COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00222-CV

IN THE INTEREST OF A.H.,
A CHILD

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-103980-16

MEMORANDUM OPINION[1]

After a bench trial, the trial court found by clear and convincing evidence that (1) Appellant D.H. (Father) and Appellant K.B. (Mother) engaged in conduct or knowingly placed their son A.H. with persons who engaged in conduct that endangered his physical or emotional well-being and (2) termination of the

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

parent-child relationship between Mother and A.H. and between Father and A.H. was in A.H.'s best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (2) (West Supp. 2017). In four issues, Mother contends: (1) the trial court abused its discretion by denying her motion for continuance; (2) the denial of the continuance violated her rights to due process; (3) the evidence is legally and factually insufficient to support the endangerment finding against her; and (4) the evidence is legally and factually insufficient to support the best interest finding against her. Father does not challenge the sufficiency of the evidence supporting the trial court's best interest and endangerment findings against him. Instead, without numbering or delineating issues, Father complains: (1) the Texas Department of Family and Protective Services (TDFPS) failed to provide him an opportunity to complete his service plan; (2) that failure resulted in the termination of his parental rights to A.H.; and (3) the termination of his parental rights resulting from TDFPS's failure to provide him an opportunity to complete his service plan violated his rights to due process. We affirm.

I. Circumstances Leading to A.H.'s Removal

A. First Removal of D.H., A.H.'s Older Brother—August 2013

In August 2013, TDFPS received a referral regarding Mother and Father's treatment of A.H.'s older brother D.H., who was then several months old. Allegations included domestic violence, drug use, and excessive drinking. Mother and Father admitted to TDFPS that they had engaged in domestic violence, and Father was arrested for allegedly choking Mother. There was no

allegation that either parent was abusing D.H. at that time, but TDFPS determined that there was reason to believe that Mother had committed medical neglect and that both Father and Mother had engaged in neglectful supervision.

D.H. was originally placed with another relative. When that placement fell through, he was returned to his parents. Mother and her mother had a physical battle with D.H. present, and he was removed in mid-September 2013 and placed with foster parents. Mother and Father actively participated in court-ordered services, and D.H. was placed back in their home on a monitored return in February 2015. The case against Mother and Father was dismissed a few months later. Another child, daughter F.H., was born during the pendency of this first case.

B. Second Removal of D.H. and Removal of F.H.—April 2016

In April 2016, less than a year after TDFPS's first case against Mother and Father regarding D.H. was dismissed, TDFPS received a Priority I referral alleging that both parents had committed physical abuse of D.H. (then three years old) and neglectful supervision of both D.H. and F.H. (then a one-year-old). The referral alleged:

- Mother had beaten D.H. and broken his arm, which resulted in a trip to Cook Children's Medical Center for treatment;
- A day or two later, Mother and Father left D.H. home alone. When the parents returned, they discovered that D.H. had removed his splint and put on his baby sister's clothes. Mother was then heard beating D.H. She threw him against the wall, after which he could no longer be heard;

- Mother had beaten D.H. so badly in the past that his heart had stopped beating and he had to be revived;
- Mother and Father had left D.H. home alone for hours at a time;
- Law enforcement had been notified;
- Mother had made comments about not wanting D.H. and considering "dropping him off at a Safe Baby Site location";
- Mother was starving D.H.;
- Domestic violence was an issue between Mother and Father; and
- Mother had been confined in various facilities for her mental health issues in the past.

Mother and Father initially did not cooperate with TDFPS's investigation and tried to hide D.H. When D.H. was finally found and examined, he had injuries severe enough to require hospitalization. TDFPS was also concerned that

- Mother and Father had not sought medical care for D.H.'s serious injuries;
- F.H. had been diagnosed with rickets;
- The children were too young and not verbal enough to protect themselves from harm; and
- The family had a previous CPS history and domestic violence issues.

The children were removed in April 2016 and placed in D.H.'s former foster home; Mother and Father were arrested for injury to a child and later released on bond.

