In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00043-CV

IN THE INTEREST OF C.A.M. AND Z.J.M., CHILDREN

On Appeal from the 223rd District Court
Gray County, Texas
Trial Court No. 39,614; Honorable Jack M. Graham, Presiding by Assignment

August 17, 2021

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

When a parent makes a good faith effort to comply with every requirement placed on him or her "for the return of their children," and that parent substantially complies with those requirements; and when the attorney for the Texas Department of Family and Protective Services never directly asks any witness whether termination of the parent-child relationship would be in the children's *best interests*; and when the children's attorney ad litem recommends reunification, does a trial court err in finding that termination is in the best interests of the children? There has been an uptick in

termination cases in the last decade. When the Department deploys a practice of offering parents a positive consequence (family reunification) in exchange for a particular course of action (working services), it seems disingenuous to this court that such a practice should result in termination when the parent does what is asked. The fallacy with this "carrot and stick" process is that often times a parent's misconduct, which was the original cause of a child's removal, is then used against that parent to terminate parental rights, even after that parent has made a good faith effort to complete the necessary steps outlined to obtain the return of the child. In many cases that come before this court, it appears as though the Department ceases to work with a parent solely because the statutory deadline for disposition of the termination proceeding is fast approaching. Courts have long held that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). That is why the facts of this particular case are so troubling.

By this appeal, Appellant, P.M., challenges the trial court's order terminating her parental rights to her children, C.A.M. and Z.J.M.[1] By a sole issue, she challenges the sufficiency of the evidence to support the trial court's finding that termination of her parental rights was in her children's best interests. Relevant to this appeal in the context of a best interest analysis is the presumption that preserving the parent-child relationship is of the highest priority. We believe an injustice has occurred in this case because the

[1] To protect the privacy of the parties involved, we refer to them by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2020). *See also* TEX. R. APP. P. 9.8(b). The children's father's parental rights were also terminated but he did not appeal.

parent's original misconduct was used in an attempt to rebut that presumption, even after she had complied with the services required by the family service plan. The Department's process, even if unintentional, sets up a compliant parent for failure. Based on the record before us, we are critical of that practice and reverse and remand the cause for further proceedings.

BACKGROUND

P.M. is a young mother who had her first child when she was sixteen years old. The children's father is approximately twenty years older. At the time of the final hearing, P.M. was in her mid-twenties. Her son was nine years old and her daughter was three. P.M., a child herself when she became a mother, was a victim of domestic violence at the hands of the children's father. She was completely dependent on him for transportation and other necessities. In November 2018, while both parents were intoxicated, the father assaulted P.M. in the children's presence. Police responded to a request for a welfare check and the father was arrested.

The Department's investigator interviewed P.M. and her older child about the domestic violence and concluded there was a "reason to believe" there was neglectful supervision. In January 2019, he referred the case to Family Based Safety Services and the Department petitioned to have the parents participate in services while the children were allowed to remain in the home.

Under the supervision of Rachel Baca, the first caseworker assigned to the case, P.M. agreed with a safety plan that did not allow the father to visit or live in the home or have any unsupervised contact with the children. The Department believed that neither

parent was cooperating with the services being offered and it petitioned the trial court to order them to cooperate with the required services. The trial court signed an *Order for Required Participation* on May 1, 2019.

Eventually, all the parties agreed that P.M.'s mother would move into P.M.'s home to supervise all contact between the children and the parents. However, one month later, the Department learned that the children's father had been in the home without supervision. Both parents were intoxicated, and the children's father had again assaulted P.M. She refused to press charges but agreed to leave her home and move into her mother's home. The Department cautioned her to follow the safety plan because future incidents could result in the children's removal.

During the summer of 2019, the children's father continued a pattern of domestic violence against P.M. The Department's investigator confirmed that P.M. had been a victim for some time and had never been the aggressor. Despite the domestic violence, P.M. was hopeful for a reconciliation with the children's father once the Department resolved the case against them. However, there were more incidents of domestic violence in the children's presence.

As a result of the continued domestic violence by the children's father, the Department commenced termination proceedings on August 29, 2019. The children were removed from P.M. on September 4, 2019. At that time, they were placed in foster care. A second caseworker, Sharlotte Watson, was then assigned to the case.

While the case was pending, P.M. was arrested three times. On August 6, 2020, she and the children's father were arrested following execution of a search warrant for

drugs. Drugs were found in a chest of drawers shared by P.M. and the children's father. The drugs, however, were found only in the drawers containing men's clothing and not in any drawers containing only women's clothing. During cross-examination at the final hearing, one of the officers who executed the search warrant confirmed that the target of the warrant was the children's father based on information from a confidential informant. He verified there was no information to request a warrant for P.M. and that she was not the target of the investigation.

