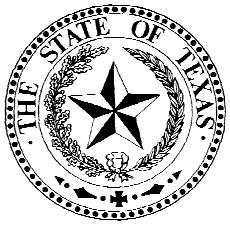
Affirmed and Opinion filed December 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00193-CV

In the Matter of Z.B. and M.B.

On Appeal from the 361st District Court
Brazos County, Texas
Trial Court Cause No. 7886-361

O P I N I O N

Appellant appeals from the trial court's judgment terminating her parental rights to Z.B. and M.B, respectively 7 and 5 years old at trial, claiming the evidence was factually insufficient to show that termination was in the children's best interests. We affirm.

I. FACTUAL BACKGROUND

After being informed that appellant had left her two young children home alone, Child Protective Services (CPS) removed them from her home. Appellant was charged by indictment with two counts of abandoning a child with intent to return under circumstances that exposed the child to unreasonable risk of harm. Appellant pleaded guilty to both counts and was sentenced to two years' confinement in a state jail facility, probated for five years.

The Texas Department of Protective and Regulatory Services (DPS) later filed a petition for protection of children, for conservatorship and termination in a suit affecting the parent-child relationship. The State presented evidence that M.B. had serious medical problems when CPS removed him and that his special needs would endure throughout his childhood. Testimony shows that appellant had a long-term alcohol problem and that she continued to abuse alcohol during the sixteen months her children were in foster care. During that period, appellant was intermittently incarcerated (as she was at trial), never obtained stable living accommodations for herself or the children, and failed to support the children. Evidence also shows that appellant unsuccessfully attempted rehabilitation through the DPS until trial in October 2000.

After a trial on the merits, the court below found by clear and convincing evidence that the State established (1) the statutory basis for terminating appellant's parental rights[1] and (2) termination of parental rights was in the best interests of the children. Accordingly, the trial court rendered judgment terminating appellant's parental rights to Z.B. and M.B. Appellant appeals raising one point of error.

II. FACTUAL SUFFICIENCY

Appellant argues her parental rights should not be terminated and that, until she can overcome her alcohol problem, the children should be placed with her sister Beatrice Sanchez (and her husband) or remain in CPS custody. Appellant argues termination is not in their best interests because (1) they are very young; (2) they may be adopted by non-relatives despite the attachments they have formed with family members; and (3) it is likely

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[1] The trial court found that termination of the parent-child relationship is in the children's best interests. The court also found that appellant (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endangered the physical or emotional well-being of the children; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the children; (3) "contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261, Texas Family Code;" and (4) failed to comply with the provisions of a court order required to return the children home.

that appellant could become a proper parent with treatment. CPS, however, seeks termination of appellant's parental rights, which would allow the children to be adopted by non-family members.

In proceedings to terminate the parent-child relationship brought under section 161.001 of the Texas Family Code, the petitioner must establish one or more of the acts or omissions enumerated under subdivision (1) of the statute[2] and must also prove that termination is in the best interests of the children.[3] *See Richardson v. Green*, 677 S.W.2d 497, 499 (Tex. 1984). Here, appellant concedes that the statutory ground has been established, acknowledging that she "left the children alone in an environment that endangered their physical well-being."[4] Thus, we turn to the "best interests" analysis.

Reviewing factual sufficiency of the evidence under a clear and convincing standard requires us to determine whether the evidence is sufficient to make the existence of the facts highly probable. *In re D.T.*, 34 S.W.3d 625, 631–32 (Tex. App.—Fort Worth 2000, pet. denied). We must consider whether the evidence is sufficient to produce in the mind of the fact-finder a firm belief or conviction as to the truth of the allegation sought to be established. *Id.* at 632. We are required to consider all of the evidence in the case in making this determination. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998). Accordingly, appellant must show that the evidence is so weak or the evidence to the contrary is so overwhelming the trier of fact could not have reasonably concluded there was a high probability that termination was in the best interests of the children. *In re A.P.*, 42 S.W.3d 248, 256 (Tex. App.—Waco 2001, no pet h.).

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2 TEX. FAM. CODE ANN. § 161.001(1) (Vernon Supp. 2001).