C. A.H.'s October 2016 Birth and the November 2016 Termination of Parental Rights to D.H. and F.H.

A.H., the only child before the court in this case, was born in late October

2016, several months after the removal of D.H. and F.H. from Mother and Father but while the case regarding D.H. and F.H. was still pending. TDFPS learned about A.H.'s birth because Mother took him on one of her visits with D.H. and F.H. On October 28, 2016, TDFPS filed a petition for the termination of Mother's and Father's parental rights to A.H. and sought A.H.'s emergency removal from them based on:

- The injuries D.H. had suffered while in his parents' care;
- Mother's and Father's alleged admissions regarding the injuries;
- The criminal charges Mother and Father faced for injury to a child;
- Mother's and Father's drug use;
- D.H.'s outcries that Mother had hit him and that Mother and Father had cut him with a black knife that Father carried in his pocket;
- Mother's failure after D.H.'s second removal to seek visits with him for about five months, while seeing daughter F.H. at every opportunity;
- Mother's statements before A.H. was born that she hoped her unborn child would be a girl because she did not bond well with boys and that if the child was a boy, Father would name him and care for him;
- The parents' failure to complete any services after D.H.'s second removal; and
- Observations that the newborn A.H. had labored breathing.

On the same day that TDFPS filed the petition, it also obtained an ex parte order for protection of a child in an emergency, authorizing the agency to remove A.H. from his parents. Mother and Father, however, were not cooperative and hid A.H. from authorities. When a TDFPS special investigator and a DPS investigator finally located A.H. a week later, he was removed. After the petition

was filed but before A.H. was physically removed, Mother's and Father's parental rights to D.H. and F.H. were terminated based on their affidavits of relinquishment.

II. Mother's Points

A. Legally and Factually Sufficient Evidence Supports the Trial Court's Endangerment and Best Interest Findings Against Mother.

In her third point, Mother contends that the evidence is legally and factually insufficient to support the trial court's endangerment finding against her. In her fourth point, Mother contends that the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the best interest of A.H.

1. Burden of Proof

For a trial court to terminate a parent-child relationship, TDFPS 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)(1)–(2) (West Supp. 2017); *In re E.N.C.*, 384 S.W.3d 796, 802, 803 (Tex. 2012); *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.). 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.

2. Standards of Review

a. Legal Sufficiency

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 TDFPS proved the challenged ground for termination. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). For Mother, we decide whether the trial court could have reasonably formed a firm belief or conviction that TDFPS proved that she engaged in conduct or knowingly placed A.H. with persons who engaged in conduct which endangered his physical or emotional well-being and that termination of the parent-child relationship between Mother and A.H. would be in his best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (2).

We review all the evidence in the light most favorable to the finding and judgment. *J.P.B.*, 180 S.W.3d at 573. 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.* 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.*

b. Factual Sufficiency

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). Here, we determine whether, on the entire record, the trial court as factfinder could reasonably form a firm conviction or belief that (1) Mother engaged in conduct or knowingly placed A.H. with persons who engaged in conduct which endangered his physical or emotional well-being and (2) the termination of the parent-child relationship between Mother and A.H. would be in the best interest of the child. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (2); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

3. Parents' Invocation of the Privilege Against Self-Incrimination Produced Evidence Against Them.

The parents' repeated invocations of the Fifth Amendment privilege against self-incrimination nevertheless resulted in evidence against them. "A party may invoke his Fifth Amendment privilege against self-incrimination in a

civil proceeding if he reasonably fears that the answer sought might incriminate him." *In re A.B.*, 372 S.W.3d 273, 275 (Tex. App.—Fort Worth 2012, no pet.) (citing *United States v. Balsys*, 524 U.S. 666, 671–72, 118 S. Ct. 2218, 2222 (1998)). A termination trial is a civil proceeding for purposes of the privilege against self-incrimination. *Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360, 367 (Tex. App.—Austin 2009, no pet.); *In re C.W.*, No. 02-17-00025-CV, 2017 WL 2289115, at *3 (Tex. App.—Fort Worth May 25, 2017, no pet.) (mem. op.). In a civil case, a factfinder may draw negative inferences from a party's assertion of the privilege against self-incrimination. *See* Tex. R. Evid. 513(c); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *see also Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) (holding Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them); *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *C.W.*, 2017 WL 2289115, at *3.

4. The Evidence is Legally and Factually Sufficient to Support the Finding of Endangering Conduct by Mother.

a. Law on Endangerment

As this court has often discussed,

> Endangerment means to expose to loss or injury, to jeopardize. . . .
>
> . . . . Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child's physical or emotional well-being was the direct result of the parent's conduct, including acts, omissions, and failures to act. . . .

> To support a finding of endangerment, the parent's conduct does not necessarily have to be directed at the child, and the child is not required to suffer injury. The specific danger to the child's well[-]being may be inferred from parental misconduct alone. . . . As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being.
>
> . . . .
>
> We have also stated that abusive or violent conduct by a parent may produce an environment that endangers the child's physical or emotional well-being.
>
> Further, even though imprisonment alone does not prove that a parent engaged in a continuing course of conduct that endangered the physical or emotional well-being of his child, it is nevertheless a factor that we may properly consider on the issue of endangerment.