Later in August 2020, P.M. was arrested for providing alcohol to a minor and assaulting her sister. A few months later, on October 7, 2020, she was arrested for driving while intoxicated following a collision. None of the officers or other witnesses who testified at the final hearing could confirm the disposition of any of these arrests.

At the final hearing, caseworker Baca testified that between January and May 2019, P.M. was not proactive in working her services. She expressed concern that P.M. continued to allow the children's father to have unsupervised contact with them in violation of the safety plan. She further testified that while she was assigned to the case, P.M. tested positive for cocaine on May 3, 2019.

In May 2019, P.M. began to turn her life around. Caseworker Baca testified that every subsequent drug test was negative. Caseworker Watson testified that P.M. eventually realized her relationship with her children was paramount to her relationship with their father. She testified that P.M. was no longer living with the children's father, and they were no longer in a relationship. According to caseworker Watson, since her turnaround, P.M. had obtained gainful employment and had successfully completed her

services toward the goal of family reunification. She participated in programs for psychosocial assessment, individual counseling, and domestic violence, and she had shown stability in employment and housing. P.M. also participated in drug and alcohol assessments and out-patient drug classes. As testified to by caseworker Baca, her drug screens subsequent to May 3, 2019, were all negative. Caseworker Watson was, however, unsure whether P.M. had attended every required AA or NA meeting, as she did not provide documentation for those programs.

Caseworker Watson testified that P.M. was on track for family reunification beginning with unsupervised visits between her and the children which were scheduled to begin on August 8, 2020. Unfortunately, P.M. was arrested on August 6, pursuant to the search warrant that was directed at the children's father. As a result, the Department discontinued P.M.'s visits with her children. A therapist who was counseling P.M.'s son recommended the children have no contact with P.M. after that arrest. Notwithstanding the cessation of visits, P.M. continued to maintain contact with the Department and regarding that contact, caseworker Watson testified, "[w]e've never had any issues with [P.M.]."

After the Department presented its evidence and rested, P.M. also rested. During the presentation of evidence, the Department caseworkers were never directly asked if it was in the best interests of the children that the parent-child relationship between them and their mother be terminated. During closing arguments, the attorney ad litem for the children argued in favor of the continuation of the parent-child relationship between P.M. and her children. Subsequent to closing arguments, the trial court found that P.M. (1) knowingly placed or knowingly allowed her children to remain in conditions which

endangered their physical and emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being; and (3) failed to comply with the provisions of a court order that specifically established the actions necessary to obtain the return of her children. The trial court also found that termination of P.M.'s parental rights was in her children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), and (O), (b)(2) (West Supp. 2020).

APPLICABLE LAW

The Texas Family Code permits a court to terminate the relationship between a parent and a child if the Department establishes one or more acts or omissions enumerated under section 161.001(b)(1) of the Code and that termination of that relationship is in the best interest of the child. *See* § 161.001(b)(1), (2); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). The burden of proof is by clear and convincing evidence. § 161.206(a) (West Supp. 2020). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." § 101.007 (West 2019).

STANDARD OF REVIEW

The natural right existing between parents and their children is one of constitutional magnitude. *See Santosky*, 455 U.S. at 758-59. Consequently, termination proceedings should be strictly construed in favor of the parent. *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012). Parental rights, however, are not absolute, and it is essential that the emotional and physical interests of a child is not sacrificed merely to preserve those rights. *In re*

C.H., 89 S.W.3d 17, 26 (Tex. 2002). The Due Process Clause of the United States Constitution and section 161.001 of the Texas Family Code require application of the heightened standard of clear and convincing evidence in cases involving involuntary termination of parental rights. *See In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

In a legal sufficiency challenge, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. *In re K.M.L.*, 443 S.W.3d 101, 112-13 (Tex. 2014). However, the reviewing court should not disregard undisputed facts that do not support the verdict to determine whether there is clear and convincing evidence. *Id.* at 113. In cases requiring clear and convincing evidence, evidence that does little more than raise surmise and suspicion will not suffice unless that evidence is capable of producing a firm belief or conviction that the allegation is true. *Id.* If, after conducting a legal sufficiency review, a court determines that no reasonable fact finder could form a *firm belief or conviction* that the matter that must be proven is true, then the evidence is legally insufficient. *Id.* (citing *In re J.F.C.*, 96 S.W.3d at 266).

In a factual sufficiency review, a court of appeals must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266 (citing *In re C.H.*, 89 S.W.3d at 25). We must determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the truth of the Department's allegations. *In re J.F.C.*, 96 S.W.3d at 266. We consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its finding. If, in light of the entire record,

the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

BEST INTEREST

P.M. does not challenge any of the statutory grounds for termination and as a result, the trial court's findings related to those grounds are final. By a sole issue, she does challenge the legal and factual sufficiency of the evidence to support the trial court's finding that termination of her parental rights was in her children's best interests.

