

MEMORANDUM

TO: Supreme Court Advisory Committee

FROM: Appellate Rules Subcommittee

RE: Appeals in Parental Termination Cases

DATE: May 25, 2022

I. Background

In response to HB 7, passed by the 85th Legislature, the Texas Supreme Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court (“Phase I Report”). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court (“Phase II Report”). The HB 7 Phase II Report recommends a rule standardizing the use of *Anders* briefs¹ in this context and opinion templates for use in parental termination cases. The Court’s referral letter asks the Committee to review these HB 7 Task Force recommendations.

II. *Anders* Procedures, Brief Checklist, and Opinion Templates

A. Rule Additions and Brief Checklist

The HB 7 Task Force recognized that there is significant momentum behind the *Anders* practice in the appellate courts. *See, e.g., In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (per curiam). The Supreme Court gave no indication that it was seeking to eliminate the practice. The Supreme Court’s charge directed the Task Force to draft *Anders* brief procedures in appeals of parental termination and child protection cases for inclusion in the Rules of Appellate Procedure. The Task Force was also asked to propose a rule addressing the inconsistency presented by the *In re P.M.* decision relating to the right to counsel through Supreme Court review in parental termination appeals in contrast to analogous procedures in the criminal-law context, in which there is no statutory right to continued representation through the petition stage at the Court of Criminal Appeals. Additional proposed amendments to Rules 28.4 and 53.2 provide a suggested procedure for attorney handling and appellate disposition of frivolous parental termination and child protection appeals.

¹ *Anders v. California*, 386 U.S. 738 (1967).

The HB 7 Task Force proposed the addition of new subparts to Rule 28.4 and 53.2. *See Appendix 1.* The Appellate Rules Subcommittee's comments and revisions to the proposed rule additions are shown in track change format.

28.4. ACCELERATED APPEALS IN PARENTAL TERMINATION AND CHILD PROTECTION CASES

() *Frivolous Parental Termination and Child Protection*² Appeals. An ~~appointed~~³ attorney representing a party appealing from a final order in a parental termination case or child protection case⁴ should not move to withdraw based upon a determination that the appeal is frivolous.⁵ Instead, the attorney must:

- (1) certify that the attorney has determined the appeal to be frivolous ~~because there are no appellate issues arguable on their merits~~,⁶
- (2) contemporaneously file a brief that:
 - (A) demonstrates the attorney has mastered the record and researched the case adequately; and

² In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of a conservator for the child is requested, an indigent parent is entitled by statute to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the interest of P.M.*, 520 S.W.3d 24 (Tex. 2016) (per curiam). The Appellate Rules Subcommittee expressed concern that the phrase “*child protection*” may be overly broad or imprecise, and invites the full Committee’s discussion as to the proper terminology for the classes of cases for which an *Anders* briefing procedure should be authorized. Should the procedure be limited to parental termination cases in a suit filed by a governmental entity; or, should it also include appointment of a conservator?

³ Parents in state-initiated parental-rights termination cases may assert ineffective assistance of counsel claims regardless of whether counsel is court-appointed or privately retained. *See In re D.T.*, 625 S.W.3d 62, 69-73 (Tex. 2021). Therefore, the subcommittee recommends that the reference to an “appointed” attorney be deleted.

⁴ *See* note 2 *infra*.

⁵ *In re P.M.*, 520 S.W.3d at 26; *In re A.M.*, 495 S.W.3d 573, 582-83 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

⁶ The Appellate Rules Subcommittee recommends avoiding the addition of further language describing or defining what “frivolous” means in this rule and instead drawing from existing definitions of “frivolous” in rules, statutes, and case law; doing so avoids the potential for disagreement in case law about whether a different definition of “frivolous” applies in this specific context.

(B) explains the basis for the attorney's determination that the appeal is frivolous~~there are no nonfrivolous grounds for appeal~~; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(D) in a parental termination case, addresses all issues included in the Parental Termination Appeal Checklist approved by the Supreme Court;

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client ~~in satisfaction of Rule 28.4(d)(3)~~.

