COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00188-CV

IN THE INTEREST OF S.H.,
A CHILD

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-102613-15

MEMORANDUM OPINION[1]

I. INTRODUCTION

This is an ultra-accelerated appeal[2] in which Appellant L.H. (Father) and Appellant A.C. (Mother) appeal the termination of their parental rights to their

[1]*See* Tex. R. App. P. 47.4.

[2]*See* Tex. R. Jud. Admin. 6.2(a) (requiring appellate court to dispose of appeal from a judgment terminating parental rights, so far as reasonably possible, within 180 days after notice of appeal is filed).

daughter, Sarah.[3] In three issues, Father challenges the sufficiency of the evidence to support the trial court's endangering-environment, endangering-conduct, and best-interest findings. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (2) (West Supp. 2016). In a single issue, Mother argues that the Texas Department of Family and Protective Services (the Department) was estopped from pursuing termination of her parental rights to Sarah based on a rule 11 agreement. For the reasons set forth below, we will affirm the trial court's judgment as to both Father and Mother.

II. Factual and Procedural Background

A. Overview

Five children—Sally, Steven, Gordon, Jackie, and Sarah—lived with Father and Mother, who were not married but had been in a relationship for three years. Of those five children, Father is the father of Gordon and Sarah; Mother is the mother of Sally, Steven, Jackie, and Sarah. Sarah, who was two years old at the time of the termination trial, is the youngest of the five children, is the only child of both Father and Mother, and is the only child involved in this appeal. The Department removed all five children from Father and Mother because of the deplorable condition of their residence and because the children were underweight. Although Father and Mother were offered services to help them,

[3]*See* Tex. R. App. P. 9.8(b)(2) (requiring court to use aliases to refer to minors in an appeal from a judgment terminating parental rights).

they failed to clean up their residence and to address their parenting issues, leading ultimately to the termination of their parental rights to Sarah.

On appeal, Father challenges the sufficiency of the evidence to support the trial court's termination order, arguing that Sarah's lack of any physical injuries demonstrates an absence of endangering conduct. Because a parent's endangering conduct toward other children is relevant to a determination of whether the parent engaged in behavior that endangered the child that is the subject of the suit,[4] we set forth a summary of the evidence that includes the parents' treatment of the other children in the home.

B. Trial Testimony

1. Nurse Wright

Donna Wright, a pediatric nurse practitioner on the CARE Team at Cook Children's Medical Center, testified that she saw Gordon on March 22, 2015, and on August 3, 2015. When Nurse Wright saw Gordon in March 2015, he was four years old and was in the pediatric intensive care unit due to severe malnutrition; when he presented, he was below the fifth percentile and was not even on the growth chart. Extensive testing revealed that Gordon did not have any underlying health problem causing his weight loss. Nurse Wright testified that

[4]*See In re P.B.*, No. 10-16-00255-CV, 2017 WL 3859892, at *3 (Tex. App.—Waco Aug. 30, 2017, no pet.) (mem. op.) (citing *In re W.J.H.*, 111 S.W.3d 707, 716 (Tex. App.—Fort Worth 2003, pet. denied) (holding that abusive conduct toward other children "can be used to support a finding of endangerment even against a child who was not yet born")).

she took photographs of Gordon, showing that he had bruises on so many different planes of his body that she concluded that the totality of the bruising was not accidental. Nurse Wright opined that Gordon had severe malnutrition due to insufficient calorie intake and was concerned that he was being physically abused and neglected.

Nurse Wright saw Gordon again in August 2015 because CPS wanted to make sure that he was growing at the appropriate rate. At that time, Gordon was being cared for by his maternal grandmother, and he had gained a "significant amount of weight," putting him in the 50th percentile on the growth chart.

2. Family-Based Safety Services (FBSS) Worker

Michelle Mullins with the FBSS Program testified that she was assigned to work with Father and Mother. Mullins explained that upon Gordon's release from Cook Children's in March 2015, he was placed with his maternal grandmother and remained there until July 2015 when CPS began to transition him back into Father and Mother's home. During the interim, Mullins offered Father and Mother various services, including counseling;[5] in-home parenting classes to address their parenting style and proper discipline that was not excessive;[6] and

[5]Mother informed the Department that she had previously been diagnosed with bipolar disorder, and Father explained that he might need counseling due to "previous trauma he had experienced in life."

[6]Mullins testified that during a visit to the home, she observed that Gordon was in time out with his hands in the air. Mother admitted that she had placed Gordon in time out and had fallen asleep, so he had been there for an extended period of time. Father sat on the couch playing video games while Gordon was

nutritional classes. Mullins testified that Father and Mother made progress on their services for a little while but then regressed, falling back into their old habits. Neither Father nor Mother took the nutrition classes offered to them.

Mullins testified that the condition of the home had become a concern by October 2015 when an FBSS technician visited. Mullins visited the home on November 22, 2015, and observed that "[i]t was very messy. There was food on the floor. There were dirty dishes in the sink, on the table, [and] on the counters in the kitchen. The bedrooms smelled like urine." Mullins indicated that the home smelled like feces, animal urine, human urine, and spoiled food. Mullins told Father and Mother that the condition of their home was not acceptable and told them to clean the home before she returned. Also during that visit, Mullins noted that the children—other than Sarah, who appeared to be clean and well cared for—were dirty; their feet were black with dirt and grime, and their hair looked like it had not been washed in a long time.