With respect to the children's best interests, the Department was required to prove *by clear and convincing evidence* that termination of P.M.'s parental rights was in her children's *best interests*. § 161.001(b)(2); *In re K.M.L.*, 443 S.W.3d at 116. We must start our analysis with the strong presumption that the best interest of a child will be served by preserving the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). That presumption may give way when evidence to the contrary supports the trial court's best interest finding. *See In re A.I.G.*, 135 S.W.3d 687, 692 (Tex. App.—San Antonio 2003, no pet.).

PRESUMPTION OF PRESERVING THE PARENT-CHILD RELATIONSHIP

Before reviewing the trial court's best interest finding, we address the Department's reliance on *In re A.I.G.*, 135 S.W.3d at 692, in support of its argument that P.M.'s conduct prior to the removal of her children (domestic violence, alcohol abuse, and pending arrests) rebuts the strong presumption that preserving the parent-child relationship is in her children's best interests. *In re A.I.G.* is distinguishable. There, the caseworker

testified regarding evidence to support termination on statutory grounds and also testified the parent did not complete her services, did not provide a stable home, and was not ready to be a full-time parent. *Id.* at 693.

In the case before us, there was evidence that P.M. had completed her services, that she did have a safe and stable home, good parenting skills, and a support system in place. Furthermore, the caseworker in *In re A.I.G.* did not testify as caseworker Watson did in this case to the effect that it was not in the children's best interests to cease contact with their mother.

We are mindful that evidence supporting one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *See In re C.H.*, 89 S.W.3d at 28. But such evidence does not relieve the Department of its heightened burden of proof to show best interest by "clear and convincing" evidence. *In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.). We also acknowledge that a trier of fact may measure a parent's future conduct by past conduct and determine whether termination of parental rights is in a child's best interest. *See id. See also In re E.C.R.*, 402 S.W.3d 239, 249-50 (Tex. 2013).

However, if a parent's misconduct prior to the Department's initiation of termination proceedings is used against that parent in order to seek termination and that parent has complied with the family service plan ordered and has successfully worked services toward the goal of family reunification, then what was the purpose of the service plan in the first place? Would it not have been in the best interests of the children to admit up front that the ultimate end was termination anyway? Because we understand the goal of

reunification and the rights of the parties to be of paramount interest, we believe the fact finder must give deferential weight and consideration to the relative success of the parent when it comes to completion of the reunification service plan.

A recent example of a parent's rights being terminated despite not having been the cause for removal and having worked his services is illustrated in *In re J.F.-G.*, 612 S.W.3d 373, 383-84 (Tex. App.—Waco 2020), *aff'd*, No. 20-0378, 2021 Tex. LEXIS 413, at *2 (Tex. May 21, 2021). Although not directly relevant to this court's best interest analysis, the case highlights the flawed system of offering a parent a chance at family reunification only to have it taken away because of past irresponsible decisions by the parent that were made prior to the removal of a child.

The father, who had a long criminal history, was a fugitive when his daughter was born and, while she was an infant, he reported to prison for drug-related offenses. *Id.* at 380. He was unaware of his daughter's mother's misconduct, including her drug use, and that of her paramour which endangered the child and resulted in removal from her mother. *Id.* at 385. He was also unaware of numerous investigations by the Department for reports of neglectful supervision. *Id.*

While still in prison, the father learned the Department had removed his daughter from her mother's care after the daughter was seriously injured in a car accident while the mother's paramour was driving while intoxicated. He gained this knowledge when he was served with notice of a termination suit. He chose to defend against the suit and was granted a continuance to work services while in prison.

When he was released from prison, he became employed (two jobs), found a suitable home, and reconnected with his daughter's mother. He also tested negative for drugs and regularly attended visitations. He continued to work services when he was released.

After his parental rights were terminated under section 161.001(b)(1)(E) and a best interest finding, he challenged the legal sufficiency of the evidence to show that he was the reason for his daughter's removal and urged that incarceration alone could not support an endangerment finding under subsection (E). In affording great deference to the fact finder, the appellate court affirmed the termination order. *In re J.F.-G.*, 612 S.W.3d at 383-84.

The appellate court described him as behaving "in an exemplary fashion" following his parole from prison. *Id*. at 383. The Supreme Court recognized the "father's strides toward overcoming his past conduct" in evaluating his daughter's best interest. But the Supreme Court decided that his rehabilitation efforts did not negate his past criminal conduct. *In re J.F.-G.*, 2021 Tex. LEXIS 413, at *22.