☐ *Pro Se Response to Certification of Frivolous Appeal.* A party appealing from a final order in a parental termination case or child protection⁷ case whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal⁸ for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

☐ *Court of Appeals Disposition of Frivolous Parental Termination and Child Protection⁹ Appeals.* In addition to the requirements of Rule 47, upon determination that an appeal in a parental termination case or child protection case is frivolous ~~because there are no appellate issues arguable on their merits~~, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

(1) within five days after the opinion is ~~handed down~~ issued, send the client a copy of the opinion and judgment and a notification that;

(A2) ~~inform the client that~~ the attorney and the court of appeals both determined the appeal is frivolous ~~because there are no appellate issues arguable on their merits~~;

⁷ See note 2 *infra*.

⁸ The Appellate Rules Subcommittee invites the full Committee's discussion about whether the 180-day timelines for deciding a parental termination appeal under Texas Rule of Judicial Administration 6.2 should be abated under this provision.

⁹ See note 2 *infra*.

~~(B3) advise the client that~~ the attorney cannot recommend that further review of a frivolous appeal;

~~(C4) the client has notify the client of~~ the right to file a petition for review under Rule 53; and

~~(25) if requested by the client, file a petition for review following the notifications required under subsection (1) file a petition for review if actually requested by the client.~~¹⁰

The HB 7 Task Force proposed the addition of Rule 53.2(). See **Appendix 1**.

53.2. CONTENTS OF PETITION

() *Review of Appeal Determined to be Frivolous by the Court of Appeals in Parental Termination Cases and Child Protection¹¹ Cases.* ~~If To the extent appointed counsel filed the certification under Rule 28.4()(1), informed the court of appeals that, after thoroughly reviewing the record, counsel concluded that there are no non-frivolous grounds for appeal, and the court of appeals likewise determined the appeal waste be~~ frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

The HB 7 Task Force concluded that amendments to these rules will resolve the *In re P.M.* dilemma by specifying that an appointed appellate lawyer invoking the frivolous-appeal procedure should not actually move to withdraw for that reason, nor should the court of appeals allow the attorney to withdraw solely for that reason. The proposed rule amendments otherwise invoke the traditional *Anders* standard for explaining the basis for the attorney's conclusion that the appeal is frivolous, as well as the procedure for the appellant to file a *pro se* response. Proposed Rule 53.2() would allow counsel, after the court of appeals has determined the appeal to be frivolous, to adopt the brief filed in the court of appeals by reference in a petition for review with the Texas Supreme Court in lieu of the contents required by subparts (f)-(j) above.

¹⁰ Cf. Tex. R. App. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a *pro se* petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.").

¹¹ See note 2 *infra*. Any limits that are placed on the *Anders* procedure in this context should be reflected in the rule's subheading to avoid confusion about whether the procedures apply to all frivolous appeals or only those pertaining to parental termination.

The Task Force proposed a “Parental Termination Brief Checklist” suitable for publication on appellate court websites to guide the evaluation of parental-termination appeals and, if warranted, *Anders* briefs. See **Appendix 2**.

Recommendation: The Appellate Rules Subcommittee recommends approval of the rule additions shown above, as modified and following discussion of the following points. (1) Is the phrase “child protection” too broad or imprecise to describe the types of cases to which an Anders briefing procedure will apply? (2) Should the rule be limited only to appointed counsel? (3) Should the term “frivolous” be further defined? (4) Should the 180-day timeline for deciding parental termination appeals be abated pending appointment of a new attorney to evaluate whether the appeal is frivolous?

The Appellate Rules Subcommittee invites the full Committee’s discussion of whether an Anders checklist for parental termination appeals is advisable. The subcommittee notes that at least three of the intermediate Texas appellate courts provide Anders guidelines for criminal cases on their websites.

B. Opinion Templates

At the Supreme Court’s direction as the HB 7 Task Force entered into Phase II of its work, the Task Force considered whether the Supreme Court should promote or adopt a template designed to produce shorter Court of Appeals opinions. To that end, a HB 7 subcommittee drafted several templates designed to streamline COA review of appeals. See **Appendix 3**.