In re I.C., No. 02-15-00300-CV, 2016 WL 1394539, at *7 (Tex. App.—Fort Worth Apr. 7, 2016, no pet.) (mem. op.) (citations and internal quotation marks omitted).

We may consider evidence of the parent's conduct occurring before and after the child's birth. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied). "[E]vidence of abuse of another child, coupled with a present or future danger to the child in question, is relevant to determine whether a parent has engaged in an endangering course of conduct, even if the abuse occurred prior to the birth of the subject child." *In re E.A.W.S.*, No. 2-06-00031-CV, 2006 WL 3525367, at *10 (Tex. App.—Fort Worth Dec. 7, 2006, pet. denied) (mem. op.); *see also In re R.S.*, No. 02-15-00137-CV, 2015 WL 5770530, at *6 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.) (mem. op.).

b. Evidence of Endangerment

i. Detective William Maddox's Testimony

Detective William Maddox of the Crimes Against Children Unit of the Fort Worth Police Department testified as follows:

- He was contacted in April 2016 after TDFPS had attempted to locate three-year-old D.H. because it had reason to believe that he was in danger or had recently been harmed;
- Patrol officers had helped TDFPS find D.H., who had been hidden in the family's home;
- Detective Maddox met with patrol officers and the family at Cook Children's Hospital, where D.H. and F.H. had been taken for evaluation;
- D.H. appeared to be small;
- Detective Maddox "observed a large . . . knot on [D.H.'s] forehead as well as two rows of . . . evenly spaced circular wounds . . . [and] numerous other smaller scars that appeared to be inflicted injuries";
- The rows of circular wounds were visible on some of the pictures of D.H. admitted into evidence;
- On D.H.'s right side, the wounds went from the top of the shoulder to his buttocks;
- The circular wounds appeared to be old injuries;
- S.N., the foster mother, told Detective Maddox that when D.H. was originally returned to his parents, "he had two small scars from an infection on his hip and no other scars";
- Mother initially told Detective Maddox that she never used corporal punishment on D.H. but that Father did;
- Father initially told Detective Maddox that D.H. tapped his head on the wall during a punishment time-out, causing the large knot on his head, and that D.H. hurt his arm playing football with friends;
- The parents did not initially explain D.H.'s other injuries;

- Mother later told Detective Maddox that Father told her that D.H. fell while taking the trash down some steps, resulting in the knot on his forehead;

- Mother "related that she saw injuries appearing on [D.H.] over time" but she did not inflict them, and the only other person who could have was Father;

- Mother "related that she decided not to tell anybody about the injuries because she was concerned about CPS removing her children again";

- In Detective Maddox's second interview with Father, Father indicated that he and Mother were both responsible "for the state of [D.H.] but that [Father] was more responsible";

- In Father's interview with another detective, Father "admitted to using a string of beads to strike [D.H.,] causing those rows of circular wounds";

- Father explained that he had hit D.H. with the beads because D.H. had "an accident with his bodily functions";

- In a phone call, Father also referred to a necklace being heated with an iron, suggesting that the beads were first heated before being used to strike D.H., but Father stated in his final interview that the beads were at "room temperature";

- The beads were made of "heavyweight plastic that felt more like the weight of glass";

- Father stated that he held the beads by a knot in the middle of them when hitting D.H.;

- Mother would have noticed the injuries from the beads when changing D.H.'s diapers;

- A caregiver would have seen the large knot around D.H.'s eye socket and forehead;

- Detective Maddox believed that Father admitted to "inflicting all of the injuries except for the knot on [D.H.'s] forehead";

- Father was arrested for injury to a child causing serious bodily injury;

- Mother was arrested for injury to a child by omission causing serious bodily injury;

- The charges against Mother and Father were still pending at the time of the termination trial; and

- Detective Maddox had no knowledge of any abuse, endangerment, or criminal conduct concerning A.H.

ii. Nurse Donna Wright's Testimony

Donna Wright, a pediatric nurse practitioner with Cook Children's Medical Center Care team, testified that she examined D.H. on April 2, 2016. She described his condition:

> [D.H.] had multiple bruises, bruises that were in a pattern formation as well as diffuse bruises, some to his face. He had scarring to his back that was circular following in a line across his back. He also had scarring in a linear pattern formation into an L on his lower back.
>
> He also had a semicircular abrasion that was reddened to his neck. He also had semicircular scarring to his left arm. He had four perpendicular scars to his left upper thigh. He also had some swelling noted to his penis as well as to his lips.