During the time Mullins worked with Father and Mother, all of the children became sick with vomiting and diarrhea, requiring multiple trips to an emergency clinic. Mullins opined that the children's health was negatively impacted by eating spoiled food and living in squalor, which both contributed to their vomiting and diarrhea.

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in time out; Father agreed that Gordon's hands were up in the air for a long time but said that he did not believe it was his responsibility to release Gordon from time out.

Also in November 2015, Mullins became concerned that all of the children were receiving inadequate nutrition because Mother stated that she fed the children only a peanut butter sandwich in the van on the way home from daycare. Mullins learned from Mother that she normally woke up the children between 5:30 and 6:00 a.m.; dropped off Gordon, Jackie, and Steven at daycare at 6:00 a.m.; picked them up from daycare between 5:30 and 5:45 p.m.; and put them to bed at 6:00 p.m.[7] Mullins testified that Father and Mother were not parenting four of the children during the week because the children were either at daycare or school or in bed.[8]

Mullins testified that when she worked the case, Sally was six years old. Mullins had concerns about Sally "mothering the other children"; Sally was responsible for taking care of her four younger siblings when her parents were not home overnight, for potty training her younger siblings, and for wiping down her siblings with wet wipes so they would not smell because baths were only on Mondays. Mullins opined that Sally would not have been able to handle a crisis if one had occurred while her parents were gone and that she could not adequately care for her siblings' food and nutrition requirements.

Mullins visited Gordon, Jackie, and Steven at daycare on December 8, 2015, and noted that they were dirty and were dressed in clothing that smelled of

[7]Sally went to school, and Sarah stayed home with Mother.

[8]Mullins testified that Father worked the night shift and was home during the visits that she made to the residence.

urine. Steven was wearing shorts and a jacket that was too big for him. Gordon was wearing clothes that were too small for him; the button on his jeans could not be closed. Mullins testified that the daycare had sent Gordon home several times because he had an odor and was not clean.

Mullins went to Father and Mother's home in December 2015 and found it "was worse" than the previous visit. Mullins explained that "[t]here was human feces smeared on the walls in the bedroom of the girls. There was -- the floors you could hardly see due to the trash and the food. The high chair that [Jackie] and [Sarah] used had pill bottles and empty soda cans on it and spoiled food." Mullins also noted that the dining room table had an open peanut butter container with a knife that was accessible to the children. The girls' room also had a broken chest of drawers, and the broken wood was out where the children could have fallen and hurt themselves. Mullins testified that the home was a safety hazard to the children. Mullins also testified that at that time, Gordon appeared to be maintaining his weight but that the other children appeared to have lost weight. Based on these observations, CPS removed the children from the home and placed them in foster care in December 2015.

3. The Children's Therapist

Laura Greuner, a licensed clinical social worker who is employed as a therapist, testified that she had seen Gordon, Steven, and Sally for therapy sessions. During Gordon's and Steven's therapy sessions, when they were approximately five years old, they made outcries of sexual abuse and physical

abuse. Gordon told Greuner that Father made him "drink his milk" and provided details about having to put Father's penis in his mouth.[9] Greuner testified that she did not think that the children had been coached; Greuner believed that the boys had suffered sexual abuse in Father and Mother's home.

Both boys told Greuner about various punishments that Father and Mother had inflicted on them, including placing them in a box and not allowing them to get out for a long period of time, burning them on the stove, and holding them under water. Both boys also told Greuner that Father and Mother had wrapped them in a blanket, had put tape around the blanket, and had placed them in a trash can outside. Additionally, both boys were "very, very afraid" to visit with their parents and were upset after visits with their parents.[10] Greuner asked the children to tell her about good things that had happened while they were with Father and Mother, but the children were unable to come up with any examples. Greuner testified that the boys had consistently stated that they did not want to see their parents and did not want to go home because they were scared of going home.

Greuner started seeing Sally for therapy sessions in January 2016, when Sally was six years old. Sally told Greuner that Mother walked around naked and

[9]Sally's foster mom, who is not Gordon and Steven's foster mom, reported to the conservatorship worker that on April 1, 2016, Sally confirmed that Father had put his "wee wee" in Gordon's and Steven's mouths.

[10]Although Mother was not Gordon's biological mother, he referred to her as his mother.

sat on Father's lap; when Greuner asked what Father and Mother were doing, Sally said, "I don't know what it's called. It's not right." Greuner testified that based on the "sexual talk" she had heard from the children, Father and Mother had "really poor boundaries with sexual things."

4. Nurse Fugate

Theresa Fugate, a registered nurse on the CARE Team at Cook Children's, testified that she saw Jackie on February 2, 2017; Gordon and Steven on February 6, 2017; and Sally on February 10, 2017. Nurse Fugate examined the children as a result of the outcries of sexual abuse that they had made. Nurse Fugate testified that her physical examination of four-year-old Jackie revealed scar tissue on her labia majora for which there was no explanation.

Gordon told Nurse Fugate that Father had "raped" him. When Nurse Fugate asked Gordon what he meant, he said that "it hurts bad and he did it a lot."[11] Gordon also said that Father had inserted the wooden handle of a hammer in his butt and that Father did that to Steven, too. Nurse Fugate testified that Gordon had a scar on the back of his skull[12] and a small scar on his left inner thigh but that his genital exam was normal and did not show signs of injury.

[11]The medical records also reflect that Gordon said that "bad guys" had raped him by putting their "pee pee" in his butt and that Father and Mother had received money from the bad guys.

[12]The Court-Appointed Special Advocate for Gordon testified that he told her that the scar on his head was from when Father hit him with a hammer.