3 *Id.* § 161.001(2).

4 The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child. TEX. FAM. CODE ANN. § 161.001(1)(D).

The Texas Supreme Court has set out a nonexclusive list of factors to consider in assessing the best interests of a child:

(1) the child's desires;
(2) the child's present and future emotional and physical needs;
(3) the present and future emotional and physical danger to the child;
(4) the parenting abilities of the individuals seeking custody;
(5) the programs available to those seeking custody to help promote the best interests of the child;
(6) the plans those seeking custody have for the child;
(7) the stability of the home or proposed placement;
(8) any acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one;
(9) any excuse for the parent's acts or omissions.

Holley v. Adams, 544 S.W.2d 367, 371–73 (Tex. 1976).

(1) Children's desires

There was no testimony as to the desires of Z.B. and M.B. However, CPS caseworker Marty Fowler testified that the children love their mother. Cathy Blankenship, who also works for CPS and monitored their visits, testified that Z.B. was "really excited" and "really happy" to see his mother when she came to visit and that both children were usually excited to see their mother and enjoyed the visits.

Appellant argues there was no testimony that the children exhibited any fear toward her when they were removed from their home or when they were scheduled to visit with her. She also points to a lack of evidence that the children desired termination or separation from her.

(2) Present and future emotional and physical needs of the children

The evidence shows that M.B. has special needs. When M.B. was put into foster care, he had a heart condition which required open-heart surgery. M.B. also has an inherited genetic disorder called Russell Silver Syndrome, which affects growth and causes weak muscle tone, attention deficit disorder, learning disabilities, and language delays. CPS

supervisor Joan Hazelwood testified that children with this condition often require physical, speech and occupational therapy. They also need considerable emotional support. CPS caseworker Fowler testified that appellant failed to follow through on M.B.'s medical care. The children's ad litem attorney, Thomas Reed, stated during closing argument that appellant was "not able to actively take care of the children on a regular basis."

In her appellate brief, appellant acknowledges the State provided evidence that she neglected M.B.'s physical needs —by failing to follow up on a doctor's visit concerning his heart condition— but points out that M.B. received the proper medical care (including heart surgery) while in foster care. Appellant argues that non-termination of her rights and placement of the children in the custody of CPS or a relative would provide for their physical care while allowing her to continue to provide "the emotional care that she has demonstrated she is capable of providing."

Appellant argues that no one testified she was unable to meet the emotional needs of the children. To the contrary, CPS caseworker Fowler testified that appellant had been visiting regularly, approximately thirty-two times since Fowler became their caseworker. However, she recalled three instances in which appellant missed visits due to being jailed, domestic violence in her family, and lack of transportation. Fowler observed about one-third of appellant's visits with her children. She testified that appellant is "very good with her kids" and that she never observed appellant being violent with them.

(3) Present and future emotional and physical danger to the children

Appellant contends that the only evidence indicating she endangered the children emotionally or physically was that she left them alone and that placement with CPS or a relative could ensure they would no longer face physical danger.

The State points to the trial court's concern with establishing stability for the children:

> "I feel like the importance of . . . establishing permanency is critical for these kids at their age. And I feel that we have gone some year and a few months in

> trying to come up with that plan of permanency. And I just don't see it at this point. And I think it's critical to move on as far as the best interest of the children are concerned."

(4) Parenting abilities of the individuals seeking custody

CPS caseworker Fowler testified it was likely that a family member would be able or willing to adopt the children. Appellant notes that (1) CPS considered the Sanchez family (appellant's sister's family) as a possible proper placement; (2) CPS temporarily placed the children with the Sanchezes; and (3) there was no testimony that CPS questioned their parenting abilities or considered placement with them inappropriate. She further argues that permanent placement of her children with relatives, particularly the Sanchez family, without termination of her rights serves the best interests of the children. CPS supervisor Hazelwood testified that the children had a lot of contact with the Sanchez family and sometimes stayed with them while growing up.

On the other hand, Fowler testified that the Sanchezes had "stepped forward" and that "they felt that they could, [after adopting the children] . . . be able to care for the children and have more power over the family who is trying to give them pressure . . . they would be able to handle it." The record indicates there was considerable stress and tension among appellant, her parents, and her sister Beatrice over the children's care. Fowler further testified that the Sanchezes remained interested in adopting the children.

