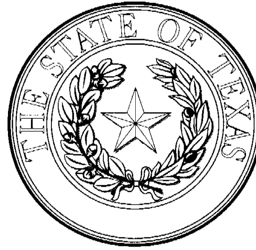
Opinion issued December 20, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00521-CV

IN THE INTEREST OF A.J.A.D. AND K.K.D., CHILDREN

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Case No. 2013-04371J

MEMORANDUM OPINION

The trial court terminated the appellant's parental rights as to two teenage children. The appellant, their mother, contends the trial court erred in doing so.[1]

We affirm.

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[1] The trial court also terminated the father's parental rights. He has not appealed.

BACKGROUND

This termination suit was tried to the bench in June 2022. The appellant's daughter, A.J.A.D., was then 15 years old and her son, K.K.D., was 13 years old.

Two witnesses testified: Mohamed Boima, who has been the caseworker from October 2021 onward, and Kamma Mangram, who was the caseworker in 2017–18 and is currently Boima's supervisor. The appellant did not testify or attend trial.

Boima testified that the children first came into the care of the Texas Department of Family and Protective Services in July 2013. Immediately beforehand, the children had been living with their maternal grandmother and her boyfriend in a hotel. The children's mother, the appellant, was in jail at the time.

The children came into the Department's custody at that time because of their grandmother's and her boyfriend's alcohol abuse. In addition to being intoxicated while the children were in their care, the grandmother and boyfriend's relationship was troubled by domestic violence. The grandmother and boyfriend had also been sedating the children with Tylenol PM to keep the children asleep at night.

The children were initially placed with the appellant once she was out of jail, but they did not remain with her due to the Department's concerns for their safety. The Department created a family service plan for the appellant and requested that she complete various services, for which the assigned caseworker made the necessary referrals. Of these services, the appellant only completed a psychosocial

evaluation. Based on that evaluation, it was recommended that she take a course on parenting, undergo a psychological evaluation, and engage in drug testing. But the appellant did not complete any of these additional three recommended services.

The trial court entered a final order in the case in March 2016. In that order, the Department was made the children's sole managing conservator. The appellant was made a possessory conservator with a right to supervised visits with the children.

Later in 2016, A.J.A.D. was returned to the appellant's care. K.K.D. joined them sometime afterward. But within a year, in 2017, the Department removed the children from her home. Since then, the children have not resided with her.

In September 2018, the trial court continued a prior order of the court that barred any contact between the appellant and her children. The record is unclear as to when the trial court first ordered that the appellant have no contact with them.

Boima testified that the Department made efforts to reunify the children with the appellant again. But the appellant did not make the required effort. Boima said that the appellant has not been able to provide the children with a stable home.

According to Boima, the appellant did not do much to complete her services after 2016. Between then and trial, the appellant engaged in minimal services, submitting to one or two drug tests, notwithstanding the fact that Boima repeatedly reiterated that she would need to complete certain services to be reunified with her

children. Boima further testified that the appellant understood that she would need to comply with and complete her family service plan to even have visitation.

In March 2022, the trial court ordered that any services the appellant had previously begun or completed would not count toward the successful completion of her family service plan. The appellant was ordered to start over from scratch.

In June 2022, the appellant told Boima that she was ready to complete the required services, and Boima told her to begin by taking a drug test a day or so later. But the appellant did not take the test and stopped responding to Boima's texts. Nor was this the lone time that the appellant had not taken a requested drug test. Boima testified that he had contacted the appellant once a month during the five months preceding trial. Each time he contacted her, he requested that she take a drug test. However, the appellant did not submit to drug testing on any of these occasions.

Boima's contact with the appellant in the five months preceding trial was solely at his instance. That is, he contacted the appellant. She did not contact him.

Boima testified about the appellant's criminal history. In March 2022, an arrest warrant was issued based on the appellant's violation of her parole terms. Criminal records admitted into evidence showed that the appellant previously had been convicted of two counts of giving false information to a peace officer while she was a fugitive in March 2019, both misdemeanor offenses for which she was sentenced to 120 days in jail. She also was convicted of possession of a controlled

substance—less than a gram of methamphetamine—in August 2014, a state jail felony for which she was sentenced to one year in jail. In conjunction with the guilty plea she entered in the drug prosecution, the state dismissed a prosecution in which the appellant was accused of the offense of unauthorized use of a motor vehicle. Boima opined that the appellant's criminal difficulties made her home unstable.

The appellant has not provided any financial support to the children.

Boima testified that the appellant has not done anything to rectify the circumstances that led to her children coming into the Department's care. Boima concluded that termination of the appellant's parental rights was in the children's best interest, given the time the children have been in the Department's care and the prolonged lack of effort on the part of the appellant to secure her children's return. The Department's present goal for the children is adoption by a nonrelative.

Previously, Boima testified, the children had been placed with a relative, but that placement was no longer possible. No other relatives can take the children. A nonrelative had talked about adopting A.J.A.D., but that prospect had fallen through.

As of trial, the children were in separate foster placements. Neither placement is one in which adoption is anticipated. Boima testified that the children were doing well in their current placements in general, but they did have some difficulties.