Steven told Nurse Fugate that Father and Mother "did bad stuff." Steven said that Father and Mother had put him in a trash can, that it was dark, and that it smelled bad. Steven also said that Father had touched him on his butt and his "pee pee" and that Father had put his "pee pee" in his butt. Steven said that "two bad guys put their pee pee" in his butt. Steven told Nurse Fugate that Father had put his mouth on Gordon's "pee pee" and that Mother had put her mouth on his (Steven's) "pee pee."

Sally told Nurse Fugate that Father and Mother "didn't take very good care of us. They didn't feed us or take us to school. So we went to live with other moms and dads." Sally said that Father and Mother were "taking classes to learn how to do better."

5. The Parents' Psychologist

Dr. Nichelle Wiggins, a clinical psychologist, testified that she performed psychological evaluations on Father and Mother. Dr. Wiggins testified that what stood out to her during Father's psychological evaluation in August 2015 was his lack of hygiene; he had "really long dirty nails." Father also had scarring on his arms from where he used to self-mutilate. Dr. Wiggins asked Father about why CPS got involved, and Father said that Gordon had developed an eating disorder within a short amount of time and had lost a considerable amount of weight. Father explained that Mother was the primary caregiver for the children because he worked. Father also claimed that he had told Mother that it was time to take Gordon to the doctor when he noticed that Gordon was losing weight because he

would not eat and could not keep food down. Father admitted that CPS had previously placed Gordon in foster care for six months when he was two years old so that Father could get his life back together and that FBSS had placed Gordon with Mother's parents during the FBSS case. Father described Sarah as his favorite child because she had not "developed toddler habits," though he later said that he loved all of his children equally.

Father and Mother's relationship was fraught with tension, and Father almost left Mother due to her habit of lying. Father said that because Mother had been involved with CPS in the past, she blamed him when the children developed skin irritations from not being changed regularly after having an accident and said that he would not allow her to change the children, but Father said he had never forbidden Mother from changing the children's underpants. Father said Mother also blamed him for "roughing up the children sometimes when disciplining them." Father said that when he becomes angry, he yells and screams and sometimes loses his temper; that his anger had caused problems in the past with his work; and that his anger sometimes frightens him. Father told Dr. Wiggins that he had spanked the children and that his preferred punishment method was to pop them on their mouths with his fingers. Father said that after the FBSS services, he decided to no longer use physical discipline.

Dr. Wiggins testified that at the time she conducted Father's psychological examination, Gordon had just been returned to Father and Mother, so Father "presented as a person who was adjusting to all the demands that were being

placed on him, he was still anxious because he wanted everything to work out fine for him and his family[,] and he admitted to his own personal traumas that he had gone through and how he had worked through those to the best of his ability." When Wiggins asked Father one thing he would change about himself, he said that he would not change a thing.

Although Father had a history of clinical depression and prior history of using marijuana and abusing alcohol, Father denied being depressed and denied engaging in drug use and alcohol use at the time of the evaluation. Dr. Wiggins diagnosed Father with an adjustment disorder with anxiety, borderline personality traits, child neglect, and a history of physical abuse as a child.

Dr. Wiggins performed Mother's psychological evaluation in two parts; it was completed in October 2016. Dr. Wiggins testified that Mother presented as "a very depressed lady" who had poor hygiene, including a strong foul body odor and bad breath. Mother told Dr. Wiggins about four separate times when CPS had been involved with her children and explained that she had relinquished her parental rights to her oldest daughter and that her second oldest daughter had gone to live with her father.[13] Mother said that Sally, Steven, Gordon, Jackie, and Sarah were removed after Gordon was returned to the home because she was overwhelmed with trying to care for them, with taking Gordon to doctor appointments, and with taking care of herself and the house. Mother told Dr.

[13]Neither of Mother's two oldest daughters were involved in the proceedings below.

Wiggins that Father would not let her change the children after they had an accident because he wanted them to learn a lesson. Mother said that she went behind his back and cleaned the children and gave them baths. Mother also said that Father yelled at the children, grabbed them by the arm, and put them in time out.

At the time of the psychological evaluation, Mother had been taking Buspar and Abilify for ten months because she had been previously diagnosed with depression, anxiety, and bipolar disorder. Dr. Wiggins noted that Mother had a history of self-mutilation and anorexia. Mother believed that some of her children had eating disorders, but she did not see how her own eating disorder could affect her children. Mother expressed concern that her mental-health conditions had negatively affected her children because she did not provide for them to the best of her ability and spent very little time with them by putting them to bed as soon as they came home from daycare.

Dr. Wiggins diagnosed Mother with bipolar disorder, generalized anxiety disorder, eating disorder—anorexia nervosa restricting type, borderline personality disorder, dependent personality type, a history of sexual abuse in her childhood, previous domestic violence relationships, and neglect of her children. Dr. Wiggins opined that Mother would continue the pattern of having other people raise her children "until she decides she's fully onboard with taking care of her mental[-]health issues."

