In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00013-CV

IN THE INTEREST OF A.R., A CHILD

On Appeal from the County Court at Law
Bowie County, Texas
Trial Court No. 19C0682-CCL

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Following the birth of A.R. on March 14, 2019, the Department of Family and Protective Services (Department) received a report that A.R. had been neglectfully supervised. At birth, A.R. tested positive for marihuana, amphetamine, and methadone. The Department thereafter filed a petition for protection of a child, for conservatorship, and for termination of Mother's parental rights to A.R.[1] The trial court granted the petition, finding that Mother knowingly placed or allowed A.R. to remain in conditions or surroundings that endangered her physical or emotional well-being, engaged in conduct or knowingly placed A.R. with persons who engaged in conduct that endangered A.R.'s physical or emotional well-being, failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain A.R.'s return, as described in Section 161.001(b)(1)(O), and used a controlled substance in a manner that endangered the health or safety of A.R. as described in Section 161.001(b)(1)(P) of the Texas Family Code. The trial court also found that termination was in A.R.'s best interests. *See* TEX. FAM. CODE ANN. §161.001(b)(1)(D), (E), (O), (P), (b)(2) (Supp.).[2]

On appeal, Mother challenges the legal and factual sufficiency of the evidence supporting each of the trial court's findings. We affirm the trial court's judgment because we conclude that (1) sufficient evidence supports termination under grounds D and E and (2) sufficient evidence supports the finding that termination was in A.R.'s best interests.

[1]To protect the minor child's privacy, we refer to appellant as Mother and to the child by initials. *See* TEX. R. APP. P. 9.8.

[2]Father relinquished his parental rights to A.R. and does not appeal the ultimate termination of those rights.

"The natural right existing between parents and their children is of constitutional dimensions." *In re E.J.Z.*, 547 S.W.3d 339, 343 (Tex. App.—Texarkana 2018, no pet.) (quoting *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). "Indeed, parents have a fundamental right to make decisions concerning 'the care, custody, and control of their children.'" *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). "Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial." *Id.* (quoting *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014)). This Court is required to "engage in an exacting review of the entire record to determine if the evidence is . . . sufficient to support the termination of parental rights." *Id.* (quoting *A.B.*, 437 S.W.3d at 500). "[I]nvoluntary termination statutes are strictly construed in favor of the parent." *Id.* (quoting *In re S.K.A.*, 236 S.W.3d 875, 900 (Tex. App.—Texarkana 2007, pet. denied) (quoting *Holick*, 685 S.W.2d at 20)).

"In order to terminate parental rights, the trial court must find, by clear and convincing evidence, that the parent has engaged in at least one statutory ground for termination and that termination is in the child's best interest." *Id.* (citing TEX. FAM. CODE ANN. § 161.001; *In re E.N.C.*, 384 S.W.3d 796, 798 (Tex. 2012)). "'Clear and convincing evidence' is that '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.'" *Id.* (quoting TEX. FAM. CODE ANN. § 101.007 (citing *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009)). "This standard of proof necessarily affects our review of the evidence." *Id.*

"In our legal sufficiency review, we consider all the evidence in the light most favorable to the findings to determine whether the fact-finder reasonably could have formed a firm belief or

conviction that the grounds for termination were proven." *In re L.E.S.*, 471 S.W.3d 915, 920 (Tex. App.—Texarkana 2015, no pet.) (citing *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam); *In re J.L.B.*, 349 S.W.3d 836, 846 (Tex. App.—Texarkana 2011, no pet.)). "We assume the trial court, acting as fact-finder, resolved disputed facts in favor of the finding, if a reasonable fact-finder could do so, and disregarded evidence that the fact-finder could have reasonably disbelieved or the credibility of which reasonably could be doubted." *Id.* (citing *J.P.B.*, 180 S.W.3d at 573).

