**Opinion issued January 20, 2017.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-16-00582-CV**

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**IN THE INTEREST OF B.T.D. AND C.M.D., Children**

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**On Appeal from the 306th District Court**
**Galveston County, Texas**
**Trial Court Case No. 12-FD-1807**

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## MEMORANDUM OPINION

Father's parental rights to B.T.D. and C.M.D. were terminated in a private proceeding tried to a jury. In three issues, Father argues that the judgment should be reversed because: (1) he was denied due process, (2) the trial court erred in denying his request for a continuance, and (3) there is insufficient evidence to support the judgment. We affirm the trial court's judgment.

## Background

Mother and Father divorced in 2010 and are the parents of B.T.D. and C.M.D. In 2012, Mother filed the present petition to modify the parent-child relationship, requesting termination of Father's parental rights with respect to both children. In her live pleading, Mother alleged that Father had "knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endanger the children's physical or emotional well-being," "engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangers the children's physical or emotional well-being," and that termination of the parent-child relationship was in the children's best interest. *See* TEX. FAM. CODE ANN. §§ 161.001(b)(1)(D)–(E), (b)(2) (West Supp. 2016).

### A. Relevant Background and Procedural History

Father is a family law attorney and former family court judge. Based on testimony Father gave during an emergency custody hearing in this case, Father was indicted in July 2013 on two felony counts of perjury. In September 2013, Father pleaded guilty to misdemeanor perjury and misdemeanor abuse of official capacity, and was placed on deferred adjudication community supervision. The other perjury charge and several abuse-of-office and official oppression charges were dismissed.

Father was represented in this termination proceeding by two attorneys until March 2015, when the trial court granted the attorneys' joint motion to withdraw.

Three months later the Harris County Sheriff's Office executed a search warrant on Father's apartment in connection with two new felony charges for online impersonation, and they allegedly seized Father's files and personal papers, which Father contends he needs to properly defend himself in this termination proceeding. Father, who was arrested on July 2, 2015 in connection with these two felony charges, was incarcerated at the time of trial in this case.

Father was given forty-five days' notice of the March 14, 2016 trial setting, during which time he could have hired a new attorney or motioned the trial court to appoint him an attorney.[1] During a pretrial hearing on March 15, 2016, the trial court heard arguments from both sides regarding a pro se motion that Father had filed that same day entitled "Second Request for Return of All Files, Pictures, Evidence Related to the Matters Before This Court."[2] Father claims that he also requested the

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[1] Unlike in criminal cases or parents in state-initiated termination cases, an indigent defendant in a privately initiated parental rights termination proceeding has no absolute constitutional or statutory right to assistance of counsel. *See In re J.C.*, 250 S.W.3d 486, 489 (Tex. App.—Fort Worth 2008, pet. denied).

[2] Father's Second Request was attached to his appellate brief and does not appear to be included in the appellate record. In his second issue challenging the denial of his motion for continuance, Father states:

> The Attorney for the Appellant has made an attempt to secure the Court Clerk's Record and the Reporter's record from the Clerk of the Court of Appeals but because of the signing and inclusion of the Order Marked as Exhibit B the attorney's access to the file has been denied. Without that access the attorney is unable to comply with this Court's requirement that referenced be made to both the Clerks' record and the Reporter's Record to support point raised in an issue in an appeal.

return of such items from a visiting judge in August 2015, and that his request was denied.[3] The trial court denied Father's request stating, "I'm going to deny the request to return the files. That's outside of my area." At the conclusion of the hearing, the trial court appointed one of Father's previous attorneys, who had been allowed to withdraw in 2015, to represent Father at trial. The trial was continued until the following day. Father made an oral request for a continuance, but that request was denied. Father was incarcerated at the time on the new felony charges.

### B. Trial Proceeding

Among the many allegations Mother had raised against Father, Mother alleged in her live pleading that: Father "had formulated a plot to possibly murder [Mother], fake his own death and flee the country with the children, specifically to New Zealand, with his former fiancée T.C. This alleged plan has come to be known in the media as the "murder and flee" plot."[4] She further alleged that "reports were

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Court records indicate that the clerk's record was filed in August 2016. Although Father's brief was initially due by October 3, 2016, Father was granted an extension and a new due date of October 17, 2016.

