to the court on November 25, 2019. The trial court admitted three exhibits, each containing certified copies of court documents from separate cases. Exhibit 1 is an order of termination, signed on October 10, 2018, that terminated Mother's parental rights to two other children. This termination order contains a finding that Mother engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the children's physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). The second exhibit is another order of termination. This order was signed on February 13, 2009, and terminated Mother's parental rights to four additional children. The order states that Mother

executed an affidavit of relinquishment with respect to the four children. Exhibit 3 is a judgment of conviction against Mother for burglary of a habitation. *See* TEX. PENAL CODE ANN. § 30.02. According to the judgment, the date of the offense was June 29, 2016, sentence was imposed on May 24, 2019, and punishment was assessed at a fine of $1,500 and eight years' imprisonment, with approximately a year of time-served credited.

The trial court also heard testimony from two witnesses. The Department's caseworker, Candice Kondoff, testified that J.M.G. was removed "primarily [for] neglect, drug use[,] and domestic violence." Kondoff did not testify further regarding alleged neglect or domestic violence. According to Kondoff, the Department's concern about drug use was directed at Mother "in particular." Kondoff "believe[d]" J.M.G. was born drug-positive. Kondoff provided no further information about Mother's alleged drug use.

Kondoff further testified that Mother had been incarcerated for the entirety of the case. According to Kondoff, she prepared a service plan for Mother, which Mother did not sign. The record includes a court-ordered service plan, which required Mother to complete services and tasks, in large part, upon release from incarceration. The plan provides that Mother will obtain and maintain stable housing and legal employment "[u]pon release from jail." Likewise, Mother's plan required her (1) to engage in domestic violence classes, (2) to submit to a psychological evaluation and any recommended treatment, (3) to submit to a substance-use screening and random drug tests, and (4) to attend supervised visitations with J.M.G. All of these tasks were required "[u]pon release from jail." The only services not contingent upon Mother's release from jail were the requirements that Mother maintain contact with her assigned caseworker and Mother's required participation in the "MATCH / PATCH Program offered at the Bexar County Jail"[1] and

[1] There is no evidence in the record indicating what this program entailed.

"parenting classes while she is in jail." Kondoff testified that Mother did not complete any services, even though services were available to Mother while she was incarcerated.

Kondoff testified that Mother had not visited J.M.G. during the course of the case due to Mother's incarceration. Kondoff confirmed that Mother's rights had been terminated to six other children in prior suits, but Kondoff did not provide any details regarding the earlier terminations.

On September 12, 2019, J.M.G. was placed with her paternal grandmother. According to Kondoff, J.M.G. was doing "very well" and was bonded with her grandmother. Kondoff stated that the grandmother was employed and that the child was enrolled in daycare and receiving speech therapy. According to Kondoff, the paternal grandmother intended to adopt J.M.G. after receiving the necessary license.

Kondoff last spoke with Mother three weeks before trial at the Bexar County Jail. According to Kondoff, they discussed services available at the jail and at the prison to which Mother would be transferred. Kondoff stated that Mother had not provided her with any certificates for programs completed at prison. According to Kondoff, Mother would be released from prison no later than 2023, but the court clarified with the Department's attorney that the latest release date would be in 2027, based on the eight-year sentence imposed in 2019.

Mother then testified by phone from prison. Mother explained that she had been credited with approximately a year and a half of time served when her eight-year sentence was imposed and that she had "made parole within the treatment program, which is six months." Mother explained that within two months of her testimony she would enter the treatment program, and she believed she would be released from prison within six to nine months, upon completion of the program. After release, Mother planned to go to a halfway house because she did not "have a current stable living [situation]."

Mother testified that she completed a parenting class while in the Bexar County Jail called Raindrops to Rainbows and that she had completed eighty hours of a parenting and wellness class and another eighty hours of a transition-from-prison program while in prison.

Mother acknowledged that she was not able to visit J.M.G. while incarcerated, but "everything else, I'm pretty much trying to do that now." Mother stated that after her release, she would do everything possible to reunite with J.M.G., but she did not elaborate further.

On cross examination, Mother denied that J.M.G. was born drug-positive; denied telling the Department's investigator that she was "using anxiety pills and buying them off the street;" and denied ever using drugs while caring for J.M.G. Mother acknowledged that she was admitted to a hospital for "mental health issues," but, beyond this acknowledgment, no further details were elicited.

