



**Fourth Court of Appeals  
San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-17-00381-CV

**IN THE INTEREST OF M.A.N.Z., a Child**

From the 73rd Judicial District Court, Bexar County, Texas  
Trial Court No. 2016-PA-00652  
Honorable Richard Garcia, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: December 6, 2017

**AFFIRMED**

This is an accelerated appeal from the trial court's order terminating appellant father's ("Father") parental rights to his child, M.A.N.Z. On appeal, Father contends the evidence was legally and factually insufficient to support the trial court's findings under section 161.001(D), (E), and (N), and its finding that termination was in M.A.N.Z.'s best interest. Father also contends he received ineffective assistance of counsel. We affirm the trial court's order terminating Father's parental rights to M.A.N.Z.

**BACKGROUND**

After receiving reports that M.A.N.Z.'s mother was abusing illegal substances, the Texas Department of Family and Protective Services ("the Department") became involved with the family. The Department ultimately removed M.A.N.Z. and his two half-siblings, E.G. and J.G.,

from their mother's care after J.G. was born positive for illegal substances. At the time M.A.N.Z. was removed, M.A.N.Z.'s father — Father — was incarcerated. It is unclear from the record whether E.G.'s father was living with the children; however, the record reflects J.G.'s father was deceased. M.A.N.Z. and E.G. were placed with E.G.'s paternal grandparents. J.G. was placed in foster care. Thereafter, the Department filed a petition, seeking to terminate M.A.N.Z.'s mother's parental rights to all three of her children, including M.A.N.Z. In its petition, the Department also sought to terminate E.G.'s father's parental rights. However, M.A.N.Z.'s father — Father — was not named in the petition at that time. At the initial adversary hearing, the trial court rendered temporary orders, naming the Department temporary managing conservator of all three children.

At the next status hearing, the trial court ordered genetic testing for M.A.N.Z. After receiving the genetic testing report establishing Father's paternity of M.A.N.Z., the Department amended its petition, naming Father as M.A.N.Z.'s father and seeking termination of Father's parental rights. During the case, the Department created a service plan for Father, which required, among other things, that he attend parenting classes, seek counseling and provide proof of employment and housing. The court held the statutorily required status and permanency hearings, and ultimately, the matter proceeded to a final hearing, during which the Department sought to terminate Father's parental rights.<sup>1</sup>

The final hearing took place over the course of three days. At the hearing, the trial court heard testimony from Evelyn Palacios, the Department caseworker involved in the case, and Father, who participated telephonically. After hearing the testimony, the trial court ordered Father's parental rights terminated. The trial court found Father: (1) knowingly placed or allowed

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<sup>1</sup> Prior to the hearing, M.A.N.Z.'s mother filed an affidavit of relinquishment. The trial court ultimately terminated her parental rights to M.A.N.Z., as well as her other two children, based on the affidavit. Mother did not file a notice of appeal challenging the order of termination. Accordingly, she is not a party to this appeal.

M.A.N.Z. to remain in conditions or surroundings that endangered M.A.N.Z.'s physical or emotional well-being; (2) engaged in conduct or knowingly placed M.A.N.Z. with someone who engaged in conduct that endangered M.A.N.Z.'s physical or emotional well-being; and (3) constructively abandoned M.A.N.Z. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), and (N) (West. Supp. 2016). The trial court further found termination of Father's parental rights would be in M.A.N.Z.'s best interest. *See id.* § 161.001(b)(2). Accordingly, the trial court rendered an order terminating Father's parental rights. Thereafter, Father perfected this appeal.

### ANALYSIS

On appeal, Father challenges the sufficiency of the evidence in support of the trial court's findings under section 161.001(b)(1)(D), (E), and (N) of the Texas Family Code ("the Code"). *See id.* § 161.001(b)(1)(D), (E), and (N). In addition to challenging each of the statutory grounds for termination, Father also challenges the sufficiency of the evidence in support of the trial court's finding that termination was in the best interest of his child. *See id.* § 161.001(b)(2). In his final issue on appeal, Father contends he received ineffective assistance of counsel.