6. Conservatorship Worker

Tiffany Kitch, a conservatorship worker with the Department, testified that she received this case in December 2015. At that time, the Department's concerns included the family's extensive CPS history and unsafe home, the malnutrition of the children, the parents' inflicting inappropriate discipline on the children, the parents' inability to meet the children's emotional needs, and the parents' lack of cooperation with FBSS. Kitch explained that since December 2006, the Department had received twenty-three referrals related to the children, that ten of the referrals were ruled out, that six were ruled "unable to determine," and that eight were ruled "reason to believe."[14]

Kitch testified that Father was asked to complete the following services: to attend individual counseling, couples counseling, the nutrition class, and the ROADS drug education program; to undergo a psychological assessment and random drug testing; to attend visits with the children; and to maintain employment, contact with the caseworker, and safe and stable housing. Fitch testified that Father had completed the ROADS program, had maintained full-time employment at Walmart, had kept in touch with Fitch, and had visited with the children when visits were allowed. After Father completed the psychological assessment, the Department required Father to attend anger management classes, which he had not completed at the time of the termination trial. Kitch

[14]Kitch was not asked why her dispositions added up to twenty-four when she had testified that there were only twenty-three referrals.

said that Father was successfully discharged from individual counseling but that there were concerns because the notes from couples counseling contradicted the notes from individual counseling in that the children's physical and sexual abuse outcries were not addressed. Kitch asked Father's therapist about the discrepancy, and she said that Father stated that he did not physically or sexually abuse the children and that there was nothing to talk about. Kitch opined that Father had not addressed the concerns that brought the children into the Department's care.

Initially, Father and Mother visited with all five children once each week. Fitch noted that during a majority of the visits, Gordon and Steven played by themselves while Mother breastfed Sarah. Beginning in March 2016, Gordon and Steven were hesitant to go back to the visitation room. After the March 31, 2016 visit, Steven reported that Mother had whispered in his ear that she was going to kill him for "talking to the bad guys."[15] On April 4, 2016, Fitch received information that Sally had made an outcry about seeing Father "pee" into Gordon's and Steven's mouths. The trial court thereafter suspended Father and Mother's visits with Sally, Gordon, and Steven, believing it was in their best interest given their fear and the outcries they had made. Approximately one month prior to the termination trial in April 2017, Father and Mother asked to reinstate the visits with Sally, and the Department agreed to their request.

[15]Steven had participated in a forensic interview earlier in the day and had received a plastic police badge.

During two of the three visits with Sally that took place after visits with her were reinstated, she spent a significant portion of the visits watching a movie by herself while Father and Mother gave their attention to Sarah.

When Fitch met with Gordon in May 2016, he was playing with dinosaurs and putting them on top of each other. Fitch asked Gordon what the dinosaurs were doing, and he laughed and said that they were "bumping," which was the word he used for sexual intercourse. Fitch asked where he had seen that, and he said his "other mommy and daddy." After Gordon turned off all the lights, Fitch asked him why he was putting them in the dark; Gordon said that it made him feel safe from the "bad guys," which he explained were his "other mommy and daddy."

When Fitch met with Gordon in September 2016, he told her that his "other mommy and daddy" had put him in the refrigerator when he was hungry, that it was dark and cold, and that he was really scared. Gordon also said that he had been thrown into a swimming pool and that he had "drowned."

When Fitch met with Steven in November 2016, he was aggressively hitting his toys with a drumstick and stated that he was mad at his "other mommy and daddy" because they had done bad things to him. When Fitch met with Gordon on that same date, he told her that if the dinosaurs stepped on Father and Mother, the dinosaurs would kill them. Fitch asked what Gordon meant, and he said that Father and Mother had let "the bad guys rape" him. Gordon explained that he had heard the word "rape" from Father and Mother.

Kitch made a visit to Father and Mother's apartment on February 22, 2017, and noted that it was cluttered with boxes, despite that they had lived there for almost a year. Kitch noted that a knife and kitchen scissors were out on the kitchen counter and that there were jars of salsa and jelly sitting out that were not being eaten but were not in the refrigerator. Kitch expressed concern over Father's and Mother's housekeeping abilities and the fact that the residence was so cluttered even when no children were living in the residence. Kitch also expressed concern that Father was not listed on the lease for the apartment, "which is against the [Section 8] housing rules."

Fitch testified that Sarah has been in the same foster home throughout the case and that Jackie is placed in the same foster home. Fitch testified that the current foster parents have been able to meet Sarah's needs and that she had progressed significantly since being placed in their home.[16] Sarah did not have any medical issues at the time of the trial, but Fitch opined that the foster parents would be able to address any issues that might come up in the future. Fitch testified that Sarah had bonded to her foster parents. When asked whether Sarah had ever stated that she wanted to go with Father and Mother, Fitch said that Sarah had just recently started talking in sentences and that she had not heard Sarah say that.

[16]The "Child's Service Plan" for Sarah notes that she had initially shown signs of speech delays.

Fitch concluded that it was in Sarah's best interest for Father's and Mother's parental rights to be terminated. The Department planned for Sarah to be adopted by her foster parents.

7. Foster Mom of Sarah and Jackie

Foster Mom testified that Sarah and Jackie had been in her home for sixteen months and that hers was the only foster home they had lived in. On the first night when Jackie arrived, she smelled so badly that Foster Mom could not put her to bed without a bath. When Foster Mom placed Jackie in the bath tub, she was fearful of the water and started crying. Foster Mom said that it took two months for Jackie to enjoy taking a bath. Jackie also was not potty trained when she came into care at three and a half years old and had an abrasion near the opening of her vagina that was very painful for her. When Jackie and Sarah first arrived at Foster Mom's home, Jackie climbed the shelves in the pantry to try to get food. Foster Mom gave Jackie a water bottle and a snack cup, and Jackie required them to be full even when she was not eating or drinking and did not let them out of her sight for the first two weeks. Foster Mom testified that Jackie had a cut on her forehead off and on for the entire time that she had lived with Foster Mom because Jackie has high anxiety and has a nervous habit of picking her skin. Jackie was in play therapy and appeared to have some sensory processing issues and speech delays.