Nurse Wright further testified that D.H.'s liver enzymes were elevated, indicating trauma to his liver. She additionally described results of his x-rays:

> The CAT scan of his abdomen and pelvis revealed fluid in his lower right abdomen. His head CT revealed scalp, soft tissue, scalp swelling. His skeletal survey, which includes x-rays of his entire body, demonstrated a healing fracture of his left femur as well.

Nurse Wright also testified:

- D.H.'s femur fracture was anywhere from four to twenty-one days old;

- Fluid in the abdomen indicated possible trauma there, especially bruising to his liver, that would have occurred from "falling from a significant height onto something, being hit with something, a car accident," or that "kind of thing[]";

- An MRI of D.H.'s arm revealed "hemorrhaging into the muscular area of his bicep . . . . [T]hose hemorrhages are related to a direct force to that part of his body[,] . . . [s]imilar to the forces" that caused his abdominal trauma;

- Clotting studies were normal, indicating that D.H. did not bruise easily;

- D.H.'s injuries "[a]bsolutely . . . did not" occur on the same day;

- D.H.'s injuries "were all caused by physical child abuse";

- A caregiver would have seen his injuries over a period of time;

- D.H.'s injuries would indicate that medical treatment was necessary;

- D.H.'s parents "[a]bsolutely" should have taken him to the hospital for treatment of his injuries;

- D.H.'s liver enzymes decreased over time, indicating that his liver was healing after his removal from Mother and Father;

- D.H. "weighed on the lower end of the growth chart[,] . . . [s]o there was a concern for malnutrition"; and

- D.H. gained 2.2 pounds by the time of his follow-up visit twenty days later, which was a significant amount.

iii. TDFPS Conservatorship Supervisor Tyra Sasita's Testimony

Tyra Sasita, a conservatorship supervisor for TDFPS who was the caseworker in D.H. and F.H.'s case, testified:

- Father had told Sasita that he caused all the injuries to D.H. and did so because "he was making [D.H.] a man."

- Mother had told Sasita that Mother knew that D.H. was injured and had told Father not to hurt him;

- Mother "knew that she couldn't take [D.H.] to the doctor because if she took him to the doctor, medical staff would call CPS. She did not want CPS involved. So she was very aware of what was going on but felt like she needed to have the child heal at home";

- Mother avoided taking D.H. to scheduled appointments;

- CPS had to get medical treatment for A.H. when he came into care because he had trouble breathing;
- Both Mother and Father engaged in conduct that endangers a child;
- The parents' conduct would subject A.H. to a life of uncertainty and instability that could endanger or would endanger his physical and emotional stability; and
- TDFPS considered A.H.'s environment based on the parents' conduct toward D.H. and F.H.

iv. TDFPS Conservatorship Caseworker Monique Barnes's Testimony

Monique Barnes, the caseworker in A.H.'s case, testified that Father told her:

> [H]e didn't mean to injure his son. [Father] was trying to make [D.H.] a man, trying to raise him to be a man, and . . . [Father] didn't know how long he was going to be on earth.
>
> [Father] said that [D.H.] would probably tell him if he was injured or not. He made the statement as far as he didn't believe that he injured his son to that extent.

Caseworker Barnes also testified that Mother was still in an on-off relationship with Father and that Barnes had specific concerns about Mother's ability to protect A.H. from Father.

v. Mother's Testimony

Mother gave no explanation for D.H.'s injuries. From Mother's invocations of her Fifth Amendment right not to incriminate herself—she repeatedly responded "I don't want to answer" in response to opposing counsel's questions after being warned of her right not to testify—the trial court as factfinder could have properly inferred:

- Mother had been a caretaker for D.H. before his final removal;
- Mother had changed his diapers after injuries had been inflicted;
- Mother had been aware of D.H.'s injuries before his final removal, including:
    (1) the swelling around D.H.'s eye;
    (2) the marks on D.H.'s back;
    (3) the scars on D.H.'s body;
    (4) the circular scars behind his neck that looked like those on his back;
    (5) the circular reddish mark behind his ear on his neck; and
    (6) the scarring on and swelling of his arm;
- Mother was familiar with the beads that scarred D.H.'s body;
- Mother lied to the police about the cause of D.H.'s head injury;
- Mother had known that D.H. needed medical treatment before his final removal;
- Mother had known that D.H. had lost weight since his return to Father and her and had participated in causing his malnourishment;
- Mother had hidden D.H. from authorities before his final removal;
- On March 15, 2017, Mother drove the vehicle into which Father loaded the dirt bike and tools that he had removed from the burglarized vehicle; and
- Mother was on bond for injury to a child when she participated in the burglary of a vehicle.