### *Standard of Review*

To terminate a parent's right to his or her child, a court must find by clear and convincing evidence that the parent committed an act prohibited by section 161.001(b)(1) of the Code and termination is in the best interest of the child. *See id.* § 161.001(b). "Clear and convincing evidence" refers to the measure or degree of proof that "will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 101.007. Courts require this heightened standard of review because termination of a parent's rights to his child results in permanent and severe changes for both the parent and child, thus, implicating due process concerns. *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2015). When reviewing the legal and factual sufficiency of the evidence, we apply the well-established standards of review.

See TEX. FAM. CODE ANN. §§ 101.007, 161.206(a); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (legal sufficiency); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (factual sufficiency).

### ***Statutory Termination Grounds***

As indicated above, Father challenges the sufficiency of the evidence in support of the trial court's findings with regard to each of the statutory grounds for termination. Specifically, Father argues the evidence is insufficient to support the trial court's findings that he: (1) knowingly placed or knowingly allowed M.A.N.Z. to remain in conditions or surroundings that endangered M.A.N.Z.'s physical or emotional well-being; (2) engaged in conduct or knowingly placed M.A.N.Z. with persons who engaged in conduct that endangered M.A.N.Z.'s physical or emotional well-being; and (3) constructively abandoned M.A.N.Z. See TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), and (N).

We begin our analysis by first considering whether the evidence is sufficient to support the trial court's finding that Father engaged in conduct or knowingly placed M.A.N.Z. with persons who engaged in conduct that endangered M.A.N.Z.'s physical or emotional well-being. See *id.* § 161.001(b)(1)(E). According to Father, the Department failed to set forth more evidence than his mere imprisonment to establish his course of conduct endangered M.A.N.Z.'s well-being.

### ***Applicable Law***

Subsection 161.001(b)(1)(E) of the Code states that a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has engaged in conduct or knowingly placed the child with a person who has engaged in conduct which endangers the physical or emotional well-being of the child. *Id.*; *In the Interest of R.S.-T.*, 522 S.W.3d 92, 109 (Tex. App.—San Antonio 2017, no pet.). Endangering a child means exposing a child to loss or injury or jeopardizing a child's emotional or physical well-being. *R.S.-T.*, 522 S.W.3d at 109 (citing *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex.1987)). To

satisfy section 161.001(b)(1)(E), there must be evidence that the endangerment of the child's well-being was the direct result of the parent's conduct, including the parent's actions, omissions, or failure to act. *Id.*; *In the Interest of M.C.*, 482 S.W.3d 675, 685 (Tex. App.—Texarkana 2016, pet. denied). The parent's conduct need not be directed at the child or have caused an actual injury or threat of injury to the child; rather, the evidence need only show that the parent in question engaged in a “course of conduct [that] creates a potential for danger which the parent is aware but disregards.” *R.S.-T.*, 522 S.W.3d at 109 (quoting *In the Interest of S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

Mere imprisonment, standing alone, does not constitute engaging in conduct that endangers the physical or emotional well-being of the child. *M.C.*, 482 S.W.3d at 685; *see In re D.J.H.*, 381 S.W.3d 606, 613 (Tex. App.—San Antonio 2012, no pet.) (citing *S.M.L.*, 171 S.W.3d at 479). However, it is a factor that the fact finder may consider because when a parent is incarcerated, he or she is absent from the child's daily life and unable to provide support to the child, negatively impacting the child's living environment and emotional well-being. *See S.M.L.*, 171 S.W.3d at 478–79. Moreover, this court has pointed out that “a parent's repeated criminal acts may constitute sufficient evidence of conduct that endangers the well-being of a child[, and] a fact-finder may infer from past conduct endangering the well-being of a child that similar conduct will recur if the child is returned to the parent.” *D.J.H.*, 381 S.W.3d at 613.