K.K.D.'s grades at school had dramatically declined. Boima also stated that K.K.D. had expressed some suicidal thoughts. K.K.D. also had recently been tested for a sexually transmitted disease, but Boima did not know the result of this test.

A.J.A.D. was doing well in school. Apart from some minor disputes with some other children in the home where she was placed, A.J.A.D. was doing well.

Both children were in therapy for trauma, and both have been prescribed psychotropic medications. Boima opined that he did not believe the appellant was capable of addressing the trauma for which her children were receiving therapy. Boima testified that the unresolved trauma the children had been through was part of the reason that the Department has had a hard time locating adoptive homes.

The children see one another sometimes, and the Department has tried to find a placement that would place them closer to one another and facilitate more contact. But the Department has not been able to find a better placement thus far, the children have been moved around a lot in the past, and the current placements are stable.

Neither child has expressed interest in being reunited with the appellant. A.J.A.D. has previously stated that she wants nothing to do with the appellant and has expressed the fear that if reunited with the appellant, the appellant will put her through the same things the appellant put her through in the past. K.K.D. has said he wants to talk to the appellant, but not necessarily for the purpose of being reunited with her. Both children were very angry with the appellant, A.J.A.D. especially.

Mangram testified about the circumstances surrounding the 2017 removal of the children from the appellant's care. This removal came about based on reports received from the children's school. The children were late to school, had a foul odor on arrival, and arrived hungry. There also was concern about the person who was bringing them to school and the physical discipline being meted out by the appellant.

When the trial court barred the appellant from visiting the children after their removal, it did so due to her drug tests. But no drug-test results are in the record.

When Mangram had been the assigned caseworker, reunifying the children with their mother had initially been the goal. Mangram stated that she made all the referrals necessary for the appellant to complete her family service plan. During that period, the appellant did use some of these referrals with respect to a case involving a third child who is not a part of this appeal. The Department allowed some of the appellant's use of those services to apply in this case as well, so that the appellant would not have to duplicate the required services. Among these services, the appellant completed a parenting course and a substance abuse assessment. However, Mangram had concerns about the latter due to the information the appellant gave during the assessment. The appellant did not complete any other ordered services.

Mangram testified that the children had at one point been placed with their paternal grandfather. But their paternal grandfather passed away in March 2021.

Like Boima, Mangram thought it was in the children's best interest for the appellant's parental rights to be terminated. Mangram based this assessment on the appellant's failure to eliminate the concerns that led the Department to intervene. In particular, Mangram noted that the appellant had not eliminated concerns about her drug use. Moreover, the appellant had not eliminated the Department's concerns despite being given multiple opportunities to do so over a lengthy period of time.

Mangram testified that termination had two advantages. Termination would give the children certainty about their future that they lacked because without termination they did not know if or when they would be returned to their mother's care. In addition, termination would allow the children to be included in a nationwide adoption database that would give them the broadest possible opportunity to secure placements that could lead to their adoption.

The trial court terminated the appellant's parental rights as to both children. It found, among other things, that the appellant had engaged in conduct or knowingly placed her children with persons who engaged in conduct that endangered their physical or emotional wellbeing and that termination of her parental rights is in the children's best interest. *See* TEX. FAM. CODE § 161.001(b)(1)(E), (b)(2).

DISCUSSION

On appeal, the appellant contends that the evidence is legally and factually insufficient to support the trial court's finding of child endangerment or any of its

other findings that would support the termination of her parental rights. The appellant further contends that the evidence is legally and factually insufficient to show that the termination of her parental rights is in her children's best interest.

Legal Standard for Terminating Parental Rights

A parent's rights to the care, custody, and management of his or her child are constitutional in scope. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982); *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). But parental rights are not absolute; the Department may seek termination of the rights of those who are not fit to accept the responsibilities of parenthood. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). The primary focus in a termination suit is protecting the child's best interest. *Id.*

To terminate parental rights under the Family Code, the Department must establish that a parent committed one or more statutorily enumerated predicate acts or omissions and that termination is in the child's best interest. FAM. § 161.001(b)(1)–(2). The Department need only establish one of these statutorily enumerated predicate acts or omissions, along with the best-interest finding. *See id.*; *In re A.V.*, 113 S.W.3d at 362. But the Department must make these showings by clear and convincing evidence. FAM. § 161.001(b). Clear and convincing evidence is "proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 101.007.

The inquiry as to the child's best interest is separate from the inquiry about the statutory predicate acts and omissions. *In re S.R.L.*, 243 S.W.3d 232, 235 (Tex. App.—Houston [14th Dist.] 2007, no pet.). But evidence used to prove predicate acts or omissions may be probative in deciding a child's best interest. *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Multiple non-exclusive factors bear on a child's best interest. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include:

- the child's desires;
- the child's emotional and physical needs now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parental abilities of those seeking custody;
- the programs available to assist them to promote the child's best interest;
- their plans for the child or the plans of the agency seeking custody;
- the stability of the home or proposed placement;
- the acts or omissions of the parent that may indicate the existing parent–child relationship is not proper; and
- any excuse for the parent's acts or omissions.