Court records also indicate that Father's trial and appellate attorney did not attempt to secure a copy of the record from the Court of Appeals until October 14, 2016—three days before the brief was due.

[3] There is no evidence of Father's request in the clerk's record or the reporter's record filed in this appeal.

[4] Based on our resolution of the issues raised in this appeal, it is not necessary for the court to reiterate all of the details of this private termination proceeding, many of which have already been discussed in a prior published opinion.

made that [Father] may have formulated a second plan to kidnap the children after the first plan was discovered."

Mother and T.C., Father's former fiancée, both testified at trial regarding the first "murder and flee" plot. The plot was discovered by law enforcement when they interviewed T.C. in connection with a criminal investigation of Father in 2013. During a meeting with the Texas Rangers, the special prosecutor from the Attorney General's Office, and the Galveston County District Attorney, T.C. provided a concise version of the plot. An audio recording of the meeting was entered into evidence.

On May 20, 2013, T.C. provided sworn testimony regarding the plot in an affidavit that was also admitted into evidence. In her affidavit, T.C. averred that Father was planning either to murder Mother, or to enlist someone else to do it, and to then stage a fake boating accident in which Father, the children, T.C., and her daughter would all be presumed dead. Using fake passports procured by Father, the group would then fly to New Zealand and start a new life. Father also planned to tell the children that Mother had died in an accident to prevent them from trying to contact her.

In her affidavit, T.C. also stated that Father had purchased a 9mm handgun with a silencer in early 2013. About this same time, Father also told T.C. that they needed to save as much money as possible for their trip, and he began stockpiling

silver bullion that he would ship to New Zealand ahead of time to fund their new life. Additional evidence corroborating T.C.'s claim was also presented to the jury. Specifically, Father testified that he bought silver bullion in 2013 and a silencer, and a receipt documenting Father's purchasing of a 9mm with a silencer was admitted into evidence. A text between Father and T.C. was also admitted into evidence in which Father told T.C., "I thought the plan was to get to NZ. Start fresh. Start a new life. Save as much before then. Live together happily ever after in NZ."

T.C. also averred in her affidavit that she had witnessed Father's interactions with the children and that Father "uses mind control with the children and is an emotional bully. The children fear him." She further opined that Father having the children "is emotionally harmful for them," and that she believed that the children were "in physical danger."

After reviewing her sworn statement, T.C. testified that she had never stated that Father's plan was to kill Mother. According to T.C., she only made a statement that Father had "made a comment [to her] that he could do it." She also stated that the audio statement she gave to law enforcement was correct. In the audio statement, T.C. reported that Father had told her that if he had an airtight alibi, he could kill Mother. When discussing another person, Father told T.C. that all one would need to do is wear a ski mask, and "walk up to the door, shoot 'em, and walk off."

Mother also testified that the children learned about the first alleged plot through their classmates and the media. According to Mother, both children live in fear that they are going to be kidnapped, although their fear has lessened since Father has been incarcerated. Mother also testified that thirteen-year old B.T.D. sleeps with his lights on.

There was also testimony regarding a second plot to kidnap the children. Specifically, Father's friend, L.F., testified that she contacted Father's attorneys in February or March 2014 because Father had said "some things that led [her] to believe that he might be taking the children over spring break or something." Mother also testified that she learned of this second plot from L.F. L.F. testified that Father's attorney felt that she had an ethical obligation to disclose the information, and Father's attorney informed the children's ad litem about the report of an alleged kidnapping plot.

Father, who was present for the entire trial, testified on five days and amassed a total of over 650 pages of trial testimony. He also introduced thirty-nine exhibits—thirty-eight of which were admitted into evidence—and called three witnesses.

Father denied having concocted the "murder and flee" plot, and he contended that T.C. had been pressured into giving a false affidavit. He further claimed that T.C. later recanted her statements. Father denied having a conversation with L.F. in which he "indicated that [he] would kidnap the children." Father also suggested that

many of the text messages, emails, Facebook posts, and communications between himself, T.C., and others, were taken out of context. There is evidence and testimony that Father pleaded guilty to misdemeanor perjury.