In addition to criminal activity, evidence of illegal drug use and its effect on a parent's life and ability to parent may establish endangering course of conduct. *M.C.*, 482 S.W.3d at 685. Courts may further consider evidence of domestic violence, lack of self-control, and propensity for violence as evidence of endangerment. *R.S.-T.*, 522 S.W.3d at 110. If the evidence shows a course of conduct that has the effect of endangering the physical or emotional well-being of the

child, a finding under section 161.001(1)(E) is supported. *R.S.-T.*, 522 S.W.3d at 109–10; *M.C.*, 482 S.W.3d at 685.

### *Application*

The record reflects that M.A.N.Z.’s physical and emotional well-being was directly affected by Father’s criminal course of conduct. The Department caseworker, Ms. Palacios, testified that when M.A.N.Z. was removed from his mother’s care, Father was incarcerated in the Uvalde County jail on a pending burglary of a habitation charge. Ms. Palacios testified that in addition to his current incarceration, Father had an extensive criminal history. According to Ms. Palacios, when she initially became involved with the family, Father “had just gotten out of jail . . . and then he was rearrested just a few months later.” When asked about his criminal history, Father testified that prior to M.A.N.Z.’s birth, he had been convicted of a misdemeanor for possession of brass knuckles as well as felony assault for a second offense of family violence. With regard to his current incarceration, Father stated he was awaiting trial in Uvalde County for burglary of a habitation. Father explained that when the Department became involved with his son’s case, he had “bonded out” of jail on the burglary charge, but he was re-arrested and sent back to the Uvalde County jail on the same charge. Father added he was also awaiting trial in Bexar County for felony possession of a firearm. Given the foregoing evidence, the trial court could have reasonably concluded Father’s pattern of criminal activity subjected him to a lifestyle of ongoing incarcerations and absence from M.A.N.Z.’s life, thereby negatively impacting M.A.N.Z.’s living environment and emotional well-being. *See M.C.*, 482 S.W.3d at 685; *D.J.H.*, 381 S.W.3d at 613; *S.M.L.*, 171 S.W.3d at 478–79.

Father, however, argues the Department’s evidence merely establishes evidence of mere imprisonment, which alone is insufficient to constitute engaging in conduct that endangers the physical or emotional well-being of the child. *See M.C.*, 482 S.W.3d at 685; *In re D.J.H.*, 381

S.W.3d at 613. Although we agree evidence of mere imprisonment is insufficient to satisfy Subsection E, the record reflects the Department produced evidence that Father had a series of past criminal convictions, including a felony assault for a second offense of family violence conviction, which caused him to be in and out of jail. *See R.S.-T.*, 522 S.W.3d at 110 (noting evidence of domestic violence is evidence of endangerment). Thus, it was reasonable for the fact-finder to conclude that Father's course of conduct established that he engaged in conduct that endangered M.A.N.Z.. *See id.*

In addition to Father's current incarceration and criminal history, the trial court heard testimony from Ms. Palacios regarding Father's drug use. The record reflects Father tested positive for methamphetamine when the Department first became involved with the family, and since his incarceration, Father has not received any drug treatment. Ms. Palacios testified that even if Father was clean during his incarceration, it was highly likely he would "resort to his old ways and start using illegal drugs again" due to a lack of treatment. As indicated above, evidence of illegal drug use and its effect on a parent's life and ability to parent may establish endangering course of conduct. *See M.C.*, 482 S.W.3d at 685.

Based on the foregoing and giving due deference to the trial court's findings, we conclude the trial court could have reasonably formed a firm belief or conviction as to the truth of the termination findings under section 161.001(b)(1)(E) — that Father engaged in conduct or knowingly placed M.A.N.Z. with a person who engaged in conduct that endangered M.A.N.Z.'s well-being. The evidence shows Father engaged in a lifestyle of criminal activity, subjecting him to numerous incarcerations. The evidence also established Father was using illegal drugs when the Department became involved in the case. Accordingly, we hold the evidence is legally and factually sufficient to support the trial court's finding under section 161.001(b)(1)(E). Because we hold the evidence is sufficient to support the trial court's finding under section

161.001(b)(1)(E), we need not address the trial court's remaining findings under section 161.001(b)(1) because a single finding under section 161.001(b)(1) of the Code is sufficient to support an order 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); *In Interest of A.L.H.*, 515 S.W.3d 60, 88 (Tex. App.–Houston [14th Dist.] 2017, pet. denied).