Analysis

The competent evidence admitted at trial is too paltry to form a firm belief or conviction that termination of Mother's parental rights was in J.M.G.'s best interest. *See In re C.H.*, 89 S.W.3d at 27.

The first *Holley* factor weighs only slightly in favor of termination. J.M.G. was too young to express her desires, and Kondoff testified that J.M.G. was doing "very well" in her grandmother's home and was bonded to her grandmother. *See In re M.C.L.*, No. 04-17-00408-CV, 2017 WL 5759376, at *3 (Tex. App.—San Antonio Nov. 29, 2017, no pet.) (mem. op.) ("When a child is unable to express his desires, a fact finder may consider that he has bonded with the foster family, is well cared for by them, and has spent minimal time with the parent." (citation omitted)).

The second *Holley* factor, concerning J.M.G.'s present and future emotional and physical needs, weighs only slightly in favor of termination, if at all. The only relevant evidence on this

factor is Kondoff's statement that J.M.G. was receiving speech therapy. Kondoff did not explain the nature of any mental or physical needs that required J.M.G. to receive such therapy, nor did she explain the scope of therapy or Mother's ability to meet J.M.G.'s speech-related needs. *Cf. In re E.N.C.*, 384 S.W.3d 796, 808 (Tex. 2012) (reasoning the second *Holley* factor did not weigh in favor of termination where the caseworker testified that the children's emotional and physical needs were great but did not explain these needs or whether the father had the ability to meet the needs).

Evidence as to the present and future emotional and physical danger to J.M.G. is vague and undeveloped. Relevant to this third *Holley* factor, Kondoff testified that J.M.G. was removed "primarily [for] neglect, drug use[,] and domestic violence." However, Kondoff gave no specific facts regarding past neglect or domestic violence or the likelihood of a reoccurrence of either. Other than Kondoff's sentence of testimony, the record contains no probative information about the potential danger to J.M.G. from neglect or domestic violence. *See In re M.A.J.*, No. 01-19-00685-CV, 2020 WL 1061774, at *8 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet. h.) (mem. op.) (determining the third *Holley* factor did not weigh in favor of termination where the caseworker testified that the children entered the Department's care based on an allegation of negligent supervision, but the caseworker knew nothing about the allegation and did not testify that it was the mother who was negligent).

Likewise, evidence regarding Mother's drug use is vague and speculative. Mother denied drug use while in the child's presence and denied that J.M.G. was born drug-positive. The Department presented no evidence that Mother ever used drugs, and Kondoff testified only that she "believe[d]" J.M.G. was born drug-positive. Kondoff's unsupported belief is not probative. *See In re K.M.J.*, No. 04-18-00727-CV, 2019 WL 1459565, at *7–8 (Tex. App.—San Antonio Apr. 3, 2019, pet. denied) (mem. op.) (reversing termination for insufficient evidence as to best

interest where the caseworker's testimony about a father's drug use was "conclusory and based on speculation and 'belief,' with no hard evidence of dirty drug tests or the confirmed presence of drugs in [the father's] home" (citations omitted)); *see also Gunn v. McCoy*, 554 S.W.3d 645, 662 (Tex. 2018) (explaining testimony offered with no basis to support it is "merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection").

The Department points to Mother's past terminations as evidence indicating that Mother will expose J.M.G. to future dangers. "A trier of fact may measure a parent's future conduct by his past conduct [in] determin[ing] whether termination of parental rights is in the child's best interest." *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). However, here, there is no evidence in the record regarding Mother's past conduct which formed the bases of the prior termination orders. The only competent evidence in the record are predicate findings that applied to other children, but those predicate findings did not relieve the Department of proving best interest in those cases—let alone the instant one. *See In re C.H.*, 89 S.W.3d at 28 ("[P]roof of acts or omissions under section 161.001(1) does not relieve the petitioner from proving the best interest of the child . . . ."); *see also In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.) ("Evidence that the parent has committed the acts or omissions prescribed by section 161.001 may also be probative in determining the child's best interest; but the mere fact that an act or omission occurred in the past does not *ipso facto* prove that termination is currently in the child's best interest." (internal citation omitted)).