Id.; *Yonko v. Dep't of Family & Protective Servs.*, 196 S.W.3d 236, 243 (Tex. App.—Houston [1st Dist.] 2006, no pet.). These factors are not exhaustive, no one factor is controlling, and a single factor may be adequate to support termination on a particular record. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002); *In re J.M.T.*, 519 S.W.3d 258, 268 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

Legal and Factual Sufficiency Review in Termination Cases

The legal issues before the court concern the legal and factual sufficiency of the evidence. Due to the elevated burden of proof in a termination suit—clear and convincing evidence—we do not apply the traditional formulations of legal and factual sufficiency on appeal. *In re A.C.*, 560 S.W.3d 624, 630 (Tex. 2018).

In conducting a legal-sufficiency review in a termination case, we cannot ignore undisputed evidence contrary to a finding, but we must otherwise assume the factfinder resolved disputed facts in favor of the finding. *Id.* at 630–31; *see In re K.M.L.*, 443 S.W.3d 101, 112–13 (Tex. 2014) (reviewing court credits evidence that supports finding if reasonable factfinder could do so and disregards contrary evidence unless reasonable factfinder could not do so). The evidence is legally insufficient if, viewing all the evidence in the light most favorable to a finding and considering undisputed contrary evidence, a reasonable factfinder could not form a firm belief or conviction that the finding is true. *In re A.C.*, 560 S.W.3d at 631.

In conducting a factual-sufficiency review in a termination case, we must weigh disputed evidence contrary to a finding against all the evidence in favor of the finding. *Id.* We consider whether the disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding. *Id.* The evidence is factually insufficient if, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of a finding is so significant

that the factfinder could not have formed a firm belief or conviction that the finding is true. *Id.* In reviewing for factual sufficiency, however, we must be careful not to usurp the factfinder's role. *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014).

Deciding whether, and if so to what degree, to credit the evidence introduced at trial is the factfinder's role, not the appellate court's role. *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009). The factfinder is the sole arbiter of witness credibility. *Id.*; *In re J.S.*, 584 S.W.3d 622, 634 (Tex. App.—Houston [1st Dist.] 2019, no pet.). In a bench trial, the trial judge is the factfinder who weighs the evidence, resolves evidentiary conflicts, and evaluates witnesses' demeanor and credibility. *In re R.J.*, 579 S.W.3d 97, 117 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

Analysis

Child Endangerment under Section 161.001(b)(1)(E)

The appellant argues the evidence is legally and factually insufficient to support the trial court's finding that she engaged in conduct or knowingly placed her children with persons who engaged in conduct that endangered their physical or emotional wellbeing. She says there is "no actual evidence" she "endangered her children," who were in the Department's care from March 2016 through trial. She reasons that nothing she did during this period "could have conceivably endangered the children" because they "were not under her care or control" at the time. In addition, the appellant argues that the testimony concerning her drug use, which

consisted of "some testimony that she missed some unknown number of drug tests and failed to engage in services," is too cursory to be sufficient to support termination for child endangerment. Finally, citing evidentiary rules, she argues that the Department "failed to provide sufficient proof of authentication that the criminal records" admitted into evidence pertained to her and thus are not relevant evidence.

We disagree that the evidence is insufficient to support termination. But before we turn to the evidence, we must spell out the law on child endangerment.

A trial court may terminate parental rights if it finds that a parent has engaged in conduct or knowingly placed her child with persons who engaged in conduct that endangers the child's physical or emotional wellbeing. FAM. § 161.001(b)(1)(E).

To be endangering conduct, a parent's behavior must pose more than a threat of theoretical injury to a child and consist of more than the ill effects of less-than-perfect parenting. *In re J.O.A.*, 283 S.W.3d at 345. Endangering conduct constitutes parental behavior that exposes a child to loss or injury or places a child's physical or emotional health in jeopardy. *In re J.F.-G.*, 627 S.W.3d 304, 312 (Tex. 2021).

Endangering conduct may consist of acts or omissions. *In re J.S.*, 584 S.W.3d at 635. But a single act or omission, however egregious, is not endangering conduct. *In re N.J.H.*, 575 S.W.3d 822, 831 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A parent must engage in a voluntary, deliberate, and conscious course of endangering conduct for his or her behavior to warrant the termination of parental

rights on this basis. *Id.* The relevant inquiry is whether a parent engaged in a course of conduct that endangered a child's physical or emotional wellbeing. *Jordan v. Dossey*, 325 S.W.3d 700, 723 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

The proof need not show that a parent intended to endanger a child. *In re J.D.G.*, 570 S.W.3d 839, 851 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A parent does not need to direct his or her endangering conduct at the child, and the child does not have to suffer actual injury from the parent's endangering conduct. *In re J.F.-G.*, 627 S.W.3d at 312. Indeed, a parent's endangering conduct need not take place in a child's presence to support termination of his or her parental rights. *In re A.M.*, 495 S.W.3d 573, 579 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The particular danger to a child's wellbeing posed by a parent's behavior may be inferred from the parent's conduct alone. *In re N.J.H.*, 575 S.W.3d at 831. The danger need not be proved as an independent proposition. *Jordan*, 325 S.W.3d at 723.