Mother admitted:

- It hurt her to look at the pictures of D.H. admitted into evidence;
- She and Father were arrested on March 15, 2017 for burglary of a vehicle; and
- She knew that TDFPS had filed a termination petition regarding A.H. and that TDFPS had custody of him when she and Father were arrested on March 15, 2017.

Mother denied:

- telling a caseworker that she could not bond with a male child;
- stating that she did not want her unborn child (A.H.) to be a boy and that if it was she would let Father raise him;
- admitting to the police and conservatorship supervisor Sasita that she knew Father was injuring and beating D.H.; and
- still being in a relationship with Father.

vi. Father's Testimony

From Father's invocation of his Fifth Amendment right not to incriminate himself, the trial court as factfinder could have properly inferred:

- Father had caused D.H.'s injuries;
- Father's March 2017 arrest was for burglary of a vehicle; and
- Mother was with him at the time of his arrest.

vii. Foster Mother S.N.

S.N., adoptive mother of D.H. and F.H. and foster mother of A.H., testified that D.H. weighed about twenty-four pounds when he was first returned to his parents after the dismissal of the first case. Fourteen months later, when he was returned to her home after the second removal, he weighed twenty-three pounds. He was just over three years old.

c. Resolution

The trial court heard evidence from multiple sources that Father had severely injured D.H. and that at the very least, Mother knew about it but did not stop it, notify authorities, or seek medical care for D.H. The trial court also heard evidence from which it could have concluded that she neglected D.H.'s nutrition

to the point of malnourishment. Additionally, the trial court heard that Mother and Father were still in a relationship and that despite the threat of losing A.H., she participated with Father in committing burglary of a vehicle while the termination case was pending. We therefore hold that the evidence is legally and factually sufficient to support the trial court's endangerment finding against Mother. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E). We overrule Mother's third issue.

5. The Evidence is Legally and Factually Sufficient to Support the Trial Court's Finding that Termination of the Parent-Child Relationship Between Mother and A.H. is in His Best Interest.

a. Law on a Child's Best Interest

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

(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) (citations omitted); *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. Evidence Pertaining to A.H.'s Best Interest

In addition to the evidence provided above, the trial court heard the following evidence affecting the determination of A.H.'s best interest.

i. Tyra Sasita's Testimony

TDFPS conservatorship supervisor Tyra Sasita testified that termination of Mother's parental rights was in A.H.'s best interest because

> [TDFPS] is very concerned about the past history of abuse. The parents did not work services in the previous case. They have failed to work services in this current case to show that there are any improvements to treat the anger management issues, the domestic violence issues.
>
> There are some untreated mental health issues that we have. Counseling, I believe, was sporadic at times. So there is some past maltreatment that [Mother] has to address as well from her own childhood that . . . continues to go unaddressed. I would be very concerned about any future children in her care.

Supervisor Sasita also testified that charges against Mother for burglary of a vehicle and injury to a child were pending and that the outcome of Mother's criminal case for injury to a child would not affect TDFPS's position regarding the termination of her parental rights to A.H.:

> This is about the issues that brought the children into care, and so without the treatment of her mental health issues, without some parenting classes to work on the developmental issues, there are still those issues that must be addressed.
>
> M[other] has not done the work to do that. Even when she wasn't in jail, . . . services were being worked very sporadically. We have the drug abuse that comes up every now and then. There are some positive tests. In my case, there were positive tests.
>
> In our current case prior to them going to jail, those remained issues that need to be addressed. A . . . positive support network should be in place as well.

Supervisor Sasita explained that Mother had been diagnosed with explosive disorder while in foster care. She had another assessment completed after D.H.'s first removal and received a diagnosis of depression. Mother was directed to seek services with MHMR for depression, but there was no evidence that she had done so.

According to Supervisor Sasita, Mother had completed her psychological evaluation and had participated in spiritual ministry in jail. Mother had also visited regularly with A.H. until she went to jail in March 2017 and told TDFPS that she was bonded with him.