### ***Best Interests***

We next turn to whether the evidence was sufficient to support the trial court's finding that termination of Father's parental rights was in M.A.N.Z.'s best interest. According to Father, the Department did not produce sufficient evidence with regard to the following *Holley* factors: "(1) desires of the child; (2) ability of [Father] to meet the present and future emotional and physical needs of the child; (4) parenting abilities of Appellant; (6) plans for the child proposed by Appellant and (7) stability of Appellant's parent's home was based solely on a lack of evidence."

### ***Applicable Law***

There is a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, promptly and permanently placing a child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a). Thus, to determine whether a child's parent is willing and able to provide the child with a safe environment, we consider the factors set forth in section 263.307(b) of the Code. *Id.*

In addition to these statutory factors, we apply the non-exhaustive *Holley* factors to our analysis. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). Particularly relevant in this case is the fact that evidence of each *Holley* factor is not required before a court may find that termination is in a child's best interest. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The absence of evidence as to some of the *Holley* factors does not preclude a trier of fact from reasonably



forming a strong conviction or belief that termination is in a child's best interest. *Id.* Moreover, in conducting our review of a trial court's best interest determination, we focus on whether termination is in the best interest of the child — not the best interest of the parent. *In re D.M.*, 452 S.W.3d 462, 468–69 (Tex. App.—San Antonio 2014, no pet.).

Additionally, evidence that proves one or more statutory grounds for termination may be probative to prove that termination is in the child's best interest. *C.H.*, 89 S.W.3d at 28 (holding same evidence may be probative of both section 161.001(1) grounds and best interest, but such evidence does not relieve the State of its burden to prove best interest). In conducting a best interest analysis, a court may consider, in addition to direct evidence, circumstantial evidence, subjective factors, and the totality of the evidence. *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). Finally, a trier of fact may measure a parent's future conduct by his past conduct in determining whether termination of parental rights is in the child's best interest. *Id.*; *see also D.J.H.*, 381 S.W.3d at 613.

### ***The Evidence***

As previously noted, two witnesses testified in this matter — the Department caseworker, Ms. Palacios, and Father. Through these witnesses, the Department produced evidence in an attempt to establish that termination was in M.A.N.Z.'s best interest. We review this evidence in light of *Holley* and section 263.307(b).

#### ***1. Desires of the Children***

At the time of trial, M.A.N.Z. was not yet three-years-old and thus, unable to express his desires regarding conservatorship. *See* TEX. FAM. CODE ANN. § 263.307(b)(1) (child's age and physical and mental vulnerabilities); *Holley*, 544 S.W.2d at 371–72. However, in evaluating M.A.N.Z.'s desires, the trial court was entitled to consider testimony regarding M.A.N.Z.'s current placement, which established that M.A.N.Z. is bonded with and is well-cared for by his current

foster family. *See In re J.D.*, 436 S.W.3d 105, 108 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Ms. Palacios, the Department caseworker, testified M.A.N.Z. has been living with his half-sibling E.G. and E.G.’s paternal grandparents for over a year. According to Ms. Palacios, M.A.N.Z. is bonded with these foster parents. *See J.D.*, 436 S.W.3d at 108; *U.P.*, 105 S.W.3d at 230.