There is no temporal restriction with respect to a parent's endangering conduct. The factfinder may consider a parent's behavior before and after a child's birth. *In re A.M.*, 495 S.W.3d at 579. Similarly, the factfinder may consider a parent's behavior before and after the Department removes a child. *Id.* A parent's behavior may support an endangerment finding even if the behavior at issue occurs when the child is not in the parent's care, control, custody, or possession. *In re K.P.*, 498 S.W.3d 157, 171–72 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Endangering conduct comes in many forms and cannot be exhaustively catalogued. But in general, any parental behavior that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional wellbeing. *In re J.S.*, 584 S.W.3d at 635. And several types of endangering conduct recur in appellate decisions. These include:

- habitual criminality and incarceration;
- knowing association with criminals;
- serious drug and alcohol abuse;
- physical violence within the home;
- significant anger-management issues;
- untreated mental-health problems;
- transient lifestyle or long-term homelessness;
- failure to seek appropriate medical care; and
- failure to provide for a child's needs.

See, e.g., *In re J.F.-G.*, 627 S.W.3d at 313–18 (criminal history and incarceration); *In re M.D.M.*, 579 S.W.3d 744, 765–68 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (violence against children and another caregiver); *In re J.D.G.*, 570 S.W.3d at 851–53 (failure to seek medical care); *In re K.P.*, 498 S.W.3d at 172 (untreated mental illness); *In re T.G.R.-M.*, 404 S.W.3d 7, 14–16 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (child abuse, criminal activity, association with criminal, failure to seek mental-health treatment, and unstable living arrangements); *In re V.V.*, 349

S.W.3d 548, 557 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (en banc) (failure to pay support or arrange to provide child with food, clothing, shelter, or care); *Jordan*, 325 S.W.3d at 724–26 (failure to obtain prenatal care, continued association with abusive father of child, transient lifestyle, including homelessness, and failure to seek adequate care for mental-health problems); *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (domestic violence); *Toliver v. Tex. Dep't of Family & Protective Servs.*, 217 S.W.3d 85, 98–101 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (serious drug use over extended period of time); *Wyatt v. Dep't of Family & Protective Servs.*, 193 S.W.3d 61, 67–68 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (refusal to seek medical care and frequent angry outbursts).

While child abuse is a prominent feature of many decisions addressing endangering conduct, mere neglect can be just as dangerous to a child's physical and emotional wellbeing. *In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996) (per curiam). For example, a parent's failure to provide a safe, sanitary home environment can constitute endangering conduct. *See id.* (extraordinarily unsanitary living conditions). Likewise, prolonged lack of contact or absence from a child's life qualifies as endangering conduct. *See, e.g.*, *In re M.D.M.*, 579 S.W.3d at 765, 767 (stating factfinder may infer child endangerment from parent's lack of contact or absence in case in which children's respective fathers had sporadic contact with them

and provided minimal financial support); *In re V.V.*, 349 S.W.3d at 556–57 (holding father's total lack of contact with child, failure to ask about or support child, and absence of effort to see to child's needs constituted evidence of child endangerment).

Though the record is sparse, particularly given that the children have been in the Department's care for most of the preceding decade, the evidence shows the appellant has engaged in a course of conduct endangering her children's wellbeing.

When the children initially came into the Department's care in 2013, the appellant was in jail. After she got out of jail, the children were placed with her but soon returned to the Department's care. In 2016, the trial court entered a final order making the Department the children's sole managing conservator. Though the appellant retained visitation rights under this order, her visits had to be supervised.

Later in 2016, the children returned to the appellant's care, but within a year the Department had to remove them from her care once again due to concerns about neglect (the children's hygiene) and abuse (physical discipline of the children). The children have not resided with her since 2017, and the trial court ordered that she have no contact with her children some time afterward. Hence, in the four years or so preceding trial, the appellant has not played any role in her children's lives.

The appellant seizes on these circumstances—that the children have been in the Department's care and her lack of contact with them—to argue that nothing she has done since the trial court entered its 2016 final order endangered the children.

We disagree. As an initial matter, children need not be in a parent's care, control, custody, or possession for their wellbeing to be endangered by a parent's conduct. *See, e.g.*, *In re K.P.*, 498 S.W.3d at 171 (affirming endangerment finding though child had not resided with mother for about six years); *In re A.A.M.*, 464 S.W.3d 421, 426 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (father's drug use and other criminal activity during period in which he only had visitation rights, rather than custody, still qualified as endangering conduct). Lack of meaningful contact—in and of itself—may be endangering conduct. *E.g.*, *In re M.D.M.*, 579 S.W.3d at 765, 767; *In re V.V.*, 349 S.W.3d at 556–57. Thus, we reject the appellant's position that her lack of possession and contact disposes of this case in her favor.