Foster Mom testified that Sarah was sixteen months old when she arrived and that it took her six months before she was able to relax during a bath and

nine months before she would lie down in the bath tub. Foster Mom explained that Sarah was afraid of the water even before her clothes were removed and screamed like someone was injuring her when the tub was filling with water. Foster Mom testified that Sarah had "done amazingly well and ha[d] caught up and [was] now on track for her age." If the trial court granted the termination, Foster Mom planned to adopt Sarah.

8. Ad Litem for the Children

The children's ad litem testified that Father and Mother had been given many opportunities and had been instructed many times on what they needed to do in order to keep their children safe, but they had failed to take advantage of the opportunities they had received and did not make the necessary changes. The children's ad litem further testified that Father believes that nothing is wrong. The children's ad litem stated that she had observed the children's fear of Father and Mother and agreed with the Department that Father's and Mother's parental rights to Sarah should be terminated for her safety and because it was in her best interest.

C. Trial Court's Disposition

After hearing the testimony and reviewing the evidence admitted at trial, the trial court found by clear and convincing evidence that Father and Mother had knowingly placed or had knowingly allowed Sarah to remain in conditions or surroundings that had endangered her physical or emotional well-being, that Father and Mother had engaged in conduct or had knowingly placed Sarah with

persons who had engaged in conduct that had endangered her physical or emotional well-being, and that termination of the parent-child relationship between Father and Sarah and between Mother and Sarah was in Sarah's best interest. Father and Mother each perfected an appeal from the trial court's termination order.

III. BURDEN OF PROOF AND STANDARDS OF REVIEW

In a termination case, the State seeks not just to limit parental rights but to erase them permanently—to divest the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except the child's right to inherit. Tex. Fam. Code Ann. § 161.206(b) (West 2014); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently, "[w]hen the State seeks to sever permanently the relationship between a parent and a child, it must first observe fundamentally fair procedures." *In re E.R.*, 385 S.W.3d 552, 554 (Tex. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92 (1982)). We strictly scrutinize termination proceedings and strictly construe involuntary termination statutes in favor of the parent. *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *E.R.*, 385 S.W.3d at 554–55; *Holick*, 685 S.W.2d at 20–21.

Termination decisions must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. §§ 161.001(b), 161.206(a); *E.N.C.*, 384 S.W.3d at 802. Due process demands this heightened standard because "[a] parental rights termination proceeding encumbers a value 'far more precious than any property right.'" *E.R.*, 385 S.W.3d at 555 (quoting *Santosky*, 455 U.S.

at 758–59, 102 S. Ct. at 1397); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see also E.N.C.*, 384 S.W.3d at 802. Evidence is clear and convincing if it "will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007 (West 2014); *E.N.C.*, 384 S.W.3d at 802.

For a trial court to terminate a parent-child relationship, the Department must establish by clear and convincing evidence that the parent's actions satisfy one ground listed in family code section 161.001(b)(1) and that termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b); *E.N.C.*, 384 S.W.3d at 803; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). Both elements must be established; termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re C.D.E.*, 391 S.W.3d 287, 295 (Tex. App.—Fort Worth 2012, no pet.).

In evaluating the evidence for legal sufficiency in parental termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the Department proved the challenged ground for termination. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005).

We review all the evidence in the light most favorable to the finding and judgment. *Id.* We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all evidence that a

reasonable factfinder could have disbelieved. *Id.* We consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.*

We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder's province. *Id.* at 573–74. 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.* at 573.

We are required to perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support the termination of a parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In reviewing the evidence for factual sufficiency, we give due deference to the factfinder's findings and do not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated one of the provisions of section 161.001(b)(1) and that termination of the parent-child relationship would be in the best interest of the child. *See* Tex. Fam. Code Ann. § 161.001(b)(1), (2); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or

conviction in the truth of its finding, then the evidence is factually insufficient. *H.R.M.*, 209 S.W.3d at 108.

IV. ENDANGERMENT FINDINGS

In his first and second issues, Father argues that the evidence is legally and factually insufficient to support the endangering-environment and endangering-conduct findings.

A. Law on Endangerment

Subsections (D) and (E) of Texas Family Code section 161.001(b)(1) provide that the court may order the termination of a parent's rights if it finds by clear and convincing evidence that a parent has

> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; [or]
>
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child[.]

Tex. Fam. Code Ann. §§ 161.001(b)(1)(D), (E).

"Endanger" means to expose to loss or injury, to jeopardize. *Boyd*, 727 at 533; *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). Under section 161.001(b)(1)(D), it is necessary to examine the evidence related to the environment of the child to determine if the environment was the source of the endangerment to the child's physical or emotional well-being. *J.T.G.*, 121 S.W.3d at 125. When termination of parental rights is based on subsection (D), the endangerment analysis focuses on the evidence of the child's physical

environment, but the environment produced by the conduct of the parents bears on the determination of whether the child's surroundings threaten her well-being. *Jordan v. Dossey*, 325 S.W.3d 700, 721 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

Under section 161.001(b)(1)(E), the relevant inquiry is whether evidence exists that the endangerment of the child's physical well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *See J.T.G.*, 121 S.W.3d at 125; *see also* Tex. Fam. Code Ann. § 161.001(b)(1)(E). It is not necessary, however, that the parent's conduct be directed at the child or that the child actually suffer injury. *Boyd*, 727 S.W.2d at 533; *J.T.G.*, 121 S.W.3d at 125. The specific danger to the child's well-being may be inferred from parental misconduct standing alone, and to determine whether termination is necessary, courts may look to parental conduct both before and after the child's birth. *Boyd*, 727 S.W.2d at 533; *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied).