In addition to the above testimony, the trial court was also entitled to consider testimony concerning the time M.A.N.Z. has spent with Father. *See J.D.*, 436 S.W.3d at 108; *U.P.*, 105 S.W.3d at 230. Ms. Palacios testified that while Father was out of jail on bond, he failed to visit with M.A.N.Z. in any constructive way. Ms. Palacios testified that although Father told her he was willing to do anything for M.A.N.Z., he did not attend his DNA appointment, which was necessary in order to establish his paternity to allow the Department to set up visitations for him with M.A.N.Z. As a result, no visitations were set up between Father and M.A.N.Z while Father was out of jail. The record reflects that Father ultimately attended a DNA appointment only after he was incarcerated and “they went to the jail for him.” Moreover, given Father’s pattern of criminal conduct as detailed in our above analysis, it highly likely he will face incarceration again and therefore, be absent from M.A.N.Z.’s life. *See* TEX. FAM. CODE ANN. § 263.307(b)(3) (magnitude, frequency, and circumstances of harm to child); *Holley*, 544 S.W.2d at 371–72; *see also S.M.L.*, 171 S.W.3d at 478-79 (stating that because parents who are incarcerated are absent from child’s daily life and unable to provide support, it is highly unlikely parent will bond with child). Accordingly, the trial court could have reasonably determined M.A.N.Z. did not spend constructive time with Father and therefore, was not bonded with Father.

## 2. Emotional & Physical Needs/Emotional & Physical Danger

Having held the evidence was sufficient to support the trial court’s finding under section 161.001(b)(1)(E) — that Father engaged in conduct or knowingly placed M.A.N.Z. with a person

who engaged in conduct that endangered M.A.N.Z.'s physical and emotional well-being — the trial court could have reasonably concluded Father failed to meet M.A.N.Z.'s needs by engaging in conduct that endangered him. As pointed out above, evidence that proves one or more statutory grounds for termination may be probative to prove that termination is in the child's best interest. *See C.H.*, 89 S.W.3d at 28. In addition to evidence that Father engaged in conduct that endangered M.A.N.Z., the trial court heard testimony from Father, who testified he knew M.A.N.Z.'s mother used drugs, engaged in prostitution, and kept M.A.N.Z. on the street late at night. *See TEX. FAM. CODE ANN. § 263.307(b)(3); id. § 263.307(b)(8)* (history of substance abuse by child's family); *Holley*, 544 S.W.2d at 371–72. Father admitted that such conduct was endangering to M.A.N.Z. However, Father also added that he tried to stop her. Father testified he told M.A.N.Z.'s mother numerous times that M.A.N.Z. did not belong on the streets. Father also testified he called Child Protective Services three times. However, beyond calling Child Protective Services, Father testified he did not do anything else because his name was not on the birth certificate — even though he knew he was M.A.N.Z.'s father..

Moreover, the record reflects Father has a criminal history, including a conviction for felony assault for a second offense of family violence, and is currently incarcerated, awaiting two trials on different charges. *See TEX. FAM. CODE ANN. § 263.307(b)(7)* (history of abusive or assaultive conduct by child's family); *Holley*, 544 S.W.2d at 371–72. The record also reflects that when the Department initially became involved with M.A.N.Z., Father tested positive for methamphetamines and has not sought treatment for his drug use. *See TEX. FAM. CODE ANN. § 263.307(b)(8); Holley*, 544 S.W.2d at 371–72. Thus, the trial court could have reasonably concluded Father failed to meet M.A.N.Z.'s needs and placed M.A.N.Z. in danger or left him with someone who endangered him.

### 3. Parenting Abilities

With regard to Father's parenting abilities, Father testified that when he was not in jail, he provided for M.A.N.Z. by buying his crib, clothes, and anything M.A.N.Z.'s mother requested. *See* TEX. FAM. CODE ANN. § 263.307(b)(12) (whether child's family demonstrates adequate parenting skills); *Holley*, 544 S.W.2d at 371–72. Father testified he provided for M.A.N.Z. when he was in his life — which was “a whole year and a half.” The record reflects M.A.N.Z. is about to turn three-years-old. Father confirmed he has not seen M.A.N.Z. in over a year – “Last time I seen him was — he was around a year and a half years old.” In addition to Father's testimony, the trial court also heard testimony from Ms. Palacios regarding Father's inability to spend constructive time with M.A.N.Z. or maintain stable employment. Ms. Palacios also testified, however, that Father was participating in a jail program that includes a parenting program. *See* TEX. FAM. CODE ANN. § 263.307(b) (11) (willingness and ability of child's family to effect positive environmental and personal change); *Holley*, 544 S.W.2d at 371–72. However, given that Father has not been in his son's life or provided for him due to incarceration for more than a year, the trial court could have reasonably determined that Father failed to exhibit sufficient parenting abilities.