To the contrary, the record shows the reason the appellant has not had contact with her children in several years is because she will not undertake and complete the services required by the family service plan imposed by the trial court. It is undisputed that she has made little effort to participate in these services since 2016, despite being told this was the means to regain visitation and custody of her children.

One purpose of a family service plan is to identify parental shortcomings and provide assistance in remedying them so that the parent's behavior does not continue to jeopardize or adversely affect his or her children's physical or emotional wellbeing. As the appellant's family service plan advised in all capital letters:

> [This document's] purpose is to help you provide your child with a safe environment within the reasonable period specified in the plan. If you

> are unwilling or unable to provide your child with a safe environment, your parental and custodial duties and rights may be restricted or terminated or your child may not be returned to you.

Consequently, a parent's voluntary failure to engage in or complete services can constitute evidence of child endangerment, particularly to the extent the parent's failure to do so indicates that past endangering conduct remains unaddressed and is likely to persist in the future. *See, e.g.*, *In re G.M.M.*, No. 01-20-00159-CV, 2020 WL 5048140, at *9–10 (Tex. App.—Houston [1st Dist.] Aug. 27, 2020, no pet.) (mem. op.) (mother's consistent failure to take advantage of assistance made available to help establish safe, stable living conditions supported endangerment finding); *In re C.E.P.*, No. 01-19-00120-CV, 2019 WL 3559004, at *14–16 (Tex. App.—Houston [1st Dist.] Aug. 6, 2019, no pet.) (mem. op.) (father's failure to complete family service plan's requirements meant to address domestic violence bore on child's safety and home's stability and supported endangerment finding); *see also In re M.M.M.*, No. 01-21-00269-CV, 2021 WL 5365102, at *11–12 (Tex. App.—Houston [1st Dist.] Nov. 18, 2021, pet. denied) (mem. op.) (evidence showed that mother completed many services required by family service plan but had not learned from them or embraced them, which supported endangerment finding).

The appellant has been wholly absent from her children's lives for about four years. She attributes her absence solely to the trial court's no-contact order. In doing so, however, the appellant overlooks the role her own behavior—specifically, her

persistent failure to complete her family service plan during this period—has played in perpetuating her absence. Under these circumstances, the trial court could have reasonably found that the appellant deliberately chose not to be present in her children's lives and that her deliberate choice endangered their wellbeing. *See In re V.V.*, 349 S.W.3d at 552, 555–57 (affirming endangerment finding based on father's absence from child's life that was in significant part attributable to incarceration). In addition, it is undisputed that the appellant has provided no support to the children during this period, which also supports the trial court's endangerment finding.

To the extent the appellant argues the evidence of her drug use is too underdeveloped to lend support to the trial court's endangerment finding, we disagree. We have no quarrel with the proposition that evidence of a parent's drug use may in some cases be too limited to provide sufficient proof of endangerment on its own. *See, e.g.*, *Ruiz v. Tex. Dep't of Family & Protective Servs.*, 212 S.W.3d 804, 818 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding limited evidence of mother's drug use—marijuana on a single occasion when she may have been pregnant with another child—was legally insufficient to prove endangerment). But the evidence of the appellant's drug use is more significant than she concedes.

Mangram testified without contradiction that the trial court discontinued the appellant's visitation rights based on her continued drug use after the Department's removal of the children from the appellant's care the second time, in 2017. This

removal had been prompted in part by the children's arrival to school late, hungry, and possessing a foul odor, as well as by concerns about the appellant's use of physical discipline. Though the record is less than definitive as to what drug or drugs the appellant continued to use, a factfinder could reasonably infer from her 2014 conviction for possession of methamphetamine that her drug use included this drug. Evidence of a parent's continued use of methamphetamine to an extent or frequency serious enough to result in the complete loss of visitation rights after the removal of the children from the home at a minimum lends some support to a child-endangerment finding. *See Toliver*, 217 S.W.3d at 98–101 (mother's continued use of cocaine and PCP, including after her parental rights were at stake, and her resistance to drug treatment supported trial court's child-endangerment finding).

Admittedly, some of the evidence of the appellant's drug use in this case is inferential or circumstantial in nature. But this does not render the evidence legally insufficient, so long as the evidence is not so meager that it could give rise to any number of inferences, none of which is more probable than another, or speculative because it amounts to no more than inferences piled one upon another. *See In re E.N.C.*, 384 S.W.3d 796, 804–05 (Tex. 2012) (meager circumstantial evidence that is consistent with differing inferences and evidence that consists of no more than inferences piled atop one another cannot support child-endangerment findings).

Moreover, the preceding evidence is not the lone evidence of continued drug

use. The Department has repeatedly asked the appellant to take drug tests, and for the most part she has repeatedly declined to do so. For example, in the five months preceding the trial resulting in termination, Boima requested that the appellant take a drug test each month. It is undisputed that the appellant did not do so. Under these circumstances, the trial court could have reasonably inferred from the appellant's persistent failure to submit to testing that she would have tested positive for illicit drug use and was trying to avoid detection by not testing. *E.g.*, *In re J.M.T.*, 519 S.W.3d 258, 269 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); ***In re D.J.W.***, 394 S.W.3d 210, 221–22 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

Notably, there is no contrary or mitigating evidence as to the appellant's continued drug use. For example, nothing suggests she had a reasonable excuse or innocent explanation for her prolonged failure to submit to the requested testing. And evidence of continued drug use after the removal of children from the home is especially salient because post-removal drug use in particular endangers the emotional wellbeing of the children given that it increases the risk the parental relationship will be permanently severed. *See In re D.J.W.*, 394 S.W.3d at 222.