"[I]t is beyond question that sexual abuse is conduct that endangers a child's physical or emotional well-being" and that "evidence of sexual abuse of one child is sufficient to support a finding of endangerment with respect to other children." *See id.* at 742. Moreover, a factfinder may infer from past conduct endangering the well-being of the child that similar conduct will recur if the child is returned to the parent. *In re M.M.*, No. 02-08-00029-CV, 2008 WL 5195353, at *6 (Tex. App.—Fort Worth Dec. 11, 2008, no pet.) (mem. op.).

Because the evidence pertaining to subsections (D) and (E) is interrelated, we conduct a consolidated review. *In re T.N.S.*, 230 S.W.3d 434, 439 (Tex. App.—San Antonio 2007, no pet.); *J.T.G.*, 121 S.W.3d at 126.

B. Sufficient Evidence Supports Endangerment Findings

Here, the record contains evidence that Gordon was hospitalized due to malnutrition and that all of the children, including Sarah, appeared to be underweight in December 2015 when they were removed from Father and Mother. Both Gordon and Steven made sexual outcries against Father, and Sally substantiated their outcries when she told her foster mom that she had seen Father put his "wee wee" in Gordon's and Steven's mouths. The record reflected that the children were bathed only once each week on Mondays; that Gordon and Steven were dropped off at daycare wearing dirty, ill-fitting, or inappropriate clothing for the weather; that Gordon and Steven were often left in soiled clothes after they had urinated on themselves; and that six-year-old Sally was tasked with caring for her four younger siblings when Father and Mother were gone overnight. Gordon and Steven recounted to Greuner, Nurse Fugate, and Fitch the various forms of abusive discipline that they had received from Father and Mother. Moreover, the conservatorship worker testified to the unsanitary and unsafe conditions of the home and opined that the condition of the home contributed to the various gastrointestinal illnesses that had resulted in trips to an emergency clinic for each of the children.

Father argues that Sarah's lack of any physical injuries demonstrates an absence of endangering conduct. It is well settled, however, that "the child does not need to suffer actual physical injury to constitute endangerment." *In re N.R.*, 101 S.W.3d 771, 775 (Tex. App.— Texarkana 2003, no pet.); *In re D.M.*, 58 S.W.3d 801, 811 (Tex. App.—Fort Worth 2001, no pet.); *In re R.D.*, 955 S.W.2d 364, 368 (Tex. App.—San Antonio 1997, pet. denied); *see also In re E.A.G.*, 373 S.W.3d 129, 143 (Tex. App.—San Antonio 2012, pets. denied) ("Although there was no testimony that [father] directly harmed the younger children, we agree that his sexual abuse of [his stepdaughter], which under the applicable standard of review we must accept as true, endangered [father's] children, including any unborn children."); *R.W.*, 129 S.W.3d at 742 ("[I]t is beyond question that sexual abuse is conduct that endangers a child's physical or emotional well-being" and that "evidence of sexual abuse of one child is sufficient to support a finding of endangerment with respect to other children."). Moreover, as set forth at the outset of this opinion, we are permitted to consider Father's endangering conduct toward other children in determining whether Father engaged in behavior that endangered Sarah. *See P.B.*, 2017 WL 3859892, at *3; *W.J.H.*, 111 S.W.3d at 716.

Viewing all the evidence in the light most favorable to the trial court's judgment and recognizing that the factfinder is the sole arbiter of the witnesses' credibility and demeanor, we hold (1) that there is some evidence of endangering environment on which a reasonable factfinder could have formed a firm belief or

conviction that Father had knowingly placed or had knowingly allowed Sarah to remain in conditions or surroundings that had endangered Sarah's emotional or physical well-being and (2) that there is some evidence of endangering conduct on which a reasonable factfinder could have formed a firm belief or conviction that Father had engaged in conduct or had knowingly placed Sarah with persons who had engaged in conduct that had endangered Sarah's physical or emotional well-being. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E); *In re A.L.*, No. 08-17-00048, 2017 WL 3225030, at *5 (Tex. App.—El Paso July 31, 2017, no pet.) (holding evidence legally sufficient to support endangering-environment finding because pet urine was found on floors throughout home; dirty dishes were stacked in sink and on kitchen counter; feces was smeared on walls; bedroom was cluttered with clothes, leftover food, and trash; and knives and prescription bottles were within child's reach); *In re A.B.*, 412 S.W.3d 588, 600–01 (Tex. App.—Fort Worth 2013) (holding evidence legally sufficient to support endangering-conduct finding because child was severely malnourished), *aff'd*, 437 S.W.3d 498 (Tex. 2014); *E.A.G.*, 373 S.W.3d at 143–44 (holding evidence legally sufficient to support endangering-conduct finding because father's sexual abuse of stepdaughter created environment that endangered younger children in household).