Father and his witnesses also testified that the children were happy, got straights "A's" and otherwise thrived when they were in Father's care. Father's witnesses also testified that they had witnessed interactions between Father and the children, that they had not observed any inappropriate or troubling behavior, and that they did not believe that Father would harm the children. They also testified that Father was very involved in the children's school and extra-curricular activities. One witness also testified that she had allowed her children to have a sleepover at Father's house. She also testified that she did not believe T.C.'s allegations. One of the witnesses was Father's aunt, another was his former court coordinator, and the third person was someone who knew Father through their children and Father had ruled in favor of this witness in a family law matter.

At the conclusion of trial, the following deemed admissions from Father were read into the record: (1) "That [Father] intended to flee to New Zealand with [B.T.D. and C.M.D]," (2) "That [Father] conspired to get [T.C.] to recant her testimony," and (3) "That [Father has] discussed kidnapping [B.T.D. and C.M.D.] with [L.F.]."

The jury found that Father committed acts and omissions justifying termination of his parental rights to B.T.D. and C.M.D. *See* TEX. FAM. CODE ANN.

§ 161.001(b)(1)(D)–(E). The jury also found that the termination of his parental rights was in the children's best interest. TEX. FAM. CODE ANN. § 161.001(b)(2).

In its subsequent Decree of Termination, the trial court found that Father "engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangers the children's physical or emotional well-being as provided by Family Code Section 161.001(1)(E)," Father "knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endanger the children's physical or emotional well-being as provided by Family Code Section 161.001(1)(D)," and that termination of the parent-child relationship was in the children's best interest. This appeal followed.

**Due Process**

In his first issue, Father argues that he was denied due process in this private termination proceeding because the trial court did not grant his request for the return of his personal files and papers which were seized by law enforcement in June 2015, and were allegedly in the possession of the Galveston County District Attorney's Office. Father further argues his inability to access these files "adversely affected his ability to try this lawsuit and resulted in an improper verdict."

In analyzing a claim of deprivation of procedural due process, we apply a two-part test: (1) whether the complaining party has a liberty or property interest entitled to protection; and (2) if so, what process is due. *Logan v. Zimmerman Brush*

*Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1153–54 (1982); *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 785 (1971).

Parents have a fundamental liberty interest "in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394–95 (1982). A parent's status as a prison inmate does not strip him of his constitutional right of reasonable access to the courts. *See In re D.W.*, 498 S.W.3d 100, 112 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *see also In re T.L.B.*, No. 07–07–0349–CV, 2008 WL 5245905, at *2 (Tex. App.—Amarillo Dec. 17, 2008, no pet.) (mem. op.) (citing *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 3198 (1984)). Therefore, Father was entitled to due process in the termination proceeding. *See In re R.M.T.*, 352 S.W.3d 12, 17 (Tex. App.—Texarkana 2011, no pet.); *Martinez v. Tex. Dep't of Protective & Reg. Servs.*, 116 S.W.3d 266, 271 (Tex. App.—El Paso 2003, pet. denied).

At a minimum, due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85

S. Ct. 1187, 1191 (1965)). What process is due in any given situation is measured by a flexible standard that depends on the practical requirements of the circumstances. *Eldridge*, 424 U.S. at 334, 96 S. Ct. at 902. To assess what process Father was due, we weigh the three factors developed by the United States Supreme Court in *Eldridge*: (1) the private interest affected by the proceeding or official action; (2) the countervailing governmental interest supporting use of the challenged proceeding; and (3) the risk of an erroneous deprivation of the private interest due to the procedures used. *In re B.L.D.*, 113 S.W.3d 340, 352 (Tex. 2003) (citing *Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903). Courts must weigh these factors to determine whether the fundamental requirements of due process have been met by affording an opportunity to be heard at a meaningful time and in a meaningful manner under the circumstances of the case. *See City of L.A. v. David*, 538 U.S. 715, 717, 123 S. Ct. 1895, 1896 (2003). Once these *Eldridge* factors are weighed against each other, the court must "balance the net result against the presumption" that the procedure applied did not violate due process. *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).

With regard to the first factor—the private interest affected by the proceeding or official action—a "parent's interest in maintaining custody of and raising his or her child is paramount." *Id*. For this reason, a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a

commanding one. *Id.* The private interests of the child must also be considered. *Id.* "Both the parent and the child have a substantial interest in the accuracy and justice of a decision." *Id.* The considerations involved in this case—namely, Father's fundamental liberty interest in maintaining custody and control of B.T.D. and C.M.D., the risk of permanent loss of the parent-child relationship between them, and Father's, Mother's, and the children's interest in a just and accurate decision—weigh in favor of Father's claim that due process required that Father be provided with his files and personal papers in order to adequately prepare for trial. *See id.* at 548.