From these earlier findings, the majority infers Mother's inability to parent, but the Department did not link Mother's past conduct towards other children to her care for J.M.G. The majority highlights the fact that a termination order was entered six weeks after J.M.G. was born, but this fact reveals nothing about when the abuse and neglect directed at the other children

occurred, the nature of the abuse and neglect, whether the abuse and neglect was expected to continue, and when the other children were removed from Mother's care. Without more, the prior termination orders raise merely a suspicion that Mother's unstated past conduct, which formed the bases for the prior findings, harmed J.M.G. or could be expected to harm J.M.G. in the future. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) ("[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." (citation omitted)). Constitutional safeguards and our clear-and-convincing standard prohibit us from inferring Mother's incapacity to care for J.M.G. based on prior termination findings without a more direct link to J.M.G. *See In re N.G.*, 577 S.W.3d 230, 236 (Tex. 2019) (per curiam) ("[P]arents . . . have a fundamental liberty interest in the right to parent—particularly, a right to parent other children not involved in the termination proceeding . . . ."); *see also Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002) ("Suits affecting the parent-child relationship are intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors.").

Evidence of Mother's criminal conduct, likewise, is insufficient to support an inference that she would expose J.M.G. to danger. Mother was incarcerated for the burglary of a habitation committed two years before J.M.G. was born. The only evidence as to the offense was the judgment of conviction, which did not indicate any of the underlying facts. "An offense occurring before a child is born may be relevant to the best-interest determination, but the Department bears the burden of introducing evidence concerning the offense and showing how it endangers the child." *In re A.L.R.*, No. 04-19-00349-CV, 2019 WL 5765793, at *6 (Tex. App.—San Antonio Nov. 6, 2019, no pet.) (mem. op.) (citing *In re E.N.C.*, 384 S.W.3d at 805). As with the prior termination orders, the Department has not made the relevant, factual connection between the offense and J.M.G.'s best interest. *See id.* (determining the third *Holley* factor did not weigh in

favor of termination where the Department did not produce any evidence regarding the facts of a burglary of a habitation committed two years before the child's birth for which the parent was imprisoned at the time of trial).

In contrast, Mother's incarceration at the time of trial is some evidence in favor of termination. *See In re J.G.S.*, 550 S.W.3d 698, 706 (Tex. App.—El Paso 2018, no pet.) ("A parent's incarceration is relevant to his ability to meet the child's present and future physical and emotional needs."). However, "the Family Code may not constitutionally be interpreted to authorize termination based solely on the fact that a parent is incarcerated." *In re A.L.R.*, 2019 WL 5765793, at *6 (citing *In re E.N.C.*, 384 S.W.3d at 805). *Holley* factor three weighs only slightly in favor of termination.

Holley factor four concerns the parenting abilities of the individuals seeking custody, and *Holley* factor five concerns the programs available to assist these individuals to promote the best interest of the child. As with the other *Holley* factors, the relevant evidence is undeveloped. Mother had no interaction with J.M.G. while imprisoned and there is no testimony regarding Mother's interactions with the child prior to Mother's incarceration. Likewise, there is no specific evidence regarding Mother's parenting of her six other children prior to termination. Mother acknowledged that she was admitted to a hospital for "mental health issues," but beyond this acknowledgement, the Department presented no evidence that mother's mental health issues remained untreated or impacted Mother's parenting of J.M.G. *Cf. In re E.F.*, 591 S.W.3d at 149 (Chapa, J., dissenting) ("When a parent with a diagnosed mental health condition undisputedly manages her condition proactively and effectively, the mere existence of the mental health diagnosis should play no role in a trial court's decision to terminate a parent's rights.").

The trial court was free to credit Kondoff's testimony that Mother did not complete a parenting class while in the Bexar County Jail. *See In re J.O.A.*, 283 S.W.3d at 346 ("[T]he

factfinder . . . is the sole arbiter of the witnesses' credibility and demeanor . . . ."). Mother's failure to complete this class is some evidence in favor of the best-interest finding. *See In re J.M.T.*, 519 S.W.3d 258, 270 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) ("A fact finder may infer from a parent's failure to take the initiative to complete the services required to regain possession of his child that he does not have the ability to motivate himself to seek out available resources needed now or in the future."). However, Mother testified that she completed a parenting class after she transferred to prison, and Kondoff, who spoke to Mother only prior to her transfer, was uninformed about the services Mother may have accessed in prison. On this record, there is scant evidence that Mother lacked parenting skills and that she failed to access any programs that she may have needed to be a successful parent. The record is nearly silent regarding the paternal grandmother's parenting skills. *Holley* factors four and five weigh only slightly in favor of termination.