- Template A is used when the issue on appeal is limited to statutory grounds only.
- Template B is used when the issue on appeal is limited to the best interest of the child.
- Template C is used when the issues on appeal involve both statutory grounds and best interest.

The templates are appropriate only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground for termination and/or the best interest finding.

Recommendation: The Appellate Rules Subcommittee invites the full Committee’s discussion of whether template opinions for legal/factual sufficiency of the evidence are advisable.

Appendix 1

**HB 7 Task
Force Phase II
Report**

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.4. Accelerated Appeals in Parental Termination and Child Protection Cases

(a) Application and Definitions.

- (1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.
- (2) In Rule 28.4:
 - (A) a “parental termination case” means a suit in which termination of the parent-child relationship is at issue.
 - (B) a “child protection case” means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(b) Appellate Record.

- (1) Responsibility for Preparation of Reporter’s Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter’s responsibility to prepare, certify and timely file the reporter’s record arises under Rule 35.3(b), the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter’s record. The trial court must arrange for a substitute reporter, if necessary.
- (2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.
- (3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

- (c) *Certification by Appointed Counsel and Motion to Show Authority.* A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court’s ruling. The court must rule on the motion

to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.

- (d) *Remand for Evidentiary Hearing.* For good cause shown by written motion filed no later than 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel. The appellate court must rule on the motion for remand within three days; otherwise it will be denied by operation of law. The trial court shall begin the evidentiary hearing no later than the seventh day after the abatement order. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result. No later than 20 days from the date of the abatement order the court reporter shall file a supplemental reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact, and the appeal shall be reinstated. The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule.
- (e) *Remand for New Trial.* If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.
- (f) *Frivolous Parental Termination and Child Protection Appeals.* An appointed attorney representing a party appealing from a final order in a parental termination case or child protection case should not move to withdraw based upon a determination that the appeal is frivolous.^[11] Instead, the attorney must:
 - (1) certify that the attorney has determined the appeal to be frivolous because there are no appellate issues arguable on their merits;^[12]
 - (2) contemporaneously file a brief that:
 - (A) demonstrates the attorney has mastered the record and researched the case adequately;
 - (B) explains the attorney's determination that there are no nonfrivolous grounds for appeal; and
 - (C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and
 - (D) in a parental termination case, addresses all issues included in the Parental Termination Appeal Checklist approved by the Supreme Court;

¹¹ *In re P.M.*, 520 S.W.3d 24, 26 (Tex. 2016); *In re A.M.*, 495 S.W.3d 573, 582-83 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

¹² *In re D.A.S.*, 973 S.W.2d 296, 297 (Tex. 1998) (citing *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396 (1967)).

- (3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and
- (4) contemporaneously file a copy of the written notice provided to the client in satisfaction of Rule 28.4(d)(3).
- (g) *Pro Se Response to Certification of Frivolous Appeal.* A party appealing from a final order in a parental termination case or child protection case whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.
- (h) *Court of Appeals Disposition of Frivolous Parental Termination and Child Protection Appeals.* In addition to the requirements of Rule 47, upon determination that an appeal in a parental termination case or child protection case is frivolous because there are no appellate issues arguable on their merits, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:
 - (1) within five days after the opinion is handed down, send the client a copy of the opinion and judgment;
 - (2) inform the client that the attorney and the court of appeals both determined the appeal is frivolous because there are no appellate issues arguable on their merits;
 - (3) advise the client that the attorney cannot recommend that further review of a frivolous appeal;
 - (4) notify the client of the right to file a petition for review under Rule 53; and
 - (5) file a petition for review if actually requested by the client. [¹³]

¹³ Cf. TEX. R. APP. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.").