### 4. Available Programs to Assist Individual to Promote Best Interest

The record reflects that the Department created a service plan for Father, requiring him to attend parenting classes, seek counseling, and provide proof of employment and housing. *See* TEX. FAM. CODE ANN. §§ 263.307(b)(10) (willingness and ability of child's family to seek out, accept and complete counseling services); *Holley*, 544 S.W.2d at 371–72. Father testified that while in jail, he has completed a program known as the SCAN program, which covers topics such as substance abuse, anger management, therapy, and counseling. Father explained it was a one-month course, and the class met once a week for two hours. With regard to employment and housing, Father testified that as soon as he was released from jail, he would be able to find stable

employment and live with his parents. Father testified he has always been a worker and he can cut hair. He also testified he has a license in construction and metal and stud framing.

Ms. Palacios, however, testified Father did not have any stable employment while he was out of jail. She also testified she could not determine whether he was free from violence or sober. Ms. Palacios testified Father has not been treated for drug use, and if he was sober, it was primarily because he was in jail. Ms. Palacios testified that she believed that once Father was released, he may relapse because he has not obtained proper drug treatment. Ms. Palacios also stated that Father told her he was attending Narcotics Anonymous while he was out of jail; however, he failed to provide her with any information regarding the location of the meeting. She stated she was also unable to independently verify his attendance at this program. Ms. Palacios further stated that Father told her he was attending a class in jail called Motivation Interviewing; however, again, Father failed to provide her with sufficient contact information so she could verify the class and his attendance. Ms. Palacios did state, however, that Father sent her a certificate, confirming his completion of the SCAN program. She stated it was her understanding that the courses covered parenting skills, anger management, and a psychological evaluation. Accordingly, based on the foregoing, the trial court could have reasonably determined that although Father may have completed some portions of his service plan, he failed to complete all parts of his service plan, and in particular, that he failed to obtain drug treatment and did not provide proof of stable employment or housing upon his release from jail.

5. *Plans for Children by Those Seeking Custody/Stability of Home or Proposed Placement*

The record shows Father has no definite plan for caring for M.A.N.Z. beyond having M.A.N.Z. placed with his parents until his release. *See* TEX. FAM. CODE ANN. § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. At the time of the hearing, Father was incarcerated and awaiting trial in both Uvalde and Bexar Counties on separate charges. It is unclear when and whether Father

would be released from jail. Thus, Father's plan for M.A.N.Z. to remain with his parents until his uncertain release fails to comply with the ultimate goal of providing M.A.N.Z. with a stable and permanent home. *See In re M.A.N.M.*, 75 S.W.3d 73, 77 (Tex. App.–San Antonio 2002, no pet.) (noting that establishing stable and permanent home for child is compelling government interest).

Currently, M.A.N.Z.'s needs are being met with his current placement. The evidence shows M.A.N.Z. has been living with half-sibling, E.G., and E.G.'s paternal grandparents for over a year. Ms. Palacios testified M.A.N.Z. is doing well with the family and testified the boys enjoyed being together. The Department is hopeful that both boys will be adopted by E.G.'s grandparents. Although there is no evidence showing a present intent by the grandparents to adopt both children, it is undisputed that M.A.N.Z. is currently placed with a stable family and is doing well. The trial court could have reasonably determined that M.A.N.Z. current placement offers him more stability than being placed with another set of grandparents, awaiting Father's release from jail. *See D.J.H.*, 381 S.W.3d at 613.