Supervisor Sasita also testified that home studies of the paternal grandmother were conducted after D.H.'s second removal and again after A.H.'s removal, but the grandmother had severe medical issues and her partner admitted occasionally using marijuana, so that placement was denied.

ii. Monique Barnes

TDFPS conservatorship caseworker Monique Barnes stated:

- Mother never showed (1) that she had addressed the endangering conduct that brought D.H. into care or (2) an ability to be protective of A.H. regarding Father's abuse;
- Mother admitted to Barnes that D.H. was underweight and that she did not know how to co-parent;
- Mother did not demonstrate safe and stable housing, employment, or an ability to care for A.H.; and
- A.H. would not be safe with Mother and Father, who Barnes believed were still a couple.

Caseworker Barnes also testified about Mother's participation in court-ordered services. Barnes first discussed Mother's service plan with her in December 2016, when Mother was out on bond, and the referrals were in place for Mother to begin the services. She completed some parenting classes but did not complete all of them. Based on Mother's psychological evaluation, it was

recommended that she have a medication consultation, domestic violence classes, outpatient relapse prevention, drug treatment, and assistive rehabilitative services, but Barnes did not set those services up because Mother cancelled multiple appointments with her and was incarcerated by the time the two women could meet. Mother participated in individual counseling, an MHMR screening on mental health, anger management classes, and couples counseling, but she did not complete the services before her incarceration. Her drug tests had been negative since December 2016.

Mother attended all scheduled visits with A.H. until her incarceration. In visits, Mother appeared appropriate and as if "she was getting bonded" with A.H. But while Mother

- asked for updates and pictures of A.H. while in jail,
- told Caseworker Barnes that she loved him, and
- asked questions about him,

her March 2017 arrest and incarceration meant that Mother had no significant contact with A.H. for almost three of his approximate seven months of life at the time of trial.

During her incarceration, Mother participated in spiritual recovery, and she told Caseworker Barnes that she was trying to complete her GED. But Mother could not provide for A.H. in any way while incarcerated, and she did not suggest a possible family placement that panned out. Mother's plans—if and when she

was released from jail—were to get a job, work all of her services, and try to get all three children back. Mother had no idea when she would get released.

Caseworker Barnes also testified about A.H.'s living situation at the time of trial:

- A.H. attended therapy sessions but did not have any special medical needs;
- A.H. had been placed in the same home as D.H. and F.H., who had already been adopted;
- The home was able to meet A.H.'s present and future physical and emotional needs; and
- Caseworker Barnes knew of no reason he would not thrive there when his brother and sister continued to do so.

iii. Foster Mother S.N.

S.N., adoptive mother of D.H. and F.H. and foster mother of A.H., testified:

- D.H. still had the circular scars and scarring on his arms, legs, and face, but he had thrived since returning to her home, weighing thirty-four pounds at his last checkup;
- A.H. had physical therapy once a week, occupational therapy twice a week, and developmental rehab therapy twice a month.
- She and her partner had never been investigated for abuse or neglect;
- She is a licensed social worker and her partner is a trauma therapist; they are both very well equipped to handle potential issues;
- She and her partner are committed to all three children; and
- They want to adopt A.H.

iv. Mother

Mother denied that she and Father were still a couple but admitted that they had "always kind of been each other's support system." She also testified

that she had told Caseworker Barnes that she "was going to be independent and not let [her] child get hurt again."

Mother testified that she is bonded to A.H., chose his name, and loves him.

Mother admitted that she did not complete her court-ordered services for D.H. and F.H.'s case or for A.H.'s case but said she did not complete services for A.H.'s case because of incarceration, which she admitted was her fault.

She also testified that she had participated in the following services while incarcerated: spiritual recovery, NA/AA, a twelve-step program, and Bible study. Mother admitted that if the trial court placed A.H. back in her care that day,

- She did not know where he would go that night;
- She did not have a safe place for him to sleep that night; and
- She could not feed him from jail.

Mother also admitted that it was not in A.H.'s best interest to wait indefinitely for her to be able to raise him.

c. Resolution

TDFPS's plan was for A.H. to remain in the home with his brother and sister and for A.H. to be adopted by their adoptive parents, who were currently fostering him. The evidence showed that the foster parents could satisfy A.H.'s current and future emotional and physical needs but that Mother could not and could not predict when she would be available to take care of him. The trial court could have believed that upon their release, Father and Mother would remain a couple and that Mother would again fail to protect a child from Father's violence.

The trial court could have further concluded that Mother's failure to engage in court-ordered services after D.H.'s second removal and failure to complete services after A.H.'s removal—because she instead chose to commit another crime with Father, resulting in her arrest—indicated that she was not an appropriate caregiver for A.H. Accordingly, we hold that the evidence is legally and factually sufficient to support the trial court's finding that termination of Mother's parent-child relationship with A.H. is in his best interest. We overrule Mother's fourth issue.