Rule 53. Petition for Review

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

- (a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.
- (b) *Table of Contents.* The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.
- (c) *Index of Authorities.* The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.
- (d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:
 - (1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
 - (2) the name of the judge who signed the order or judgment appealed from;
 - (3) the designation of the trial court and the county in which it is located;
 - (4) the disposition of the case by the trial court;
 - (5) the parties in the court of appeals;
 - (6) the district of the court of appeals;
 - (7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
 - (8) the citation for the court of appeals' opinion; and
 - (9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.
- (e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.
- (f) *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it

should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

- (g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.
- (h) *Summary of the Argument.* The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.
- (i) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.
- (j) *Prayer.* The petition must contain a short conclusion that clearly states the nature of the relief sought.
- (k) *Appendix.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

- (A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
- (B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;
- (C) the opinion and judgment of the court of appeals; and
- (D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit

was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

- (l) Certification by Appointed Counsel. In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.
- (m) Review of Appeal Determined to be Frivolous by the Court of Appeals. To the extent appointed counsel informed the court of appeals that, after thoroughly reviewing the record, counsel concluded that there are no non-frivolous grounds for appeal, and the court of appeals likewise determined the appeal to be frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

Appendix 2

HB7 Task Force Phase II Report

PARENTAL TERMINATION BRIEF CHECKLIST

You are strongly encouraged to consult your client, consult trial counsel, and complete and append this checklist to your *Anders* brief to ensure compliance with the appellate rules and to assist the court in conducting its examination of the record. Provide citations to the record and to relevant authority, where appropriate, in the right-hand column to demonstrate compliance by the trial court or parties.

Pretrial	
Service of process	
Any adverse pretrial rulings	
Pretrial effectiveness of counsel	
Did counsel's representation reflect satisfaction of basic obligations to the client, as described in the American Bar Association's <i>Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases</i> ? ¹⁴	
Did counsel's representation reflect an appropriate attorney-client relationship? ¹⁵	
Did counsel's representation reflect an appropriate pretrial investigation? ¹⁶	
Did counsel's representation reflect appropriate utilization of informal and formal discovery procedures? ¹⁷	
Did counsel's pretrial representation reflect appropriate preparation? ¹⁸	
Trial	
Timeliness of proceeding under Family Code § 263.401	
Jury selection, if applicable	
Any adverse rulings during trial on objections or motions	
Sufficiency of the evidence, including a recitation of applicable legal elements and evaluation of evidence adduced at trial, including any evidence suggesting that termination would not be in the best interest of the child	
Jury instructions, if applicable	
Effectiveness of counsel at trial	
Did counsel's representation at trial reflect appropriate preparation, including the identification, location, and preparation of all witnesses, as well as adequate cross-examination of adverse witnesses? ¹⁹	
Did counsel object to inadmissible evidence and otherwise take appropriate steps to preserve error?	

¹⁴ AM. BAR ASS'N, [STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf), at 8-11, https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf (basic obligations of parent's attorney) [hereinafter, *ABA Standards*]; see also TEX. FAM. CODE § 107.0131(a)(1)(I).

¹⁵ *ABA Standards*, at 11-19 (relationship with the client).

¹⁶ *ABA Standards*, at 19-20 (investigation).

¹⁷ *ABA Standards*, at 20-21 (informal and formal discovery).

¹⁸ *ABA Standards*, at 21-29 (court preparation, hearings).

¹⁹ *ABA Standards*, at 21-29 (court preparation, hearings).

Post-trial	
Any adverse rulings on post-trial motions	
Post-trial effectiveness of counsel	
Was the client actually represented by counsel during the period when a motion for new trial could be filed?	
Did counsel utilize appropriate post-trial procedures, including the utilization of a motion for new trial as necessary to supplement the record and preserve error? ²⁰	
In the Supreme Court of Texas: Any issues identified by appellant in pro se filings responding to a previous certification that the appeal is frivolous	

²⁰ [ABA Standards](#), at 29-32 (post hearings/appeals).

Appendix 3

**HB7 Task
Force Phase II
Report**

INSTRUCTIONS FOR USE OF TEMPLATES

The sample opinions are designed to provide guidance and are by no means comprehensive for use in all parental termination appeals.

These sample opinions are for use only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground(s) for termination and/or the best interest finding.

Use only the footnotes applicable to the issues in the appeal.