In this private termination proceeding the second factor—the countervailing governmental interest supporting use of the challenged proceeding—is focused on the accuracy of the proceeding. Specifically, the State's interest in the proceeding includes protecting the best interest of the children, an interest which is "served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home." *In re M.S.*, 115 S.W.3d at 548–49 (quoting *Santosky*, 455 U.S. at 767, 102 S. Ct. at 1402).

Father had ample opportunity to challenge and scrutinize Mother's case and to present his own defense. The record reflects that Father actively participated in all aspects of the trial proceedings. He testified extensively about the facts of the case, he called other witnesses to testify on his behalf, and he admitted nearly forty

exhibits into evidence. Father's attorney also cross-examined all of Mother's witnesses. In his appellate brief, Father makes no specific reference to what, if any, evidence existed that he did not have access to that he would have introduced into evidence at trial. Thus, despite the trial court's refusal to order the District Attorney to provide Father's files to him, Father had an opportunity to be heard at a meaningful time and in a meaningful manner in this case. He also had a sufficient opportunity to formulate his defense. Accordingly, we conclude that the second factor is neutral or weighs against the finding of a deprivation of due process in this case.

The third factor pertains to the risk of an erroneous deprivation of the private interest due to the procedures used. As discussed above, Father had ample opportunity to challenge and scrutinize Mother's case, and to formulate his own defense and present his defense to the jury. Given his active participation at trial and the robustness of his defense, we conclude that the third factor is neutral or weighs against the finding of a deprivation of due process in this case.

When the *Eldridge* factors are balanced against the presumption that the trial court's denial of Father's request comports with constitutional due process requirements, we find that presumption has not been overcome. *See In re M.S.*, 115 S.W.3d at 547 (stating that net result of *Eldridge* factors must be balanced against

presumption that procedural rules comport with constitutional due process requirements).

Father also argues that, due to his incarceration for the ten months preceding trial, "every aspect of the prosecution of this suit by a private citizen using the authority of the District Court to terminate his parental rights was a violation of his due process rights under the 14th Amendment of the Constitution of the United States." He further contends, without citation to any relevant legal authority, that given his incarceration, he "should have been afforded *much greater due process* to provide him with an opportunity to marshal any available resources to prepare his position." However, we have not found any legal authority for the proposition that an incarcerated parent is entitled to greater due process than other parents in parental termination proceedings, and we are not inclined to create new precedent based on the facts of this case. Father's unique status as an attorney and former family law judge, his active participation in the trial, and the fact that he was represented by counsel for a significant portion of this proceeding, makes it impossible to hold that he suffered harm as a result of any alleged violation of his due process rights.

We overrule Father's first issue.

**Continuance**

In his second issue, Father argues that the trial court erred by refusing to grant him a continuance to enable him to properly prepare for trial.

We review the trial court's ruling on a motion for continuance in a parental termination case for an abuse of discretion. *In re R.A.L.*, 291 S.W.3d 438, 447 (Tex. App.—Texarkana 2009, no pet.). A motion for a continuance must be accompanied by a supporting affidavit, unless it is an agreed motion or results from the operation of law. TEX. R. CIV. P. 251; *see generally In re R.A.L.*, 291 S.W.3d at 447–448 (denial of continuance was not abuse of discretion in absence of supporting affidavit).

Father made an oral request for a continuance; he did not file a motion for a continuance with an accompanying affidavit, as required by the Rules of Civil Procedure. Assuming without deciding that Father preserved this complaint for our review, in the absence of a written motion that complies with the rules of procedure, we cannot say that the trial court abused its discretion when it denied Father's request for a continuance. *See In re R.A.L.*, 291 S.W.3d at 447–48; s*ee also In re A.M.*, 418 S.W.3d 830, 838 (Tex. App.—Dallas 2013, no pet.) (holding father failed to preserve complaint regarding trial court's denial of continuance in parental termination case and noting that oral motion did not satisfy Rule of Civil Procedure 251).

We overrule Father's second issue.