Giving due deference to the factfinder's endangering-environment and endangering-conduct findings, without supplanting the factfinder's judgment with our own, and after reviewing the entire record, we hold that a factfinder could

reasonably form a firm conviction or belief that Father had knowingly placed or had knowingly allowed Sarah to remain in conditions or surroundings that had endangered Sarah's emotional or physical well-being and that Father had engaged in conduct or had knowingly placed Sarah with persons who had engaged in conduct that had endangered Sarah's physical or emotional well-being. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E); *A.L.*, 2017 WL 3225030, at *6 (holding evidence factually sufficient to support endangering-environment finding because home was not appropriate or sufficiently safe for child to be returned); *A.B.*, 412 S.W.3d at 600–01 (holding evidence factually sufficient to support endangering-conduct finding because father consistently failed to adequately feed his children and engaged in a course of hostile conduct around the children). We overrule Father's first and second issues.

V. BEST-INTEREST FINDING

In Father's third issue, he challenges the sufficiency of the evidence to support the trial court's best-interest finding.

A. Best-Interest Factors

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).

We review the entire record to determine the child's best interest. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). The same evidence may be probative of both the subsection (1) ground and best interest. *Id.* at 249; *C.H.*, 89 S.W.3d at 28. Nonexclusive factors that the trier of fact in a termination case may also

use in determining the best interest of the child include the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *see E.C.R.*, 402 S.W.3d at 249 (stating that in reviewing a best-interest finding, "we consider, among other evidence, the *Holley* factors"); *E.N.C.*, 384 S.W.3d at 807. These factors are not exhaustive, and some listed factors may be inapplicable to some cases. *C.H.*, 89 S.W.3d at 27. Furthermore, undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest of the child. *Id.* On the other hand, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

B. Sufficient Evidence Supports Best-Interest Finding

Within his best-interest analysis, Father argues that unsanitary conditions of the home, alone, are not sufficient to support termination. As set forth above and as detailed in the analysis that follows, the *Holley* factors take into account more than the condition of the home in determining the child's best interest.

With regard to Sarah's desires, the record reflects that Sarah was approximately two and a half years old at the time of the termination trial and was just beginning to speak in sentences; therefore, she did not testify. Although Father expressed that Sarah was his favorite and paid attention to her during the visits, Sarah's conservatorship worker testified that Sarah had bonded to her foster parents. *See In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("When children are too young to express their desires, the factfinder may consider whether the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent."); *Smith v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 673, 682 (Tex. App.—Austin 2005, no pet.) (stating that best-interest focus is on the children, not the needs and desires of the parent). The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

With regard to Sarah's emotional and physical needs now and in the future, Sarah does not have any special needs, but her basic needs include food, shelter, and clothing; routine medical and dental care; a safe, stimulating, and nurturing home environment; and friendships and recreational activities appropriate to her age. The record reflects that Father failed to provide adequate food for the children in his home; that the home was unsanitary; that Gordon's and Steven's clothing was dirty, ill-fitting, or inappropriate for the weather; that Gordon and Steven were left in urinated clothes if they soiled themselves; and that the home environment was not safe or nurturing but rather was marked by

neglect and abusive discipline. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

With regard to the emotional and physical danger to Sarah now and in the future, the evidence demonstrates that Gordon and Steven made outcries that they had been sexually abused and physically abused by Father, that they were fearful of Father, and that Father had refused to address the allegations of sexual and physical abuse during his counseling sessions. The record also reflects that Sarah was approximately two and a half years old and was not in a position to protect herself. Moreover, when all of the children came into the Department's care, they appeared underweight; Jackie demonstrated behaviors in foster care that indicated Father and Mother had restricted food; and both Jackie and Sarah were initially terrified during baths. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

With regard to Father's parental abilities, the record demonstrates that CPS received numerous referrals regarding this family and became involved in this case when Gordon was hospitalized due to being severely underweight. When Mother put Gordon in timeout and ordered him to keep his hands raised, Father admitted that he did not release Gordon from time out when Mother fell asleep, leaving Gordon with his hands raised for an extended period of time. Gordon and Steven recounted various other forms of abusive punishment, including being placed in a box for a long period of time, being burned on the stove, being held underwater, and being wrapped up in a blanket that was then

taped and placed in a trash can. Gordon and Steven also made outcries of sexual abuse involving Father and Mother, and the children had witnessed Father and Mother engage in sexual behavior. The record further demonstrates that Father and Mother had allowed six-year-old Sally to care for the four younger children overnight in Father and Mother's absence and had required Sally to potty train the younger children. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

The record revealed that Father had completed all of his services with the exception of anger management but that he had not addressed the children's outcries of physical and sexual abuse. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

With regard to the plans for the children by the individuals seeking custody and the stability of the home or proposed placement, Father had not made his home safe for Sarah to live in, and no evidence was presented regarding his plans for Sarah. Sarah's Foster Mom—whom Sarah was placed with when she was sixteen months old, who had cared for Sarah for the sixteen months preceding trial, and who wanted to adopt Sarah—demonstrated that she could provide a stable home and meet Sarah's basic needs, as well as any special needs that might arise in the future. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

With regard to the acts or omissions of Father that may indicate the existing parent-child relationship is not a proper one, the analysis set forth

above—which details the unsanitary and unsafe conditions of Father's home, the inability to properly feed and clothe the children, and the sexual and physical abuse he inflicted on Gordon and Steven—reveals that the existing parent-child relationship between Father and Sarah is not a proper parent-child relationship. The trial court was entitled to find that this factor weighed in favor of terminating Father's parental rights to Sarah.

As for any excuse for the acts or omissions of the parent, Father's appellate brief intimates that poverty played a role in his inability to provide for the children's basic needs. Father did not argue this in the trial court. The trial court was entitled to find that this factor weighed neither in favor of nor against terminating Father's parental rights to Sarah.