Phase II Report, Template A



Fourth Court of Appeals

San Antonio, Texas

MEMORANDUM OPINION

No. ____ - ____ - ____ -CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas

Trial Court No. ____

Honorable ____, Judge Presiding

Opinion by: ____, Justice

Sitting: ____, Justice

____, Justice

____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.¹ Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's statutory predicate finding(s). Instead, Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that terminating his/her parental rights is in his/her child's/children's best interests. We affirm the trial court's order.

BACKGROUND²

[Recitation of basic facts: Department received report, filed petition, child/children removed, statutory ground(s) pleaded by Department] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENCE REQUIRED, STANDARDS OF REVIEW

The evidentiary standards³ the Department must meet and the statutory grounds⁴ the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal⁵ and factual⁶ sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. Father's/Mother's Course of Parental Conduct

The trial court/jury found by clear and convincing evidence that [statutory ground(s)]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1) ([list grounds paragraphs *e.g.*, (N), (O)]). On appeal, Father/Mother does not challenge this/these predicate statutory ground/s finding/s.

B. Best Interests of the Child/Children

Instead, Father/Mother challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors⁷ for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

C. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury

was the “sole judge[] of the credibility of the witnesses and the weight to give their testimony.”
See City of Keller v. Wilson, 168 S.W.3d 802, 819 (Tex. 2005); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child’s/children’s best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that [key evidence of *Holley* factors, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child’s age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (), (), ()); *see also* TEX. FAM. CODE ANN. § 263.307(b)(), (), ().

Considering all the evidence in the light most favorable to the trial court’s/jury’s findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating Father’s/Mother’s parental rights to his/her child/children was in the child/children’s best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because (1) Father/Mother does not challenge the trial court’s/jury’s finding, by clear and convincing evidence, of a predicate ground for termination and (2) the evidence is legally and factually sufficient to support the trial court’s/jury’s finding that termination of Father’s/Mother’s parental rights is in the best interest of the child/each child, we affirm the trial court’s order.

_____, Justice

¹ To protect the minors’ identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

² Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

³ Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "Clear and convincing evidence" means 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 ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

⁴ Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. See TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

- (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
- (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
- (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
- (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
- (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
- (F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
- (G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
- (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
- (I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
- (J) been the major cause of:
 - (i) the failure of the child to be enrolled in school as required by the Education Code; or
 - (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
- (K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
- (L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

- (i) Section 19.02 (murder);
- (ii) Section 19.03 (capital murder);
- (iii) Section 19.04 (manslaughter);
- (iv) Section 21.11 (indecent with a child);
- (v) Section 22.01 (assault);
- (vi) Section 22.011 (sexual assault);
- (vii) Section 22.02 (aggravated assault);
- (viii) Section 22.021 (aggravated sexual assault);
- (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
- (x) Section 22.041 (abandoning or endangering child);
- (xi) Section 25.02 (prohibited sexual conduct);
- (xii) Section 43.25 (sexual performance by a child);
- (xiii) Section 43.26 (possession or promotion of child pornography);
- (xiv) Section 21.02 (continuous sexual abuse of young child or children);
- (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
- (xvi) Section 43.05(a)(2) (compelling prostitution);
- (M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
- (N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
 - (i) the department has made reasonable efforts to return the child to the parent;
 - (ii) the parent has not regularly visited or maintained significant contact with the child; and
 - (iii) the parent has demonstrated an inability to provide the child with a safe environment;
- (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;
- (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
 - (i) failed to complete a court-ordered substance abuse treatment program; or
 - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
- (Q) knowingly engaged in criminal conduct that has resulted in the parent's:
 - (i) conviction of an offense; and
 - (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;
- (R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;
- (S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;
- (T) been convicted of:
 - (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
 - (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
 - (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that

- contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
- (iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or
- (U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code.

Id. § 161.001(b)(1).

⁵ Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to “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.” *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). “[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *Id.* If the court “determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,” the evidence is legally sufficient. *Id.*

⁶ Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if “a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider “whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. “If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.” *J.F.C.*, 96 S.W.3d at 266.