To the extent the appellant complains that the Department did not authenticate her criminal records or prove these records were relevant by showing they pertained to her, rather than another defendant with the same name, she did not make these evidentiary objections at trial. Thus, the appellant did not preserve for review these

challenges to the admissibility of the records. *See* TEX. R. APP. P. 33.1(a); *see, e.g.*, *In re A.A.M.*, 464 S.W.3d at 425 (holding that appellant could not raise evidentiary objection for first time on appeal).

These records, along with testimony at trial, show that over the seven-and-a-half years or so preceding trial, the appellant was convicted of three crimes, two of which were misdemeanors. The third crime was a state jail felony for drug possession. Though all three convictions resulted in periods of incarceration, it is unknown how much time the appellant served. We know only that her three sentences together totaled less than two years. The appellant was able to dispose of a fourth offense—a state jail felony—via the plea bargain she negotiated for the drug possession offense. Because the appellant was in jail in 2013 when her children first came into the Department's care, we know she has additional criminal history predating the aforementioned offenses. But the record does not disclose any details about this additional criminal history. Most recently, a few months before trial, a warrant was issued for the appellant's arrest due to an unspecified parole violation.

Given the limited record concerning the appellant's criminal history and its impact on her children, the evidence is not sufficient to show the kind of habitual criminality or incarceration that, standing alone, will support a child-endangerment finding. *See In re J.F.-G.*, 627 S.W.3d at 315 (crime resulting in incarceration is not conclusive evidence of endangerment, but rather such evidence, together with

duration and consequences of incarceration, is relevant when resulting abandonment presents risk to child's physical or emotional wellbeing); *cf. In re V.V.*, 349 S.W.3d at 555 (father's life of crime exhibited by eight convictions, four of which were felonies and several of which involved violence, over course of decade resulting in substantial incarceration during that period supported endangerment finding because consequences of such habitual criminality would almost totally prevent him from being present in child's life). But that does not render the appellant's criminal history meaningless. Four separate criminal charges, two of which were for state jail felonies and three of which resulted in conviction, plus an alleged parole violation within the span of about seven-and-a-half years is a worrisome pattern. When considered together with the evidence of the appellant's failure to complete her family service plan and continued drug use, the trial court could have reasonably found her criminal history lent some additional support to its child-endangerment finding. *See, e.g.*, *In re A.A.M.*, 464 S.W.3d at 426–27 (considering father's drug use and other criminal activity together in evaluating sufficiency of evidence on endangerment). Like her other behavior, it is reasonable to conclude that the appellant's repeated criminal conduct compromised her ability to play a constructive role in her children's lives and poses a danger to their wellbeing going forward, especially in light of the issuance of an arrest warrant for a parole violation not long before trial. *See In re T.G.R.-M.*, 404 S.W.3d at 15 (fact that mother continued to place herself in situations

risking incarceration even though she knew her parental rights were in jeopardy after child was removed from her custody supported child-endangerment finding).

Viewing all the evidence in the light most favorable to the trial court's child-endangerment finding under section 161.001(b)(1)(E) and considering undisputed contrary evidence, we conclude that a reasonable factfinder could have formed a firm belief or conviction that the appellant endangered her children's wellbeing. In light of the entire record, we conclude that the disputed evidence that a reasonable factfinder could not have credited in favor of the child-endangerment finding is not so significant that the factfinder could not have formed a firm belief or conviction that it is true. Thus, we hold that the evidence is legally and factually sufficient to support the child-endangerment finding. *See In re A.C.*, 560 S.W.3d at 630–31.

As the evidence is sufficient to support termination for child endangerment under section 161.001(b)(1)(E), we need not separately address the trial court's other grounds for termination. *See* FAM. § 161.001(b)(1); *In re A.V.*, 113 S.W.3d at 362; *see also* TEX. R. APP. P. 47.1 (court to issue opinion that is as brief as practicable but addresses every issue raised and necessary to final disposition of appeal).

Children's Best Interest under Section 161.001(b)(2)

The appellant asserts that termination of parental rights is in a child's best interest solely when the evidence shows the parent's failings result from indifference or malice. The evidence, she says, does not show indifference or malice. The

appellant further argues that none of the *Holley* factors weigh in favor of the termination of her parental rights, and that the evidence relevant to these factors is legally and factually insufficient to support the trial court's best-interest finding.