**Sufficiency of the Evidence**

In his third issue, Father argues that there is insufficient evidence to support the trial court's termination of his parental rights to B.T.D. and C.M.D. Father does

not specify whether he is challenging the legal or factual sufficiency of the evidence, or both. The standard of review he cites to on page 14 of his brief indicates that he is challenging the legal sufficiency of the evidence. *See In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Mother, however, characterizes Father's third issue as a challenge to the *factual* sufficiency of the evidence. Out of an abundance of caution, this memorandum opinion will address both the legal and factual sufficiency of the evidence supporting termination of Father's rights. Specifically, Father argues that "there is not sufficient evidence when viewed as a whole, to support the verdict by clear and convincing evidence that the actions plead had in fact occurred in a fashion that affected the children or that termination is in the best interest of the children." Father further contends:

> While the case went on several days much of the evidence was hotly contested and disputed but really had very little to do with the children the subject of the lawsuit. Much of the evidence was seized or stolen from [Father] without his consent thereby converting his personal property and . . . subjecting it to illegal searches and seizures by the Houston [sic] County District Attorney's Office. In addition, the Attorney General for the state of Texas who was involved in the removal process of [Father] from his judicial position continued to be involved in the process of gathering information for this termination lawsuit. This involvement by the state of Texas [is] consistent with the allegations by [Father] that he was denied process by having his property illegally seized and his person illegally detained for extended periods of time.

Father's sufficiency challenges are inadequately briefed and, therefore, are waived.

Texas Rule of Appellate Procedure 38.1(i) requires appellate briefs to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). An appellate issue unsupported by argument or containing an argument lacking citation to the record or legal authority presents nothing for review. *Arellano v. Magana*, 315 S.W.3d 576, 577 (Tex. App.—El Paso 2010, no pet.) (citing *Republic Underwriters Ins. Co. v. Mex–Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004)). "Bare assertions of error without argument or authority waive error." *In re J.A.M.R.*, 303 S.W.3d 422, 425 (Tex. App.—Dallas 2010, no pet.); *see also In re K.C.B.*, 280 S.W.3d 888, 896 (Tex. App.—Amarillo 2009, pet. denied) (parent waived sufficiency complaint in parental termination case due to inadequate briefing). Furthermore, we have "no duty to search a voluminous record without guidance from appellant to determine whether an assertion of reversible error is valid." *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also Manon v. Solis*, 142 S.W.3d 380, 391 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

The appellate record in this case includes a seventeen volume reporter's record, plus an additional sixteen electronic exhibits, and a nearly 4,400 page clerk's record. Aside from making general assertions that the evidence presented at trial was "hotly contested and disputed," Father does not identify any disputed evidence that supports either a factual or a legal sufficiency challenge. Father also does not cite to

the record or offer a meaningful legal analysis with regard to either sufficiency challenge.

Father cites to three cases in the sufficiency section of his brief. Two of these support the standard of review. *See In re J.P.B.*, 180 S.W.3d at 573; *In re K.N.D.*, 403 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2012), *rev'd*, 424 S.W.3d 8 (Tex. 2014). The third does not support Father's general proposition that "there is not sufficient evidence when viewed as a whole, to support the verdict by clear and convincing evidence that the actions plead[ed] had in fact occurred in a fashion that affected the children or that termination is in the best interest of the children." *See In re A.A.A.*, 265 S.W.3d 507, 515 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Instead, *In re A.A.A.* states that when evaluating the sufficiency of evidence supporting a trial court finding under a different predicate than the two found in this case, an appellate court "must consider whether DFPS proved by clear and convincing evidence that [child] was removed under Chapter 262 for [parent's] abuse or neglect. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O) (West Supp. 2016). The court then discusses the type of evidence that would support such a finding. *In re A.A.A.*, 265 S.W.3d at 515. In this case, Father's parental rights were terminated based on the trial court's determination that Father committed acts and omissions set forth in subsections (b)(1)(D) and (b)(1)(E). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D)–(E).