B. The Trial Court Did Not Abuse Its Discretion by Denying Mother's Motion for Continuance Urged the First Day of Trial.

In her first issue, Mother contends that the trial court abused its discretion by denying her motion for continuance. The motion was filed at 9:45 a.m. after TDFPS announced ready on the first day of trial. Mother's trial counsel stated on the record, "[Mother] is currently incarcerated, and she has another criminal setting of a status conference on the 12th of June, and she would request that we continue this case until the conclusion of her criminal case." When the trial court asked when Mother's criminal case would be concluded, Mother's trial counsel stated, "At this time, my understanding is they don't have a final trial date. They're going on the 12th to exchange evidence and pick a trial date. I don't have a date set at this time. Her criminal attorney does not have a date at this time." TDFPS opposed the continuance. Its trial counsel explained,

> The department is proceeding on the grounds that [Mother] and [Father] have engaged in conduct that constitutes a criminal act of

> injury to a child. The outcome of [Mother]'s criminal case is not necessary for us to proceed on our case.
>
> Additionally, we do have a time constraint that our case must be completed by October 30th of 2017, and we don't have any guarantees that her criminal case will be completed by that time.
>
> [Mother] actually has two criminal cases in addition to injury to a child. She has an additional case regarding burglary of a vehicle during the pendency of this present case.

A.H.'s attorney ad litem also objected to a continuance, stating, "[A.H. is] in a stable home with his siblings who have been adopted by the foster parents and there's just—nothing's going to change between now and then." The trial court denied the motion.

1. Standard of Review

We review a trial court's ruling on a motion for continuance for an abuse of discretion. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). We do not substitute our judgment for that of the trial court. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding). Instead, we must determine whether the trial court's action was so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The test is whether the trial court acted without reference to guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004).

2. Substantive Law

Rule 251 of the Texas Rules of Civil Procedure provides, "No application for a continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law." Tex. R. Civ. P. 251. Section 161.2011(a) of the family code provides as follows:

> A parent whose rights are subject to termination in a suit affecting the parent-child relationship and against whom criminal charges are filed that directly relate to the grounds for which termination is sought may file a motion requesting a continuance of the final trial in the suit until the criminal charges are resolved. The court may grant the motion only if the court finds that a continuance is in the best interest of the child.

Tex. Fam. Code Ann. § 161.2011(a) (West 2014). Rule 251 still governs motions filed under section 161.2011(a). *See, e.g.*, *In re J.S.*, No. 12-15-00053-CV, 2015 WL 4747980, at *1–2 (Tex. App.—Tyler Aug. 12, 2015, no pet.) (mem. op.) (upholding trial court's denial of continuance on rule 251 grounds despite parent's reliance on section 161.2011); *In re L.T.*, No. 02-10-00094-CV, 2011 WL 582710, at *9–10 (Tex. App.—Fort Worth Feb. 17, 2011, no pet.) (mem. op.) (same).

3. Analysis

Mother did not establish sufficient cause for the continuance. *See* Tex. R. Civ. P. 251. The record does not show when her criminal cases would be resolved. *See J.S.*, 2015 WL 4747980, at *1–2 (holding that parent's failure to put on evidence of when his criminal case would be resolved supported denial of

continuance); *L.T.*, 2011 WL 582710, at *9–10 (same). Moreover, Mother neither alleged nor proved that delaying the termination trial would serve A.H.'s best interest. *See* Tex. Fam. Code Ann. § 161.2011(a); *L.T.*, 2011 WL 582710, at *9–10 (holding parent's failure to demonstrate potential alternative relative placement and child's need for stability in current placement supported denial of continuance). A.H. had been in a foster home since his first month of life, and having the trial as scheduled in June 2017 allowed the trial court to give him stability and permanence in a safe environment. "[T]he prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." Tex. Fam. Code Ann. § 263.307(a) (West Supp. 2017). Because Mother failed to show (1) when her criminal cases would be resolved and (2) that delaying the termination trial would be in A.H.'s best interest, she did not establish sufficient cause for a continuance. *See* Tex. R. Civ. P. 251. We therefore hold that the trial court did not abuse its discretion by denying her motion for continuance, and we overrule Mother's first issue.

C. Mother Did Not Preserve Her Due Process Claim.

In her second issue, Mother contends that the trial court's denial of her motion for continuance violated her right to due process. Mother did not raise this complaint in the trial court.