"In our review of factual sufficiency, we give due consideration to evidence the trial court could have reasonably found to be clear and convincing." *Id.* (citing *In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006) (per curiam)). "We consider only that evidence the fact-finder reasonably could have found to be clear and convincing and determine 'whether the evidence is such that a fact[-]finder could reasonably form a firm belief or conviction about the truth of the . . . allegations.'" *Id.* (quoting *H.R.M.*, 209 S.W.3d at 109; *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)) (citing *In re J.F.C.*, 96 S.W.3d 256, 264, 266 (Tex. 2002)). "If, in light of the entire record, the disputed evidence that a reasonable fact-finder could not have credited in favor of the finding is so significant that a fact-finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.* (quoting *J.F.C.*, 96 S.W.3d at 266). In making this determination, we undertake "an exacting review of the entire record with a healthy regard for the constitutional interests at stake." *Id.* (quoting *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) (quoting *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002)).

"Despite the profound constitutional interests at stake in a proceeding to terminate parental rights, 'the rights of natural parents are not absolute; protection of the child is paramount.'" *Id.* (quoting *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003); *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994)) (citing *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003)). "A child's emotional and physical interests must not be sacrificed merely to preserve parental rights." *Id.* (quoting *In re C.A.J.*, 459 S.W.3d 175, 179 (Tex. App.—Texarkana 2015, no pet.)).

"Only one predicate finding under Section 161.001[b](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *Id.* at 923 (quoting *In re O.R.F.*, 417 S.W.3d 24, 37 (Tex. App.—Texarkana 2013, pet. denied); *A.V.*, 113 S.W.3d at 362 (citing *In re K.W.*, 335 S.W.3d 767, 769 (Tex. App.—Texarkana 2011, no pet.)). Even so, in *In re N.G.*, the Texas Supreme Court held that due process demands that we review the evidence supporting findings under Grounds D and E when they are challenged on appeal because termination of parental rights under these Grounds "may have implications for . . . parental rights to other children." *In re N.G.*, 577 S.W.3d 230, 234 (Tex. 2019). As a result, we focus our analysis on Grounds D and E.

(1) Sufficient Evidence Supports Termination Under Grounds D and E

At birth, A.R. tested positive for marihuana, amphetamine, and methadone.[3] Stevie Willis, an investigator for the Department, testified that A.R. experienced withdrawal symptoms following her birth. As a result, A.R. remained hospitalized a month after she was born. When she was discharged from the hospital, A.R. was placed with her paternal grandmother.

[3]Mother testified that she took methadone during her pregnancy but stated that she had a prescription for it.

Willis testified that, during Mother's first visit with A.R. after the removal hearing, Mother fell asleep in a chair while holding A.R. and dropped her. Mother testified that she dropped A.R. because she was a new mother and was tired. Although she was taking methadone at the time, Mother testified that she was sober when she dropped A.R.[4] A.R. was taken to the emergency room following the incident. Willis testified that hospital personnel were concerned that Mother dropped A.R. because she was under the influence. Mother testified that, when she was waiting in the emergency room during A.R.'s examination, she dozed off but denied that she had passed out.

Mother struggled with her drug addiction throughout the pendency of the case. Chantel Finley, the Department conservatorship worker assigned to the case, testified that, due to Mother's noncompliance and continued positive drug tests, the trial court cut off all visitation with A.R. after July 2019. According to Finley, Mother had one negative drug test on February 13, 2020, one week before trial. Mother failed every other drug test throughout the pendency of the nine-month-long case.[5] Mother's drug tests in October 2019 were particularly alarming in that she tested positive for over ten different substances. Mother admitted to using even more drugs in October 2019 than she used before A.R's birth. She did not submit to drug testing in the last two months of 2019.

[4]Mother later testified that she did not drop A.R. She stated that A.R. had been screaming and was inconsolable due to the child's withdrawal from methadone. Mother stated that A.R. was thrashing "really hard" and hit her head on the side of a table when Mother attempted to grab a bottle of milk. A.R.'s grandmother and great-grandmother, who were present in the home at the time, did not hear the child crying.

[5]On January 31, 2020, Mother's drug test resulted in a dilute negative. According to Finley, a dilute negative is an altered sample resulting from the ingestion of a substance to clean the urine. Mother's hair follicle test on January 31, 2020, was positive for marihuana.