By failing to adequately brief his legal and factual sufficiency challenges to the evidence supporting either predicate finding required for termination or the finding that termination is in the best interest of the children, Father has waived these complaints for appellate review. *See Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (noting longstanding rule that point may be waived due to inadequate briefing); *see also In re D.R.L.*, No. 01-15-00733-CV, 2016 WL 672664, at *10 (Tex. App.—Houston [1st Dist.] Feb. 18, 2016, no pet.) (mem. op.) (indicating parent waived challenge to legal and factual sufficiency of evidence supporting predicate finding due to lack of meaningful argument or analysis); *In re D.J.W.*, 394 S.W.3d 210, 223 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding parent waived challenge to legal and factual sufficiency of evidence supporting trial court's best interest finding where she failed to provide legal argument). Other appellate courts have reached similar conclusions. *See In re H.P.*, No. 13-16-00277-CV, 2016 WL 5846538, at *4 (Tex. App.—Corpus Christi Oct. 6, 2016, no pet. h.) (mem. op.) (holding parents waived challenge to sufficiency of evidence supporting predicate finding due to inadequate briefing); *In re K.C.B.*, 280 S.W.3d at 896 (holding parent waived sufficiency complaint regarding finding that termination was in child's best interest due to inadequate briefing).

However, even if we were to address Father's sufficiency challenges, our review of the record demonstrates the evidence is legally and factually sufficient to support the trial court's judgment.

### A. Standard of Review

When the legal sufficiency of the evidence supporting termination of parental rights is challenged, the reviewing court looks at all the evidence in the light most favorable to the termination finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that the finding was true. *In re J.F.C.*, 96 S.W.3d at 266; *see also In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). The court must "assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.*, 96 S.W.3d at 266. It should "disregard all evidence that a reasonable factfinder could have disbelieved or found to be incredible." *Id.* "If, after conducting a legal-sufficiency review of the record evidence, the court determines that no reasonable factfinder could have formed a firm belief or conviction that the matter to be proved was true, the court must conclude that the evidence on that matter is legally insufficient." *Id.* We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder's province. *See J.P.B.*, 180 S.W.3d at 573. And even when credibility issues appear in the appellate record, we defer to the factfinder's determinations as long as they are not unreasonable. *Id*.

Only when the factual sufficiency of the evidence is challenged does the reviewing court review disputed or conflicting evidence. *In re J.O.A.*, 283 S.W.3d at 345. The evidence is factually insufficient in a termination suit "[i]f, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of its finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction that the matter to be proven was true." *In re J.F.C.*, 96 S.W.3d at 266. The court of appeals should "explain in its opinion 'why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding.'" *Id.* at 267. The factfinder is the sole arbiter when assessing the credibility and demeanor of witnesses. *In re J.O.A.*, 283 S.W.3d at 346.[5]

### B. Applicable Law

In a private proceeding to terminate the parent-child relationship brought under section 161.001, the petitioner must establish by clear and convincing evidence two elements: (1) a predicate violation, i.e., one or more acts or omissions enumerated under subsection (b)(1) of section 161.001; and (2) that termination is

[5] Father does not challenge the admissibility of any of the evidence or testimony presented to the jury.

in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b)(1), (2); *Swate v. Swate*, 72 S.W.3d 763, 766 (Tex. App.—Waco 2002, pet. denied).

The factfinder must find that both elements are established by clear and convincing evidence, and proof of one element does not relieve the petitioner of the burden of proving the other. *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). "Clear and convincing evidence" is defined as "that measure or degree of proof which 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." *Spangler v. Tex. Dep't of Protective & Reg. Servs.*, 962 S.W.2d 253, 256 (Tex. App.—Waco 1998, no pet.).

A single predicate finding under Family Code section 161.001(b)(1) is sufficient to support a judgment of termination when there is also a finding that termination is in the child's best interest. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). If a trial court lists multiple statutory grounds for termination in its order and we affirm on one of those grounds, we need not consider the remaining grounds. *See In re T.G.R.–M.*, 404 S.W.3d 7, 16 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

The Texas Supreme Court has recognized several factors which may be considered in determining when termination is in a child's best interest. *Holley*, 544 S.W.2d at 372. These include:

1. The desires of the child;
2. The emotional and physical needs of the child now and in the future;

3. The emotional and physical danger to the child now and in the future;

4. The parental abilities of the individuals seeking custody;

5. The programs available to assist these individuals to promote the best interest of the child;

6. The plans for the child by these individuals or by the agency seeking custody;

7. The stability of the home or proposed placement;

8. The acts/omissions of the parent which may indicate that the existing parent-child relationship is not proper; and

9. Any excuse for the acts/omissions of the parent.

*Id.* This listing is not exhaustive and no single consideration is controlling. *Id.* However, the analysis of one factor may be adequate in a particular factual situation to support a finding that termination is in the best interest of the child. *Swate*, 72 S.W.3d at 767.

