



# Fourth Court of Appeals San Antonio, Texas

## 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

**AFFIRMED**

Mother appeals an order terminating her parental rights to her child, J.M.G.<sup>1</sup> In one issue, Mother argues there is legally and factually insufficient evidence to support the trial court's finding that termination of her parental rights is in J.M.G.'s best interest. We affirm the trial court's order.

### **BACKGROUND**

On January 11, 2019, the Texas Department of Family & Protective Services filed a petition for conservatorship of J.M.G. and termination of Mother's parental rights. J.M.G. was approximately five months old when removed from Mother, and was removed due to concerns of

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<sup>1</sup> To protect the minor child's privacy, we use the child's initials and an alias to refer to appellant. See TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

neglect and was placed with her grandmother. The case proceeded to a bench trial. The trial court admitted into evidence three judgments, which included two prior orders terminating Mother's parental rights to a total of six children, and one judgment of conviction for burglary of a habitation with force. The Department's sole witness was its caseworker, Candice Kondoff. Mother testified telephonically from prison.

The trial court found, by clear and convincing evidence, four grounds to terminate Mother's parental rights: (1) the existence of a prior order terminating her parental rights for knowingly endangering other children; (2) constructive abandonment; (3) failure to comply with court-ordered provisions of her family service plan; and (4) knowing criminal conduct resulting in her conviction, imprisonment, and inability to care for J.M.G. for two years as of the date of the filing of the Department's petition. *See* TEX. FAM. CODE § 161.001(b)(1)(M), (N), (O), (Q). The trial court also found, by clear and convincing evidence, termination of Mother's parental rights is in J.M.G.'s best interest. Mother challenges only the best interest finding.

#### **STANDARD OF REVIEW**

“When reviewing the sufficiency of the evidence, we apply the well-established [legal and factual sufficiency] standards.” *In re B.T.K.*, No. 04-19-00587-CV, 2020 WL 908022, at \*2 (Tex. App.—San Antonio Feb. 26, 2020, no pet.) (mem. op.). In a bench trial, “the trial court is the sole judge of the credibility of witnesses and the weight to be given their testimony.” *Id.* “We therefore defer to the trial court's ... credibility determinations.” *Id.*

#### **J.M.G.'S BEST INTEREST**

Before a trial court may terminate parental rights, a trier of fact must find by clear and convincing evidence: (1) one of the statutory grounds; and (2) termination is in the child's best interest. *Id.* Because Mother does not challenge the trial court's findings of statutory grounds for

terminating her parental rights, our sole inquiry is whether sufficient evidence supports the trial court's best interest finding. *See id.*

### **A. Applicable Law**

Determining a child's best interest involves considering evidence of the non-exclusive *Holley* factors: (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 the existing parent-child relationship is not a proper one; and (9) any excuse for those acts or omissions. *In re A.L.R.*, No. 04-19-00349-CV, 2019 WL 5765793, at \*4 (Tex. App.—San Antonio Nov. 6, 2019, no pet.) (mem. op.).

“[B]est interest determinations are fact-intensive.” *In re G.A.L.*, No. 05-19-00844-CV, 2020 WL 582282, at \*14 (Tex. App.—Dallas Feb. 6, 2020, no pet.) (mem. op.). We must consider “the totality of the circumstances in light of the *Holley* factors” to determine whether sufficient evidence supports the challenged finding. *In re B.F.*, No. 02-07-334-CV, 2008 WL 902790, at \*11 (Tex. App.—Fort Worth Apr. 3, 2008, no pet.) (mem. op.). Because each case's facts, and the state of the evidence can vary significantly, “[best interest] precedents have limited usefulness.” *G.A.L.*, 2020 WL 582282, at \*14. And here, although the facts are limited due to the absence of a thoroughly developed record, it is the cumulative weight and substance of these limited facts that provide sufficient evidence establishing termination of Mother's parental rights is in J.M.G.'s best interest.

## B. Analysis

The trial court admitted into evidence a 2009 order in which Mother's parental rights were terminated to four children (ages six, four, two, and one) based on her voluntary relinquishment and a finding by the court that it was in the best interest of the children. The trial court also admitted into evidence a 2018 order terminating Mother's rights to two more children (ages nine and eighteen months). The 2018 order recited the trier of fact had found, by clear and convincing evidence, that Mother:

- voluntarily abandoned the children for three months without expressing an intent to return, and without providing adequate support for the children;
- voluntarily left the children alone or in the possession of another without providing adequate support for the children and remained away for a period of at least six months;
- knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being;
- engaged in conduct or knowingly placed the children with persons who engaged in conduct endangering their physical or emotional well-being;
- constructively abandoned the children, who were in the permanent or temporary managing conservatorship of the Department for at least six months;
- failed to comply with court-ordered provisions of her family service plan; and
- had a mental or emotional illness or a mental deficiency that rendered her unable to provide for the physical, emotional, and mental needs of the child, and the illness or deficiency, in all reasonable probability, would continue to render the parent unable to provide for the children's needs until their 18th birthdays.