6. *Act or Omissions Suggesting Parent-Child Relationship is Not Proper/Excuses*

As detailed above, the trial court heard evidence concerning Father's acts or omissions that demonstrate his inability to provide for M.A.N.Z.'s well-being. The trial court heard evidence of Father's past criminal conduct as well as his current incarceration, which suggests Father will continue to engage in improper acts, negatively affecting M.A.N.Z.'s overall well-being. *See E.D.*, 419 S.W.3d at 620; *D.J.H.*, 381 S.W.3d at 613. The record also reflects Father tested positive for methamphetamines when the Department became involved in the case. Father did not provide any excuses as to his past conduct or current incarceration, but stated he wanted to provide a better life for M.A.N.Z.

### *Application*

After reviewing the evidence above and considering the *Holley* factors and the statutory factors in section 263.307(b) of the Code, we conclude the evidence was such that the trial court could have reasonably determined termination of Father's parental rights was in M.A.N.Z.'s best interest. *See J.P.B.*, 180 S.W.3d at 573; *H.R.M.*, 209 S.W.3d at 108. Here, the evidence shows that Father has engaged in a course of conduct that endangered M.A.N.Z.'s emotional and physical well-being, and the trial court was free to judge Father's future conduct based on his past conduct. *E.D.*, 419 S.W.3d at 620; *D.J.H.*, 381 S.W.3d at 613. And although Father states he tried to stop M.A.N.Z.'s mother from keeping M.A.N.Z. on the streets due to her drug use and prostitution activities, the evidence also shows Father did not actively pursue removing M.A.N.Z. from his mother. Moreover, the evidence shows that when he was out of jail, Father did not bond or visit with M.A.N.Z. in any constructive way. The record also reflects Father has a past history of criminal activity and drug use, and the trial court was free to judge his future conduct by his past conduct when making its best interest determination. *See D.J.H.*, 381 S.W.3d at 613; *E.D.*, 419 S.W.3d at 620. Father is also potentially facing future incarceration on two separate charges. And although there is some evidence that Father completed portions of his service plan, the trial court also heard evidence that Father has not sought drug treatment, does not have stable housing lined up for his release, and has no definite plan for caring for M.A.N.Z. in the future.

Accordingly, after considering all the evidence in the light most favorable to the best interest finding, we conclude the trial court could have reasonably formed a firm belief or conviction that termination of Father's parental rights was in M.A.N.Z.'s best interest. *See J.P.B.*, 180 S.W.3d at 573; *H.R.M.*, 209 S.W.3d at 108. Given that the trial court was permitted to consider circumstantial evidence, subjective factors, and the totality of the evidence, in addition to the direct evidence presented, we hold the trial court was within its discretion in finding termination of

Father's parental rights would be in M.A.N.Z.'s best interest. *See J.P.B.*, 180 S.W.3d at 573; *H.R.M.*, 209 S.W.3d at 108; *E.D.*, 419 S.W.3d at 620.

### ***Ineffective Assistance of Counsel***

In his final issue on appeal, Father argues his original trial counsel failed to provide him with effective assistance. Specifically, Father argues his original appointed attorney rendered ineffective assistance because she failed to meet with him, failed to request a status hearing once his paternity was established, and failed to withdraw from representation in a timely manner. According to Father, if his original counsel had met with him and scheduled a status hearing, she would have learned a conflict of interest existed because she was representing Father and the father of E.G. in the termination proceeding. Father further argues that because his original trial counsel did not withdraw in a timely manner, he was unable to obtain a service plan timely and complete it.

### ***Applicable Law***

In analyzing the effectiveness of counsel in a parental-rights termination case, we follow the well-established standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *In the Interest of D.R.R.*, No. 04-17-00076-CV, 2017 WL 3044575, at \*2 (Tex. App.—San Antonio July 19, 2017, pet. denied) (mem. op.); *In Interest of K.A.D.K.*, No. 04-15-00758-CV, 2016 WL 1587535, at \*7 (Tex. App.—San Antonio Apr. 20, 2016, pet. denied) (mem. op.). Under the *Strickland* standard, an appellant must show (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense. *D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. To satisfy the first *Strickland* prong and establish counsel's performance was deficient, an appellant must show trial counsel's "conduct was so outrageous that no competent attorney would have engaged in it." *D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. We indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable, professional



assistance and was motivated by sound trial strategy. *D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. To satisfy the second *Strickland* prong, appellant must show “there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7.