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the

request, objection, or motion. Tex. R. App. P. 33.1(a); *see also* Tex. R. Evid. 103(a)(1). If a party fails to do this, error is not preserved, and the complaint is forfeited. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). Even constitutional issues must be properly raised in the trial court, or they are forfeited on appeal. *In re L.C.W.*, 411 S.W.3d 116, 124–25 (Tex. App.—El Paso 2013, no pet.); *Holcombe v. Reeves Cty. Appraisal Dist.*, 310 S.W.3d 86, 90 (Tex. App.—El Paso 2010, no pet.); *In re Baby Boy R.*, 191 S.W.3d 916, 921–22 (Tex. App.—Dallas, pet. denied), *cert. denied*, *Gidney v. Little Flower Adoptions*, 549 U.S. 1080 (2006). Because Mother did not raise her due process claim in the trial court, error is not preserved, and her complaint is forfeited. *See* Tex. R. App. P. 33.1(a); *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex.) (refusing to reach merits of issue not raised in intermediate appellate court), *cert. denied*, *Carroll v. Faucheux*, 546 U.S. 961 (2005); *In re L.M.I.*, 119 S.W.3d 707, 708–09, 711 (Tex. 2003) (holding argument that parent's affidavit of relinquishment was secured in manner violating due process waived because not raised in trial court), *cert. denied*, *Duenas v. Montegut*, 541 U.S. 1043 (2004); *In re B.L.D.*, 113 S.W.3d 340, 350–51 (Tex. 2003) (holding doctrine of fundamental error inapplicable to procedural preservation rules and that due process does not mandate appellate review of unpreserved issues in parental termination cases), *cert. denied*, *Dossey v. Tex. Dep't of Protective and Regulatory Servs.*, 541 U.S. 945 (2004); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (holding failure to raise constitutional issue below bars its

appellate review); *In re T.H.*, No. 02-07-00464-CV, 2008 WL 4831374, at *8 (Tex. App.—Fort Worth Nov. 6, 2008, no pet.) (mem. op.) (holding father failed to preserve argument that proceeding to trial in his absence violated his constitutional rights). We overrule Mother's second point.

III. Father's Issues

Father does not challenge the evidence supporting the trial court's best interest and endangerment findings against him. Along with a best interest finding, a finding of only one ground alleged under section 161.001(b)(1) is sufficient to support a judgment of termination. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *In re K.H.*, No. 02-15-00164-CV, 2015 WL 6081791, at *3 (Tex. App.—Fort Worth Oct. 15, 2015, no pet.) (mem. op.); *In re E.M.N.*, 221 S.W.3d 815, 821 (Tex. App.—Fort Worth 2007, no pet.).

Instead of challenging the sufficiency of the evidence against him, Father appears to complain that he was prevented from generating evidence that would have been favorable to him in the best-interest context. In his unnumbered issue or issues on appeal, Father

- speculates that "[o]ne of the main pieces of evidence that most likely contributed to the trial court's decision to terminate [his] parental rights to [A.H.] was the fact that [Father] did not complete his Service Plan";
- contends that if he had completed the plan, CPS "could have looked upon [that fact] favorably with regards to [his] case";
- argues that CPS "failed in its duty owed to [Father] to provide him an opportunity" to complete his service plan;

- further argues that "in turn, this failure by CPS to provide him this opportunity resulted in [Father's] parental rights being terminated"; and
- concludes that "[t]his[,] in turn, was a violation of [Father's] due process rights."

While Father's lawyer developed through questions and closing argument the theory that TDFPS did not do enough to provide Father opportunities to complete court-ordered services during his incarceration from mid-March 2017 to June 2017, Father does not point to any place in the record where his complaints were preserved or where he gave the trial court the opportunity to rule on them. He has therefore forfeited any possible error. *See* Tex. R. App. P. 33.1; Tex. R. Evid. 103(a)(1); *K.A.F.*, 160 S.W.3d at 928; *L.M.I.*, 119 S.W.3d at 708–09, 711; *B.L.D.*, 113 S.W.3d at 350–51; *Sherry*, 46 S.W.3d at 861; *Bushell*, 803 S.W.2d at 712; *L.C.W.*, 411 S.W.3d at 124–25; *Baby Boy R.*, 191 S.W.3d at 921–22; *T.H.*, 2008 WL 4831374, at *8. We overrule all of Father's unnumbered issues.

IV. Conclusion

Having overruled all of Mother's and Father's issues, we affirm the trial court's judgment terminating their parent-child relationships with A.H.

PER CURIAM

PANEL: PITTMAN, WALKER, and MEIER, JJ.

DELIVERED: November 9, 2017