Holley factors six and seven, which concern the plans held by the individuals seeking custody of the child and the stability of the proposed placements, weigh most heavily in favor of termination. The paternal grandmother intended to adopt J.M.G. In contrast, Mother was incarcerated at the time of trial. Kondoff was uncertain about the last possible date Mother would be released from prison, and Mother could only estimate that she would be released from prison six to nine months after the termination trial, upon the successful completion of a drug treatment program. Mother acknowledged that she had no stable living situation and intended to move to a halfway house. "Lack of stability, including a stable home, supports a finding that the parent is unable to provide for a child's emotional and physical needs." *In re M.C.L.*, No. 04-17-00408-CV, 2017 WL 5759376, at *4 (Tex. App.—San Antonio Nov. 29, 2017, no pet.) (mem. op.) (citation omitted); *see also* TEX. FAM. CODE ANN. § 263.307(a) ("[T]he prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.").

While it is undisputed that Mother lacked stability, it is also undisputed that Mother was eligible for parole within a year of trial. *See In re J.F.C.*, 96 S.W.3d at 266 ("Disregarding undisputed facts that do not support the [termination] finding could skew the analysis of whether there is clear and convincing evidence."). Mother's plan upon release was to access the services she needed to reunite with J.M.G. The Department's service plan conditioned most of Mother's required services on her release from jail.[2]

On this record, Mother's instability could tip the scales against her were this a preponderance-of-the-evidence evaluation; however, for termination, the question is whether the evidence amounts to clear and convincing evidence that Mother should have no relationship with her child. *See id.*; *see also In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007) (contrasting clear-and-convincing standard of proof for termination decisions with the preponderance-of-the evidence standard for conservatorship decisions).[3] The limited evidence in the record regarding the needs or plans for J.M.G. and Mother's parenting skills as well as the undisputed evidence regarding Mother's expected parole date and Mother's vow to obtain needed services, which largely were required only after her release from jail, altogether do not create a firm belief or conviction that termination of Mother's parental rights is in J.M.G.'s best interest.

Holley factors eight and nine concern Mother's acts or omissions which may indicate that the existing parent-child relationship is not a proper one and any excuse for the acts or omissions. To the extent that the record contains any evidence regarding these factors, I have discussed that evidence with the other seven factors.

[2] Kondoff did not dispute that Mother was eligible for parole; Kondoff's testimony was that 2023 was Mother's "maximum release date," which the Department later acknowledged was incorrect. "[P]arole decisions are inherently speculative" but, here, the undisputed testimony was that the decision had already been made. *In re E.N.Q.*, No. 04-17-00089-CV, 2017 WL 2791286, at *4 (Tex. App.—San Antonio June 28, 2017, pet. denied) (mem. op.).

[3] Mother does not challenge the Department's continued conservatorship of J.M.G.

With scant evidence as to most of the *Holley* factors and with Mother's instability not dispositive on this record, the Department has not met its burden to prove by clear and convincing evidence that termination of Mother's parental rights is in J.M.G.'s best interest. *See In re C.H.*, 89 S.W.3d at 27 (remarking that "paltry evidence relevant to each consideration mentioned in *Holley* [may] not suffice to uphold [a] finding that termination is required"); *In re M.A.J.*, 2020 WL 1061774, at *6 ("The presence of scant evidence relevant to each factor will generally not support a finding that termination of parental rights is in [a child's] best interest."); *see also Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) ("Actions which break the ties between a parent and child can never be justified without the most solid and substantial reasons." (citation omitted)). To be sure, there is some evidence in favor of the trial court's best-interest finding, and it is possible that it may be in J.M.G.'s best interest that the parent-child relationship be severed. *See In re E.N.C.*, 384 S.W.3d at 809 (explaining that reversal for insufficient evidence as to best-interest does not imply that a child's best interest is served either by maintaining the parent-child relationship or by severing the relationship). However, when the Department has not carried its burden, the evidentiary gap cannot be filed with unfounded inferences to affirm termination. *See Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968) ("[A] vital fact may not be established by piling inference upon inference . . . ."). For these reasons, I respectfully dissent.

Rebeca C. Martinez, Justice