### *Application*

With regard to the first *Strickland* prong, there is nothing in the record before us showing the reason for trial counsel’s actions or that such actions were unreasonable. *See D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. Although Father contends he never met with his original trial counsel, and as a result, trial counsel did not become aware of her potential conflict in interest and therefore withdraw in a timely manner, Father did not file a motion for new trial from which he could have elicited testimony from trial counsel regarding the reasons for her actions or inactions. *See D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. Nor did he provide an affidavit in which trial counsel explained the challenged conduct. *See D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7. Because the record is silent as to the reasons for trial counsel’s conduct, we may not speculate as to the reasons behind counsel’s actions or omissions to find counsel’s performance deficient. *See D.R.R.*, 2017 WL 3044575, at \*2; *K.A.D.K.*, 2016 WL 1587535, at \*7.

Even assuming Father’s original trial counsel’s performance was deficient, there is nothing in the record establishing that Father was prejudiced by his original counsel’s failure to withdraw from the case sooner than she did. Although Father asserts that because of his original counsel’s inaction, he did not obtain a service plan until five days before the merits trial and therefore, was unable to complete it, the record reflects Father was aware of the Department’s involvement with

M.A.N.Z. since December 2015 — six months prior to trial. Ms. Palacios testified that Father was out of jail at that time and she communicated with Father, who confirmed he was M.A.N.Z.'s father and was aware M.A.N.Z.'s mother was using drugs. Ms. Palacios further testified she spoke to Father again around March of 2017 about the service plan. Specifically, Ms. Palacios testified she went over what services would be asked of him once the service plan was created. *See In re G.S.*, No. 14-14-00477-CV, 2014 WL 4699480, at \*23 (Tex. App.—Houston [14th Dist.] Sept. 23, 2014, no pet.) (mem. op.) (rejecting ineffective assistance of counsel claim that counsel rendered ineffective assistance by failing to conduct discovery to determine statute of service plan after evidence established Father was aware of service plan). The record also reflects that Ms. Palacios advised Father that one of the first steps in his plan was that he needed to complete a DNA test in order to establish paternity so that she could set up visitation rights for him. Ms. Palacios further stated she provided Father with the time and place to complete DNA testing; however, Father failed to attend. Ms. Palacios testified she never heard from Father again until he was arrested. It was during his incarceration that Father finally completed DNA testing. As a result, the Department was unable to set up a visitation schedule for him while he was in jail.

Moreover, the evidence produced at trial supports the trial court's findings with regard to Subsection E of section 161.001 of the Code and that termination of Father's parental rights was in M.A.N.Z.'s best interest. *See* TEX. FAM. CODE ANN. § 161.001(1), (2); *Holley*, 544 S.W.3d at 372; *D.R.R.*, 2017 WL 3044575, at \*2 (holding that prejudice prong of ineffective assistance claim not established when overwhelming evidence supports finding that termination was in child's best interest); *K.A.D.K.*, 2016 WL 1587535, at \*7 (holding that Father failed to establish ineffective assistance claim when sufficient evidence in the record established termination of Father's rights was in children's best interests). Accordingly, we hold Father has failed to satisfy either prong of the *Strickland* test.

**CONCLUSION**

Based on the foregoing, we hold the evidence is legally and factually sufficient to support the trial court's finding under section 161.001(b)(1)(E) and its best interest finding. We further hold Father failed to satisfy his burden of demonstrating ineffective assistance of counsel. Accordingly, we overrule Father's appellate issues and affirm the trial court's order.

Marialyn Barnard, Justice