⁷ Holley Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;
- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individuals seeking custody;
- (E) the programs available to assist these individuals to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- (I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors); *see also* TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to “be considered by the court and the department in determining whether the child’s parents are willing and able to provide the child with a safe environment”).



Fourth Court of Appeals

San Antonio, Texas

No. ____-____-____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas

Trial Court No. ____

Honorable ____, Judge Presiding

BEFORE JUSTICE ____, JUSTICE ____, AND JUSTICE ____

In accordance with this Court's opinion of this date, the trial court's order terminating ____'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____, Justice

Phase II Report, Template B



Fourth Court of Appeals
San Antonio, Texas
MEMORANDUM OPINION

No. ____ - ____ - ____ -CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas
Trial Court No. ____
Honorable ____, Judge Presiding

Opinion by: ____, Justice

Sitting: ____, Justice
____, Justice
____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children ____.¹ Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination. Because (1) the evidence was sufficient to support the trial court's/jury's finding of a predicate ground/predicate grounds for terminating Father's/Mother's parental rights, and (2) Father/Mother does not challenge the finding that terminating his/her parental rights was in the child's/children's best interest, we affirm the trial court's order.

BACKGROUND²

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards³ the Department must meet and the statutory grounds⁴ the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal⁵ and factual⁶ sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground].
See TEX. FAM. CODE ANN. § 161.001(b)(1)().

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that[brief recitation of facts pertaining to and supporting the first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2).

CONCLUSION

Because (1) the evidence was legally and factually sufficient to support the trial court's/jury's finding by clear and convincing evidence of a predicate ground/predicate grounds for termination and (2) Father/Mother does not challenge the finding that termination of his/her parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

¹ To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

² Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

³ Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means 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 ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

⁴ Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

- (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
- (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
- (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
- (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
- (F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
- (G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
- (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
- (I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
- (J) been the major cause of:
 - (i) the failure of the child to be enrolled in school as required by the Education Code; or
 - (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
- (K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
- (L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
 - (i) Section 19.02 (murder);
 - (ii) Section 19.03 (capital murder);
 - (iii) Section 19.04 (manslaughter);
 - (iv) Section 21.11 (indecent with a child);
 - (v) Section 22.01 (assault);
 - (vi) Section 22.011 (sexual assault);
 - (vii) Section 22.02 (aggravated assault);
 - (viii) Section 22.021 (aggravated sexual assault);
 - (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
 - (x) Section 22.041 (abandoning or endangering child);
 - (xi) Section 25.02 (prohibited sexual conduct);
 - (xii) Section 43.25 (sexual performance by a child);
 - (xiii) Section 43.26 (possession or promotion of child pornography);
 - (xiv) Section 21.02 (continuous sexual abuse of young child or children);
 - (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
 - (xvi) Section 43.05(a)(2) (compelling prostitution);
- (M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
- (N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
 - (i) the department has made reasonable efforts to return the child to the parent;

- (ii) the parent has not regularly visited or maintained significant contact with the child; and
 - (iii) the parent has demonstrated an inability to provide the child with a safe environment;
- (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;
- (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
 - (i) failed to complete a court-ordered substance abuse treatment program; or
 - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
- (Q) knowingly engaged in criminal conduct that has resulted in the parent's:
 - (i) conviction of an offense; and
 - (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;
- (R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;
- (S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;
- (T) been convicted of:
 - (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
 - (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
 - (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
 - (iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or
- (U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

⁵ Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to “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.” *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). “[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *Id.* If the court “determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,” the evidence is legally sufficient. *Id.*

⁶ Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if “a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider “whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. “If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.” *J.F.C.*, 96 S.W.3d at 266.



Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. ____ - ____ - ____ -CV

IN THE INTEREST OF A.B.C. and [D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas

Trial Court No. ____

Honorable ____, Judge Presiding

BEFORE JUSTICE ____, JUSTICE ____, AND JUSTICE ____

In accordance with this Court's opinion of this date, the trial court's order terminating ____'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____, Justice

Phase II Report, Template C



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. ____-____-____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas

Trial Court No. ____

Honorable ____, Judge Presiding

Opinion by: ____, Justice

Sitting: ____, Justice

____, Justice

____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.¹ Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination or that terminating his/her parental rights is in his/her child/children's best interests. Because the evidence was legally and factually sufficient to support the trial court's/jury's statutory ground(s) and best interest findings, we affirm the trial court's order.