Mother explained that she relapsed in July 2019 because A.R.'s father believed that he lost his visitation rights due to Mother's continued drug use, and he became angry with her. Mother's resulting depression purportedly caused her to relapse. Mother thereafter learned at the October 17 status hearing that A.R.'s father had relinquished his rights to A.R. Mother explained that she was in a bad place, "did a bunch of stupid stuff," and made some mistakes.

Finley testified that, due to Mother's continued drug use, the trial court ordered Mother to enter inpatient rehabilitation. Although Mother entered inpatient rehabilitation, she checked herself out after five days and did not successfully complete the program. Mother explained that she did not complete the program due to legal trouble. She came home to take care of a felony charge filed against her and was arrested and incarcerated for a month and a half through January 5, 2020. Although the charge on which Mother was arrested was ultimately dismissed, she pled guilty to a misdemeanor theft charge.[6] Mother testified that, when she was released from jail in January, she did not go right back to using drugs and would have had more negative drug tests but for her incarceration.

Finley testified that Mother completed certain court-ordered services including counseling, parenting classes, and outpatient services from ETCADA.[7] In Finley's opinion, however, Mother was not currently able to parent A.R., and her psychological examination revealed the continued potential to abuse or neglect A.R. At the February 2020 trial, Finley testified that Mother had last visited A.R. in July 2019. In Finley's experience, a cut off of visitation motivates parents to do

[6]Mother has had other, unidentified, misdemeanor convictions.

[7]ETCADA is the East Texas Council on Alcohol and Drug Abuse. *In re E.N.C.*, 385 S.W.3d 1, 11 (Tex. App.—Texarkana 2011), *rev'd in part*, 384 S.W.3d 796 (Tex. 2012).

what they need to do. That was not true in this case. Mother's drug use had been, and continued to be, a major concern.

Under Ground D, a trial court may terminate the parent-child relationship if the evidence is clear and convincing that the parent has "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotion well-being of the child." TEX. FAM. CODE ANN. § 161.001(b)(1)(D). "A child is endangered when the environment creates a potential for danger that the parent is aware of, but disregards." *In re N.B.*, No. 06-12-00007-CV, 2013 WL 1605457, at *9 (Tex. App.—Texarkana May 8, 2012, no pet.) (mem. op.). "[S]ubsection (D) permits termination [of parental rights] based on a single act or omission [by the parent]." *In re L.C.*, 145 S.W.3d 790, 797 (Tex. App.—Texarkana 2004, no pet.); *see In re A.B.*, 125 S.W.3d 769, 776 (Tex. App.—Texarkana 2003, pet. denied). "Inappropriate, abusive, or unlawful conduct by a parent . . . can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D)." *In re C.J.B.*, No. 05-19-00165-CV, 2019 WL 3940987, at *6 (Tex. App.—Dallas Aug. 21, 2019, no pet.) (mem. op.). "Endanger," as used in the definition of Grounds D and E, "means to expose to loss or injury; to jeopardize." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *see L.E.S.*, 471 S.W.3d at 923.

Termination is permitted under Ground E on clear and convincing proof that the parent "engaged in conduct . . . which endangers the physical or emotional well-being of the child." TEX. FAM. CODE ANN. § 161.001(b)(1)(E). "It is not necessary that the conduct be directed at the child or that the child actually suffer injury." *L.E.S.*, 471 S.W.3d at 923. "Under subsection (E), it is

sufficient that the child's well-being is jeopardized or exposed to loss or injury." *Id.* (citing *Boyd*, 727 S.W.2d at 533; *N.S.G.*, 235 S.W.3d at 367). "Further, termination under subsection (E) must be based on more than a single act or omission. Instead, a 'voluntary, deliberate, and conscious course of conduct by the parent is required.'" *Id.* (quoting *Perez v. Tex. Dep't of Protective & Regulatory Servs.*, 148 S.W.3d 427, 436 (Tex. App.—El Paso 2004, no pet.) (citing *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—Eastland 1999, no pet.))). Because the evidence concerning Grounds D and E is interrelated, we consolidate our examination of these grounds.