Viewing all the evidence in the light most favorable to the best-interest finding and considering the nonexclusive *Holley* factors, we hold that the trial court could have reasonably formed a firm conviction or belief that termination of the parent-child relationship between Father and Sarah was in Sarah's best interest, and we therefore hold the evidence legally sufficient to support the trial court's best-interest finding. *See* Tex. Fam. Code Ann. § 161.001(b)(2); *Jordan*, 325 S.W.3d at 733 (holding evidence legally sufficient to support best-interest finding when most of the best-interest factors weighed in favor of termination); *A.L.*, 2017 WL 3225030, at *6–8 (holding evidence legally sufficient to support best-interest finding because child was bonded to foster parents, mother's home was unsanitary, and mother demonstrated an inability to meet child's physical

needs); *A.B.*, 412 S.W.3d at 602–07 (holding evidence legally sufficient to support best-interest finding because father exhibited an inability to maintain a suitable home for children, father never displayed anger management skills or ability to change his behavior, children had improved while in foster care, and foster parents wanted to adopt children).

Similarly, reviewing all the evidence with appropriate deference to the factfinder, we hold that the trial court could have reasonably formed a firm conviction or belief that termination of the parent-child relationship between Father and Sarah was in Sarah's best interest, and we therefore hold that the evidence is factually sufficient to support the trial court's best-interest finding. *See* Tex. Fam. Code Ann. § 161.001(b)(2); *A.L.*, 2017 WL 3225030, at *8 (holding evidence factually sufficient to support best-interest finding because child did not have strong emotional attachment to mother, mother's home remained unsanitary and unsafe, and mother's parenting abilities did not improve after working services); *A.B.*, 412 S.W.3d at 602–07 (holding evidence factually sufficient to support best-interest finding because father exhibited an inability to maintain a suitable home for children, father never displayed anger management skills or ability to change his behavior, children had improved while in foster care, and foster parents wanted to adopt children).

We overrule Father's third issue.

VI. RULE 11 AGREEMENT

In Mother's sole issue,[17] she argues that because she was appointed as possessory conservator with visitation pursuant to an agreement between she and the biological father of Sally, Jackie, and Steven, and thus her parental rights were not terminated to those three children, it was therefore not in Sarah's best interest for Mother's parental rights to be terminated.[18] Mother cites no authority,

[17]The "Issue Presented" section of Mother's brief challenges the legal and factual sufficiency of the evidence to support the trial court's best-interest finding, but she did not set forth the *Holley* factors in her brief, nor did she apply them. Instead, Mother focused her argument solely on the rule 11 agreement. Mother has therefore waived her legal and factual sufficiency challenge to the trial court's best-interest finding. *See* Tex. R. App. P. 38.1(i) (requiring appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994); *In re D.V.*, No. 06-16-00065-CV, 2017 WL 1018606, at *7 (Tex. App.—Texarkana Mar. 16, 2017, pets. denied) (mem. op.) (holding that appellant waived challenge to best-interest finding by failing to provide any substantive analysis of the evidence regarding child's best interest).

[18]At the outset of the termination trial, the following was stated on the record:

> The parties agree and stipulate -- the parties meaning [The father of Sally, Jackie, and Steven] . . . [and Mother] . . . agree to the following terms: With regard to the children [Sally], [Jackie,] and [Steven], [their father] . . . and [their paternal grandparents] will be appointed as joint managing conservators of the children [Sally], [Jackie,] and [Steven]. [The father of Sally, Jackie, and Steven] shall have the exclusive right to establish a domicile within Tarrant County, Texas; Cleveland County, Oklahoma[;] or Oklahoma County, Oklahoma. [The father of Sally, Jackie, and Steven] will have the exclusive rights of the managing conservator pursuant to the Texas Family Code. [Mother] . . . will be named a possessory conservator. Visitation and access will be as follows: The

and we have found none, for her proposition that because the trial court accepted the agreement giving her possessory rights to three of her children, it was therefore not in Sarah's best interest for Mother's parental rights to be terminated. The State interprets Mother's issue as a claim "that the Rule 11 agreement concerning [Sally, Jackie, and Steven] somehow estopped the Department from seeking termination of the parental relationship between [Mother] and [Sarah]." Mother, however, forfeited this complaint by failing to plead the defense of estoppel and by failing to present the defense of estoppel to the trial court. *See In re. S.A.P.*, 156 S.W.3d 574, 576–77 (Tex. 2005) (holding that parents waived defense of estoppel by failing to plead it in their answer and by failing to present the defense to the factfinder). *See generally id.* at 577 (stating that defense of equitable estoppel is generally not applicable to governmental entities and that parents who endangered their children did not have the "clean hands" necessary to assert the defense of estoppel). Alternatively, if we construe Mother's issue on appeal as arguing that the Department was barred by res judicata from terminating her parental rights to Sarah based on the rule 11 agreement, Mother waived such challenge by failing to affirmatively plead res judicata as a defense. *See Whallon v. City of Houston*, 462 S.W.3d 146, 155 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)

> Respondent Mother shall have visitation on the second, fourth[,] and fifth Saturdays of each month . . . .

("Generally, res judicata must be pled or be waived"). Accordingly, we overrule Mother's sole issue.

VII. CONCLUSION

Having overruled Father's three issues, we affirm the trial court's judgment terminating Father's parental rights to Sarah. Having overruled Mother's sole issue, we affirm the trial court's judgment terminating Mother's parental rights to Sarah.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: SUDDERTH, C.J.; WALKER and GABRIEL, JJ.

DELIVERED: October 12, 2017