Our preceding analysis regarding child endangerment is relevant to whether termination of the appellant's parental rights is in her children's best interest. *See In re J.L.*, 163 S.W.3d 79, 87 (Tex. 2005) (considering all evidence of endangerment in evaluating sufficiency of evidence as to factfinder's best-interest finding). Indeed, evidence of child endangerment is especially relevant to an evaluation of a child's best interest. *In re J.T.*, No. 01-19-00908-CV, 2020 WL 1942463, at *11 (Tex. App.—Houston [1st Dist.] Apr. 23, 2020, pet. denied) (mem. op.). One of the *Holley* factors—the emotional and physical danger to the child now and in the future—explicitly turns on evidence of child endangerment. At least three others—the child's emotional and physical needs now and in the future, parental abilities of those seeking custody, and acts or omissions of the parent that may indicate the existing parent–child relationship is not proper—necessarily must take into account any evidence of child endangerment. *See, e.g.*, *Vasquez v. Tex. Dep't of Protective & Regulatory Servs.*, 190 S.W.3d 189, 197–98 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (considering evidence relevant to endangerment in assessing several *Holley* factors). Thus, based on our preceding analysis of the sufficiency of the evidence concerning the endangerment of the children's physical and emotional

wellbeing, we conclude that these four *Holley* factors support the trial court's finding that termination of the appellant's parental rights is in her children's best interest.

In addition, the evidence shows that a fifth *Holley* factor—the programs available to assist a parent to promote the child's best interest—also supports the trial court's best-interest finding. While such programs exist, the appellant has shown that she is unwilling to avail herself of them by failing to make a meaningful effort to engage in the services required by her family service plan over the course of several years. The trial court could have reasonably found that the appellant's prolonged failure to engage in these services is another consideration demonstrating that termination is in the children's best interest. *See In re N.J.H.*, 575 S.W.3d at 835 (trial court may consider parent's noncompliance with court-ordered service plan in deciding whether termination is in child's best interest); *see, e.g.*, *In re J.M.T.*, 519 S.W.3d at 269–70 (father's failure to complete services supported factfinder's best-interest finding because this failure allowed factfinder to infer father lacked motivation to seek out available resources now and in future); *see also Wyatt*, 193 S.W.3d at 70 (taking into account mother's apparent failure to recognize she needed programs to help with her parenting skills, failure to benefit from parenting and other programs as exhibited by lack of change in her behavior, and general disregard for measures she needed to take to regain custody of children).

While the appellant told Boima she was ready to complete the services required to regain custody of her children about a week before trial, the record belies her claim of readiness. Setting aside for a moment the appellant's failure to complete these services for years, Boima responded to her claimed readiness by asking that she begin by submitting to a drug test that week. It is undisputed that the appellant did not do so. Our Supreme Court has observed that evidence of improved conduct, especially when it is short in duration, does not negate the probative value of a long history of irresponsible choices. *In re J.O.A.*, 283 S.W.3d at 346. Here, there is not even evidence of improved conduct, just an unfulfilled commitment to improve.

Termination of parental rights is not warranted when the evidence shows that a parent merely failed to provide a more desirable degree of care and support due to misfortune or lack of intelligence or training, rather than indifference or malice. *In re N.J.H.*, 575 S.W.3d at 833–34. But the evidence in this case shows more than a mere failure to provide a more desirable degree of care and support. The appellant has not provided her children with any care or support whatsoever for years, and she has not shown a willingness to make a serious effort to do what is necessary to regain custody of them. On this record, the trial court could have reasonably found that the appellant's failures resulted from indifference to her parental obligations. For example, her refusal to submit to drug testing and apparent continued drug use even after her parental rights were in jeopardy are circumstances from which the trial court

could have reasonably found that she is indifferent to her children's wellbeing. *See, e.g.*, *In re K.T.S.N.*, No. 01-21-00456-CV, 2022 WL 96737, at *11 (Tex. App.—Houston [1st Dist.] Jan. 11, 2022, pet. denied) (mem. op.) (mother's failure to address drug abuse and her positive drug-test results evidenced more than mere failure to provide more desirable degree of care and support due to misfortune or lack of intelligence or training); *In re R.S.*, No. 01-20-00126-CV, 2020 WL 4289978, at *7 (Tex. App.—Houston [1st Dist.] July 28, 2020, no pet.) (mem. op.) (father's use of methamphetamine after child's removal showed conscious indifference as to whether his parental rights were terminated or else inability or unwillingness to prioritize child's wellbeing). Similarly, the appellant's refusal to use and complete the services required by her family service plan is another circumstance from which the trial court could have reasonably found that she is indifferent to her children's welfare. *See, e.g.*, *In re K.T.S.N.*, 2022 WL 96737, at *11 (mother's failure to take advantage of services to help her develop skills needed to provide child with safe and stable home evidenced more than mere failure to provide more desirable degree of care and support due to misfortune or lack of intelligence or training).