*See* TEX. FAM. CODE §§ 161.001(b)(1)(B), (C), (D), (E), (N), (O); 161.003. The 2018 order also recites that termination of Mother's parental rights was in the best interest of the two children. Notably, J.M.G. was born approximately six weeks before the trial in the 2018 termination. J.M.G. was therefore six weeks old when the above-listed findings were made.

In this case, the trial court was permitted to take as true the conduct-specific findings in these judgments as showing Mother had a history of abandoning and endangering her children, failed to take advantage of programs available to assist her to promote her children's best interest, lacked a long-term ability to provide for her children's needs, and acted or failed to act in ways indicating her relationship with her children was improper. *See In re E.N.C.*, 384 S.W.3d 796, 804 (Tex. 2012) (holding a trier of fact may draw reasonable inferences from a prior judgment and cannot assume "a worst case scenario").<sup>2</sup> The trial court was also permitted to measure Mother's future conduct by her past conduct in determining whether termination of her parental rights is in J.M.G.'s best interest. *See In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied); *Dunn v. Tex. Dep't of Protective & Regulatory Servs.*, No. 03-98-00569-CV, 2000 WL 1288915, at \*4 n.3 (Tex. App.—Austin Sept. 14, 2000, no pet.) (mem. op.) (stating one child's "best interest can be inferred from the direct evidence establishing her siblings' best interest"); *see, e.g., J.E.R.*, 2020 WL 690642, at \*3 (considering evidence of a prior termination as to two children in analyzing evidence relating to another child's best interest).

The trial court also admitted into evidence Mother's 2019 judgment of conviction for burglary of a habitation with force. Acting as the trier of fact, the trial court was permitted to accept as true the contents of the 2019 judgment. The 2019 judgment notes the date of the offense was June 29, 2016, identifies the offense as burglary of a habitation with force, and recites Mother pled no contest to the charge. The 2019 judgment also orders Mother to pay \$500 in restitution to the victim and to serve an eight-year sentence in prison. Although the trial court was not entitled to

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<sup>2</sup> *In re A.C.*, 394 S.W.3d 633, 641 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("Just as a trial court's judgment is effective for purposes of precluding relitigation between the same parties on the same issues, the judgment is also effective for the purpose of presenting evidence to the factfinder of a prior termination."); *see, e.g., In re J.E.R.*, No. 04-19-00566-CV, 2020 WL 690642, at \*3 (Tex. App.—San Antonio Feb. 12, 2020, pet. denied) (mem. op.) (considering, in a best interest analysis, "a judgment ordering termination of [father's] parental rights regarding two other children because his drug use endangered those children").

assume Mother committed a burglary in “a worst case scenario,” *E.N.C.*, 384 S.W.3d at 804, the trial court was well within its authority to “consider the instability that results from incarceration in its best interest analysis.” *See A.L.R.*, 2019 WL 5765793, at \*6.

The 2019 judgment of conviction for burglary further notes Mother was incarcerated on four separate occasions: (1) two days on June 30, 2016, and July 1, 2016; (2) seven months from November 13, 2016, to June 2, 2017; (3) two months from December 25, 2017, to February 17, 2018—while she was pregnant with J.M.G.; and (4) after J.M.G. was born, ten months from January 18, 2019, to the November 25, 2019 trial date in this case. Although the record does not reveal the underlying reasons for those four separate periods of incarcerations, the trial court was permitted to consider that a parent’s repeated “incarceration[s] . . . can negatively impact a child’s living environment and emotional well-being.” *In re J.J.C.B.R.*, No. 04-19-00297-CV, 2019 WL 4453734, at \*2 (Tex. App.—San Antonio Sept. 18, 2019, no pet.) (mem. op.).

Mother testified she would be released on parole within a year of the bench trial in this case, which was held on November 25, 2019. Specifically, Mother testified as follows:

Q All right. First, let’s start with parole and what not. You had some back time when you got sentenced; is that right?

A Yes, sir. I did.

Q About how much?

A I believe a year and a half, give or take.

Q Okay. All right. And, also, if I’m not mistaken, you paroled much earlier than eight years; right?

A Yes. I currently already made parole within the treatment program, which is six months.

Q All right. When would that start?

A Well, my original parole date was this month, but it, possibly, could take another few months to pull through the program. But I believe six to nine months, I should be able to be in there and out.

Q And then, do you go to a halfway house?

A Yes. I believe so.

Q All right.

A Because I don't have a current stable living [sic], I would go to a halfway house.

Q So, within a year, you would hope you would be done with everything done with parole, but out?

A Yes. I definitely believe, within the year, I could do that.