BACKGROUND²

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards³ the Department must meet and the statutory grounds⁴ the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal⁵ and factual⁶ sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground].
See TEX. FAM. CODE ANN. § 161.001(b)(1)().

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that _____ [brief recitation of facts pertaining to and supporting first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground]. See TEX. FAM. CODE ANN. § 161.001(b)(1)(); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother also challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors⁷ for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

D. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury was the "sole judge[] of the credibility of the witnesses and the weight to give their testimony." *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child's/children's best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that _____.

[key evidence that implicates *Holley*, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child's age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (), (), ()); *see also* TEX. FAM. CODE ANN. § 263.307(b)(), (), ().

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating

Father's/Mother's parental rights to his/her child/children was in the child/children's best interests.

See TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because the evidence was legally and factually sufficient to support the trial court's/jury's finding, by clear and convincing evidence, (1) of a predicate ground/predicate grounds for termination and (2) that termination of Father's/Mother's parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

¹ To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. See TEX. R. APP. P. 9.8.

² Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

³ Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means 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 ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

⁴ Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. See TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

- (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
- (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
- (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

- (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
- (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
- (F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
- (G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
- (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
- (I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
- (J) been the major cause of:
 - (i) the failure of the child to be enrolled in school as required by the Education Code; or
 - (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
- (K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
- (L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
 - (i) Section 19.02 (murder);
 - (ii) Section 19.03 (capital murder);
 - (iii) Section 19.04 (manslaughter);
 - (iv) Section 21.11 (indecent with a child);
 - (v) Section 22.01 (assault);
 - (vi) Section 22.011 (sexual assault);
 - (vii) Section 22.02 (aggravated assault);
 - (viii) Section 22.021 (aggravated sexual assault);
 - (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
 - (x) Section 22.041 (abandoning or endangering child);
 - (xi) Section 25.02 (prohibited sexual conduct);
 - (xii) Section 43.25 (sexual performance by a child);
 - (xiii) Section 43.26 (possession or promotion of child pornography);
 - (xiv) Section 21.02 (continuous sexual abuse of young child or children);
 - (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
 - (xvi) Section 43.05(a)(2) (compelling prostitution);
- (M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
- (N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
 - (i) the department has made reasonable efforts to return the child to the parent;
 - (ii) the parent has not regularly visited or maintained significant contact with the child; and
 - (iii) the parent has demonstrated an inability to provide the child with a safe environment;
- (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for

- not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;
- (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
 - (i) failed to complete a court-ordered substance abuse treatment program; or
 - (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;
 - (Q) knowingly engaged in criminal conduct that has resulted in the parent's:
 - (i) conviction of an offense; and
 - (R) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition; been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;
 - (S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;
 - (T) been convicted of:
 - (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
 - (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
 - (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
 - (iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or
 - (U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

⁵ Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to “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.” *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). “[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *Id.* If the court “determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,” the evidence is legally sufficient. *Id.*

⁶ Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if “a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *C.H.*, 89 S.W.3d at 25; accord *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider “whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *J.F.C.*, 96 S.W.3d at 266; accord *H.R.M.*, 209 S.W.3d at 108. “If, in light of the entire record, the disputed evidence that a reasonable

factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.” *J.F.C.*, 96 S.W.3d at 266.

⁷ Holley Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;
- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individuals seeking custody;
- (E) the programs available to assist these individuals to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- (I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); accord *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors) ; see also TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to “be considered by the court and the department in determining whether the child’s parents are willing and able to provide the child with a safe environment”).



Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. ____ - ____ - ____ -CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the ____ Judicial District Court, ____ County, Texas

Trial Court No. ____

Honorable ____, Judge Presiding

BEFORE JUSTICE ____, JUSTICE ____, AND JUSTICE ____

In accordance with this Court's opinion of this date, the trial court's order terminating ____'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____, Justice