Moreover, the appellant did not even attend trial. Though a warrant had been issued for her arrest about two-and-a-half months before trial, the record contains no evidence that she was incarcerated at the time of trial or even that she had been arrested beforehand. Boima had last spoken to the appellant a week or so before trial,

at which time he requested she take a drug test. Thus, the evidence indicates she was not incarcerated at that time. In sum, the record does not divulge any reason for the appellant's failure to attend trial other than a conscious choice on her part not to do so even though the trial would decide whether she kept her parental rights. When, as here, a parent fails to attend trial without giving a valid excuse, the factfinder may reasonably infer she is indifferent to the outcome. *See, e.g.*, *In re K.N.D.*, No. 01-12-00584-CV, 2014 WL 3970642, at *9 (Tex. App.—Houston [1st Dist.] Aug. 14, 2014, no pet.) (mem. op.) (factfinder could find termination proceeding was not important to mother who did not attend trial without giving explanation for her absence and consider mother's indifference in deciding whether termination was in child's best interest); *In re D.B.*, No. 06-21-00003-CV, 2021 WL 1375430, at *4 (Tex. App.—Texarkana Apr. 13, 2021, no pet.) (mem. op.) (mother's lack of participation throughout case, including her failure to complete family service plan and attend trial, was evidence that allowed trial court to find proceeding was not important to her and relationship between parent and child was not proper one).

The appellant seemingly suggests that the children are not doing well in their current foster placements and that this circumstance indicates termination of the appellant's parental rights is not in their best interest. We agree that there is evidence that the children's lives are far from perfect at present. For example, K.K.D. has voiced thoughts of suicide, both children are very angry, and both of them are in

therapy for the trauma they have endured. But a reasonable factfinder could infer from their anger, which is directed at the appellant, that she is in whole or part responsible for their trauma and the resulting difficulties they are experiencing in life. The elder child, A.J.A.D., has in the past stated that she wants nothing to do with the appellant precisely because she fears that if they are reunited the appellant will put her through the same things the appellant has already put her through. Neither child expressed a desire that the appellant retain her parental rights. While K.K.D. stated he wanted to talk to the appellant, he did not want to live with her. On this record, to the extent that the children's present troubles are relevant to the best-interest inquiry, the trial court could have reasonably found that they too weigh in favor of termination. *See, e.g.*, *In re L.W.*, No. 01-18-01025-CV, 2019 WL 1523124, at *18 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, pet. denied) (mem. op.) (child's expression of fear about living with mother and her boyfriend based on past events considered in evaluating child's best interest under *Holley* factor pertaining to child's desires); *In re L.M.N.*, No. 01-18-00413-CV, 2018 WL 5831672, at *20 (Tex. App.—Houston [1st Dist.] Nov. 8, 2018, pet. denied) (mem. op.) (child's expression of fear of returning to mother's care due to prior abuse by mother considered in evaluating child's best interest under *Holley* factor pertaining to child's desires).

The appellant also suggests that termination is not in the children's best interest because termination will prevent them from attending therapy together to

address and resolve the children's anger about her past failings as a parent. But this suggestion lacks a factual basis in the record. Though the appellant's lawyer raised this issue at trial, there is no evidence that the appellant has requested family therapy or would participate in it. To the contrary, based on the appellant's failure to take advantage of the services required by her family service plan, a failure that prevented her from reobtaining visitation rights with her children, the trial court could have reasonably found that there is no realistic prospect that the appellant would participate in family therapy. *See In re J.M.T.*, 519 S.W.3d at 269–70.

Finally, the children have lingered in a state of uncertainty as to whether they will be returned to the appellant's care for several years now. While the appellant's parental rights are constitutional in magnitude, we cannot sacrifice the children's physical or emotional wellbeing to preserve those rights, given that the appellant has not fulfilled her corresponding parental obligations to the children for years. *See In re J.F.-G.*, 627 S.W.3d at 317 (saying so and affirming termination of parental rights in case in which father had not played role in child's life for many years). The evidence shows that the Department has seen to it that the children have a stable foster placement at present and that only the Department has a meaningful plan for the children's future—specifically, the pursuit of nonrelative adoption. The children's need for a stable, permanent home is the paramount consideration in assessing their best interest. *See In re K.P.*, 498 S.W.3d at 175 (recognizing that

prompt, permanent placement of child in safe, stable environment is paramount concern and that adoption is not possible so long as parental rights remain intact and holding that evidence sufficed to support finding that termination was in child's best interest in case in which child had languished in foster care for seven years during which mother had done little to effect reunification). Thus, the trial court could have reasonably found that the *Holley* factor relating to the appellant's and the agency's respective plans for the children weighed especially heavy in favor of termination.

Viewing all the evidence in the light most favorable to the trial court's best-interest finding under section 161.001(b)(2) and considering undisputed contrary evidence, we conclude that a reasonable factfinder could have formed a firm belief or conviction that termination of the appellant's parental rights is in her children's best interest. In light of the entire record, we conclude that the disputed evidence that a reasonable factfinder could not have credited in favor of the best-interest finding is not so significant that the factfinder could not have formed a firm belief or conviction that it is true. Thus, we hold that the evidence is legally and factually sufficient to support the best-interest finding. *See In re A.C.*, 560 S.W.3d at 630–31.

CONCLUSION

We affirm the trial court's decree terminating the appellant's parental rights.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Hightower, and Guerra.