This testimony was disputed by Kondoff, who testified Mother's "next date" for release is in 2023. Our standard of review requires us to defer to the trial court's credibility determinations in resolving conflicting testimony. *See B.T.K.*, 2020 WL 908022, at \*2. Moreover, a parent's testimony about parole eligibility, even if undisputed, is generally not binding on a factfinder because "parole decisions are inherently speculative and rest entirely within the parole board's discretion." *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.) (citing *In re H.R.M.*, 209 S.W.3d 105, 110 (Tex. 2006)).

In short, Mother is currently serving an eight-year prison sentence, and the trial court specifically considered on the record the possibility Mother could serve the entire eight years. Although it is possible Mother could be released early on parole, the trial court was permitted to consider that "[s]he could also serve [her] entire sentence and not be released" early. *See In re J.D.S.*, No. 01-10-00767-CV, 2011 WL 4398554, at \*5 (Tex. App.—Houston [1st Dist.] Sept. 22, 2011, no pet.) (mem. op.). A parent's lengthy absence from a child's life during her early years due to incarceration creates an "emotional vacuum" that threatens the child's emotional well-being

and “indicate[s] that [the] parent-child relationship [is] not a proper one.” *T.L. v. Tex. Dep’t of Family & Protective Servs.*, No. 03-19-00382-CV, 2019 WL 5779913, at \*4 (Tex. App.—Austin Nov. 6, 2019, pet. denied) (mem. op.); *In re C.A.J.*, 459 S.W.3d 175, 184 (Tex. App.—Texarkana 2015, no pet.); see *In re J.W.M.*, 153 S.W.3d 541, 549 (Tex. App.—Amarillo 2004, pet. denied). Mother further testified that upon release from prison, she did not plan to try to reunify immediately with J.M.G. She testified that after her release, she planned to first live in a halfway house because she had no stable housing. See *A.L.R.*, 2019 WL 5765793, at \*4 (noting stable housing is one of the *Holley* factors).

Mother also testified she completed eighty hours of a parenting course in prison. According to her own testimony, however, the program was “not completed, yet.” Furthermore, Kondoff testified Mother had access to parenting programs while she was incarcerated, but she did not work on completing those services. Our standard of review requires us to defer to the trial court’s credibility determinations in resolving conflicting evidence. See *B.T.K.*, 2020 WL 908022, at \*2. We must therefore presume the trial court believed Kondoff’s testimony instead of Mother’s. See *id.*

Furthermore, J.M.G. was born in August 2018 and was approximately fifteen months old at the time of trial. “When children are too young to express their desires, the fact finder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent.” See *In re S.J.R.-Z.*, 537 S.W.3d 677, 693 (Tex. App.—San Antonio 2017, pet. denied). Kondoff testified J.M.G. was placed and has bonded with her grandmother, who plans to adopt J.M.G. J.M.G.’s grandmother is employed, takes J.M.G. to speech therapy, and is seeking a license to afford daycare for J.M.G. J.M.G. was removed from Mother when J.M.G. was a few months old, and due to her incarceration, Mother has not thereafter



seen J.M.G. The evidence shows J.M.G. has spent minimal time with Mother and has bonded with her grandmother, who is providing for J.M.G.'s needs.

The trial court could have also reasonably considered the two prior orders as evidence of Mother's inability to parent and her prior unwillingness or inability to engage in programs to help promote the best interest of her children. The first order shows Mother voluntarily relinquished her parental rights (resulting in termination to four children), and the second order terminated her parental rights "for cause" to two more children. The most recent order presumably carrying more weight due to its proximity in time to J.M.G.'s birth and the trial involving J.M.G. Moreover, both issuing trial courts found termination was in the best interest as to the six children to terminate Mother's parental rights. In addition to the 2009 relinquishment order in which the court found by clear and convincing evidence that it was in the best interest of the children that Mother's rights be terminated, the 2018 termination order (which was rendered weeks after J.M.G.'s birth) shows Mother's recent history of abandonment, endangerment, a failure to comply with court orders, and mental or emotional illness or deficiency rendering Mother unable to provide for the physical, emotional and mental needs of her children. The evidence shows Mother has had a long and recent history of abandoning her children and has not been capable of being present in their lives or meeting their basic emotional and physical needs. *See A.L.R.*, 2019 WL 5765793, at \*4.

Although there is not evidence of every single *Holley* factor, "not every factor must be proved to find that termination is in the child's best interest." *In re P.G.D.*, No. 04-19-00896-CV, 2020 WL 2543310, at \*2 (Tex. App.—San Antonio May 20, 2020, no pet. h.) (mem. op.). Considering the cumulative weight of the evidence discussed above, we hold legally and factually sufficient evidence supports the trial court's finding that termination of Mother's parental rights is in J.M.G.'s best interest.

**CONCLUSION**

We therefore affirm the trial court's order of termination.

Luz Elena D. Chapa, Justice