Mother used drugs while she was pregnant with A.R., which resulted in A.R. having methadone, marihuana, and amphetamine in her system at birth. A mother's drug use during pregnancy "may amount to conduct that endangers the physical and emotional well-being of the child." *In re E.J.P.*, No. 06-04-00131-CV, 2005 WL 2138573, at *3 (Tex. App.—Texarkana Sept. 7, 2005, no pet.) (mem. op.); *see In re M.L.B.*, 269 S.W.3d 757, 760 (Tex. App.—Beaumont 2008, no pet.) ("Drug use during pregnancy can support a charge that the mother has engaged in conduct that endangers the physical and emotional welfare of the child."); *In re J.T.G.*, 121 S.W.3d 117, 125–27 (Tex. App.—Fort Worth 2003, no pet.) (holding that a mother's drug use during pregnancy may endanger the child's well-being); *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 84 (Tex. App.—Dallas 1995, no writ) (illegal drug use during pregnancy supports finding that mother has engaged in conduct that endangers physical and emotional welfare of child).

Despite the fact that A.R. was born with a drug addiction, Mother continued to use drugs after A.R.'s birth throughout the pendency of the case. "'Drug addiction and its effect on a parent's

life and ability to parent may establish an endangering course of conduct' by a parent sufficient to support a petition to terminate parental rights." *In re O.R.F.*, 417 S.W.3d 24, 38 (Tex. App.—Texarkana 2013, pet. denied). "A parent's failure to remain drug-free while under the Department's supervision will support a finding of endangering conduct under subsection (E) even if there is no direct evidence that the parent's drug use actually injured the child" "[b]ecause it exposes the child to the possibility that the parent may be impaired or imprisoned." *Id*. at 39 (quoting *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). "Moreover, illegal drug use by a parent likewise supports the conclusion that the children's surroundings endanger their physical or emotional well-being." *L.E.S.*, 471 S.W.3d at 925 (citing *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.)); *see In re N.B.*, No. 06-12-00007-CV, 2012 WL 1605457, at *9 (Tex. App.—Texarkana May 8, 2012, no pet.) (mem. op.).

The evidence in this case demonstrates that Mother abused drugs before A.R.'s birth and continued to do so throughout the pendency of the case. A.R. suffered from withdrawal symptoms and required continued hospitalization and monitoring. Mother admitted to continued drug use after A.R.'s birth and acknowledged that she made other mistakes. She had only one clean drug test throughout the case, on the eve of trial. Mother did not complete inpatient drug rehabilitation, was incarcerated during the pendency of this case, and had more than one misdemeanor conviction. *See L.E.S.*, 471 S.W.3d at 924 ("[I]ntentional criminal activity which expose[s] the parent to incarceration is relevant evidence tending to establish a course of conduct endangering the emotional and physical well-being of the child.").

Considering the entire record, we conclude that the evidence is both legally and factually sufficient to support the trial court's findings by clear and convincing evidence under Grounds D and E. We overrule these points of error.[8]

(2) Sufficient Evidence Supports the Finding that Termination Was in A.R.'s Best Interests

Mother also challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of her parental rights was in A.R.'s best interests.

"There is a strong presumption that keeping a child with a parent is in the child's best interest." *In re J.A.S., Jr.*, No. 13-12-00612-CV, 2013 WL 782692, at *7 (Tex. App.—Corpus Christi Feb. 28, 2013, pet. denied) (mem. op.) (citing *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam)). "Termination 'can never be justified without the most solid and substantial reasons.'" *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.) (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)).

In determining the best interests of the child, courts consider the following *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, (6) the plans for the child by these individuals, (7) the stability of the home, (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 the acts or omissions of the parent.

[8]Mother also argues that the trial court erred in failing to grant a directed verdict because the Department did not establish that A.R. was removed for abuse or neglect. This argument affects the propriety of termination under Ground O. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O). Mother also appears to argue that a showing of abuse or neglect was required for termination under Ground P and further contends that the evidence was legally and factually insufficient to support termination under each of these grounds. Because we affirm the trial court's findings under Grounds D and E, we need not address the propriety of termination under Grounds O and P. *See L.E.S.*, 471 S.W.3d at 923; *N.G.*, 577 S.W.3d at 234.