### C. Analysis

In this case, the trial court and the jury found that Father "engaged in conduct or knowingly placed the children with persons who engaged in conduct that endanger[ed] the children's physical or emotional well-being as provided by Family Code Section 161.001(b)(1)(E)." The trial court and jury also found that termination in the children's best interest.

There is testimony and documentary evidence that Father formulated a plan to murder Mother and move to New Zealand with the children, along with T.C. and

her daughter. Text messages between Father and T.C. that corroborated the plan to move to New Zealand and start a new life together were also admitted into evidence, along with a detailed affidavit from T.C.

In her affidavit, T.C. averred that Father was planning to either murder Mother or to enlist someone else to do it, and then to stage a fake boating accident in which Father, the children, T.C. and her daughter would all be presumed dead. Using fake passports procured by Father, the group would then fly to New Zealand and start a new life. Father also planned to tell the children that Mother had died in an accident to prevent them from trying to contact her. Additional evidence corroborating T.C.'s claims and demonstrating that Father had taken steps in furtherance of this plan was admitted into evidence. In one of those text messages, Father told T.C., "I thought the plan was to get to NZ. Start fresh. Start a new life. Save as much before then. Live together happily ever after in NZ."

T.C. also stated in her affidavit that Father had purchased a 9mm handgun with a silencer in early 2013. About this same time, Father also told T.C. that they needed to save as much money as possible for their trip, and he began stockpiling silver bullion to ship to New Zealand ahead of time to fund their new life. Evidence and testimony corroborating T.C.'s claims was also admitted into evidence, namely Father's admission to having bought silver bullion in 2013 and a silencer, and a receipt documenting Father's purchasing of a 9mm with a silencer was admitted into

evidence. There is also evidence and testimony that Father may have been planning to kidnap the children later, based on a 2014 conversation he allegedly had with L.F.

There is testimony that the children fear Father and that they lived in fear of being kidnapped after they learned of the "murder and flee" plot from their classmates and through the media. There is also evidence that Father "uses mind control with the children and is an emotional bully. The children fear him." According to T.C., it "is emotionally harmful for [the children]" to be with Father. She further stated that she believed that the children were "in physical danger."

Although Father denied having concocted the "murder and flee" plot, or ever telling Fort that he planned to kidnap the children, and he claimed that the children were happy and well adjusted when they were in his custody, the jury, as trier of fact and evaluator of credibility of witnesses, could disregard such testimony, especially given Father's perjury conviction. *See J.P.B.*, 180 S.W.3d at 573. The jury was also within its province to disbelieve the testimony from Father's witnesses that they never witnessed any troubling behavior with regard to Father and that the children were happy and did well while in Father's custody. *Id.*

After reviewing all the evidence in the light most favorable to the termination finding, and assuming the factfinder resolved any disputed facts in favor of its finding, we conclude that there was sufficient clear and convincing evidence that a reasonable trier of fact could have formed a firm belief or conviction that the finding

was true. *In re J.F.C.*, 96 S.W.3d at 266. We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the section 161.001(b)(1)(E) finding, such that the court could reasonably have formed a firm belief or conviction that the elements of section 161.001(b)(1)(E) were shown. Accordingly, we hold that the evidence is legally and factually sufficient to support the section 161.001(b)(1)(E) finding. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E) (supporting termination of parental rights when parent "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"). Thus, we do not reach Father's challenges to the trial court's findings under subsection (D).

After reviewing at the evidence in the light most favorable to the termination finding, and assuming the factfinder resolved any disputed facts in favor of its finding, we conclude that the evidence was sufficiently clear and convincing that a reasonable trier of fact could have formed a firm belief or conviction that termination of the parental relationship was in the children's best interest. *In re J.F.C.*, 96 S.W.3d at 266. We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the best interest finding or was not so significant that the trial court could not reasonably have formed a firm belief or conviction that the *Holley* factors were satisfied. Accordingly, we hold that the

evidence is legally and factually sufficient to support the best interest finding. We overrule Father's third issue.

## Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Higley, and Lloyd.