The Sanchezes told CPS supervisor Hazelwood they could manage the family's behavior if they were able to adopt the children. However, after a subsequent telephone conversation with the Sanchezes, Hazelwood no longer had confidence that the Sanchezes wanted to adopt the children. The Sanchezes' vacillation on the issue was negative for Hazelwood because what CPS wanted for the children was "a family who is willing to commit to them regardless . . . ."

(5) Programs available to those seeking custody to help promote the best interests of the children

One of the benefits of adoption is to give the adoptive parents access to adoption subsidies available for families who adopt siblings and special-needs children. Fowler testified that the adoption subsidies help pay for special-needs such as future residential treatment and programs for any type of physical, emotional, speech, or learning disabilities. Appellant argues that this consideration is outweighed by the fact that the children are of an age that they have established relationships with their biological relatives and that termination could permanently sever those ties.

(6) Plans that those seeking custody have for the children

Appellant did not address this factor in her appellate brief. As discussed above, it is unclear whether the Sanchezes still want to adopt the children. CPS intends to place the children together in an adoptive home. The foster family with whom the children currently reside have expressed an interest in adopting them, but neither party cites evidence of their additional plans.

(7) Stability of the home or proposed placement

Because the State does not appear to sanction any particular placement option, this factor is difficult to analyze. Appellant did not address this factor in her appellate brief, and the State contends there is no evidence directly on this point. However, placement in the Sanchez home appears to be unstable. The Sanchezes asked that the children be removed from their house due to stress in the family and after, among other things, appellant's father threatened to kill Beatrice Sanchez's husband. Hazelwood testified that the foster parents in the home in which Z.B. and M.B. stayed at the time of trial had expressed an interest in adopting them. CPS intends to place the children together, which would clearly lend stability to their new home environment.

(8) Acts or omissions of parent indicating the existing parent-child relationship is not a proper one

Appellant admits that she left the children home alone in a potentially dangerous situation in June 1999. She also acknowledged her failure to follow up on M.B.'s medical care, knowing he had a heart condition requiring follow-up treatment. She has failed to pay child-support as ordered by the court. Moreover, since removal of her children, appellant has been unable to remain employed or sober and has been unable to secure housing or avoid incarceration. Any one of these impediments, standing alone, would hinder the adequate care for these children. In the aggregate, and coupled with M.B.'s medical problems and appellant's apparent inability to make even necessary changes, the combination of obstacles would place a weighty toll on two children who have already had a difficult childhood.

(9) Any excuse for the parent's acts or omissions

While the State contends there was no testimony as to this factor, appellant argues that all the acts and omissions alleged in the pleadings stem from her alcohol abuse problem. Lillian Haden, who works for an alcohol and substance abuse program, testified that appellant is an alcoholic and characterized this condition as a "disease." Haden testified that appellant was in an alcohol treatment program from August 1999 to September 2000. Appellant also attended part of a counseling program but was discharged from the program for lack of attendance. Haden testified that appellant failed to attend the program on other occasions due to incarceration in jail. For readmission to the program, appellant was required to attend Alcoholics Anonymous, and she successfully completed the program. Haden testified that when appellant enters a program, her progress is excellent and that "[s]he does the work. She is out there really giving it her best. The problem is with perseverance." Haden did not know if appellant had ever received in-patient treatment, but she believed appellant was the type of person who could benefit from such a program. Appellant argued that if she were to attend in-patient treatment, she could benefit from it, reshape her life, and become a good parent.

In light of the foregoing evidence, we find that appellant has made very little of the opportunities to change her behavior or to create a new home-life for the children. Since the children were removed, appellant has continued to drink to excess, has been unable to maintain employment or housing, and has failed to support her children among her many stints in jail. Accordingly, after reviewing the appellate record in light of the *Holley* factors, we find there is factually sufficient evidence that termination of appellant's parental rights is in the best interests of the children. We overrule appellant's sole point of error.

We affirm the judgment of the trial court.

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Charles W. Seymore
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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