Id. at 818–19 (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)); *see In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012); *see also* TEX. FAM. CODE ANN. § 263.307(b). "There is no requirement that the party seeking termination prove all nine factors." *N.L.D.*, 412 S.W.3d at 819 (citing *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002)). Further, we may consider evidence used to support the grounds for termination of parental rights in the best interest analysis. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). "A parent's inability to provide adequate care for her child, lack of parenting skills, and poor judgment may be considered when looking at the child's best interests." *N.L.D.*, 412 S.W.3d at 819 (citing *In re C.A.J.*, 122 S.W.3d 888, 893 (Tex. App.—Fort Worth 2003, no pet.)). "Parental drug abuse is also a factor to be considered in determining a child's best interests." *Id*. (citing *In re M.R.*, 243 S.W.3d 807, 820 (Tex. App.—Fort Worth 2007, no pet.)).

It is undisputed that A.R. is bonded with her relative in whose care she has been placed—her paternal grandmother—and that she has had no contact with Mother since she was approximately four months' old. However, she is too young to express her desires. Therefore, we find that the first *Holley* factor is neutral.

At the time of trial, A.R. was eleven months old. Given her young age, her emotional and physical needs now and in the future are great. At the time of trial, Mother had no job, no income, and no home other than that of her parents—about whom the record is silent. "A parent who lacks stability, income, and a home is unable to provide for a child's emotional and physical needs." *In re C.A.J.*, 459 S.W.3d 175, 183 (Tex. App.—Texarkana 2015, no pet.) (quoting *In re J.T.G.*, No. 14-10-00972-CV, 2012 WL 171012, at *17 (Tex. App.—Houston [14th Dist.] Jan. 19, 2012, pet. denied) (mem. op.)). We find that the second *Holley* factor weighs in favor of termination.

In evaluating the third and fourth *Holley* factors, we recognize that "[e]vidence of past misconduct or neglect can be used to measure a parent's future conduct." *Id*. (quoting *In re I.R.K.N.*, No. 10-13-00455-CV, 2014 WL 2069281, at *7 (Tex. App.—Waco May 15, 2004, pet. denied) (mem. op.); *Ray v. Burns*, 832 S.W.2d 431, 435 (Tex. App.—Waco 1992, no writ) ("Past is often prologue."). Although Mother expressed her love for A.R. and the desire to be her mother, her lengthy history of drug abuse and poor decisions established that she had been a danger to A.R. Mother's failure to remain drug free during the pendency of this case suggests that it is likely that Mother could be a danger to A.R. in the future. We find that the third and fourth *Holley* factors weigh in favor of termination.

Although Mother completed the program at ECTADA, she did not complete inpatient substance abuse treatment and did not conquer her drug addiction. This was necessary to becoming a capable parent to A.R. Further, Mother's decision to use drugs during her pregnancy and during the pendency of this case indicate that the existing parent-child relationship with A.R. is not a proper one. We find that the fifth, eighth and ninth *Holley* factors weigh in favor of termination.

As for the sixth and seventh *Holley* factors, the evidence showed that A.R. has been living with her paternal grandmother since the day she was discharged from the hospital at the age of four weeks. Finley testified that A.R. is bonded to her grandmother, who is her potential adoptive placement.

Patricia Smith, the advocate coordinator for Court Appointed Special Advocates (CASA) testified that A.R.'s grandmother has a very safe and clean home environment for A.R. and that A.R. is happy and healthy. A.R.'s physical and emotional needs are being met in this home. A.R.

has her own room next to the living area and is thriving in her grandmother's home. Because A.R. needs stability and permanency, Smith expressed the opinion that it was in A.R.'s best interests to terminate Mother's parental rights. A.R.'s attorney ad litem also believed that it was in A.R.'s best interests to terminate Mother's parental rights.

Mother testified that she is currently in the in the process of getting a job and stated that she had family support to help her with A.R. until she was able to manage on her own. Mother believed that it would be in A.R.'s best interests to be reunited with her, but expressed no future plans for A.R. We conclude that the sixth and seventh *Holley* factors weigh in favor of termination.

Considering the *Holley* factors and in light of all of the evidence, we conclude that the trial court could have reasonably formed a firm belief or conviction that termination of Mother's parental rights was in A.R.'s best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). We therefore overrule this issue.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 2, 2020
Date Decided: July 9, 2020