The Supreme Court's dissent criticizes the use of subsection (E) as a catch-all statutory ground when the Legislature saw fit to provide for termination under subsection (Q) for certain categories of imprisonment and under other subsections for certain "termination-eligible crimes" under subsections (L), (T), and (U). *Id.* at *29. The dissent also criticizes holding the father accountable for "knowingly placing" his daughter with her mother who later endangered her when he was absent and unaware of the Department's involvement until he was served with a termination suit. *Id.* at *37 n.4.

In re J.F.-G. demonstrates a departure from recent Supreme Court cases in which parental rights have been protected and treated as being of constitutional magnitude. *See In re N.G.,* 577 S.W.3d 230, 235 (Tex. 2019) (per curiam) (noting that due process mandates a clear and convincing standard of proof and a heightened standard of review). *See also In re L.G.*, 596 S.W.3d 778, 781 (reversing decision of the court of appeals for failing to detail its analysis of challenged findings); *In re A.M.*, No. 18-0905, 2019 Tex. LEXIS 1042, at *1, *3 (Oct. 18, 2019) (Blacklock, J., concurring in denial of petition for review, referring to termination of parental rights cases as the "civil death penalty," and criticizing judicial interference with parental rights on use of traditional disciplinary methods in a termination case); *In re P.M.*, 520 S.W.3d 24, 25 (Tex. 2016) (holding that the appointment of counsel for an indigent parent in termination cases extends to proceedings in the Supreme Court).

The presumption of preserving the parent-child relationship should not be rebuttable by considering a parent's conduct prior to initiation of termination proceedings alone. Instead, the Department should evaluate a parent's conduct during the termination proceedings and, if that conduct is not in compliance with a family service plan or contrary to a child's best interest, then the preservation presumption is rebutted. Otherwise, it is likely that parental rights, which are of constitutional dimension, may be disregarded and a parent will have no opportunity for redemption. *See*, *e.g.*, *In re J.F.-G.*, 2021 Tex. LEXIS 413, at *32 (Blacklock, J., dissenting) ("I fail to understand how drug use before a person becomes a parent can possibly be construed as endangering future children the person did not know would exist at the time of the drug use.").

FACTORS TO CONSIDER IN BEST INTEREST FINDING

In the case before us, to assess the trial court's best interest finding, we consider factors enumerated in the non-exhaustive list set forth in section 263.307(b) of the Family Code. We also consider other factors when determining the best interest of a child. *See Holley*, 544 S.W.2d at 371-72. Those factors include (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individual seeking custody; (5) the programs available to assist the individual to promote the best interest of the child; (6) the plans for the child by the individual or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* The absence of evidence of one or more of these factors does not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the child's best interest. *In re C.H.*, 89 S.W.3d at 27.

Evidence that supports one or more statutory grounds for termination may also constitute evidence illustrating that termination is in the child's best interest. *See id.* at 28. But such evidence does not relieve the Department of its heightened burden of proof to show that termination is in a child's best interest. *In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.).

The best interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as direct evidence. *See In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). Additionally, a child's need for

permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in determining best interest. *See In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

ANALYSIS

P.M. acknowledges that her past may support the statutory grounds for termination found by the trial court and that those facts may also be considered in determining what is in the best interests of her children. However, she maintains the Department failed to satisfy its burden of proof by clear and convincing evidence that *at this time* termination of her parental rights is in her children's best interests. We agree.

Termination of parental rights is a drastic remedy that completely severs and divests for all time the parent's right to a child and therefore, proceedings should be strictly scrutinized. *See In re J.R.*, 171 S.W.3d 558, 567 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The Department must meet the clear and convincing burden of proof not only on the statutory grounds, but also on the best interest determination. § 161.001(b)(1), (2).

Initially, we note that during caseworker Watson's testimony, counsel for the Department never asked if termination of P.M.'s parental rights was in the children's best interests. During cross-examination, however, she was asked if "it's in the children's best interest to never have contact with their mother again," and she answered, "I can't say that it's best interest, no." She could not commit to testifying that severing contact between P.M. and her children was in their best interests.

Caseworker Watson testified that P.M.'s conduct that resulted in the removal of her children endangered their physical and emotional well-being. But she only "partially" faulted P.M. for their removal, placing substantial blame on the children's abusive father.

Although caseworker Watson acknowledged the children were having all their needs met in foster care and that the foster parents were willing to provide a permanent home, she testified the older child, C.A.M., is bonded with his mother and being separated from her is difficult for him. She also believed the child holds "his dad more accountable than he does his mother."[2] The children do not have any special needs but C.A.M. is being counseled to deal with his parents' domestic violence issues. Caseworker Watson further testified that although Z.J.M. was very young when she was removed, she "[does] have an attachment to her mother."

Caseworker Watson shared her personal observations that P.M. has a safe and stable home that is appropriate for the children. According to the family service plan, which was admitted into evidence, P.M. has "good parenting skills" and an "adequate support system that she can rely on . . . ." She testified there were no concerns in P.M.'s interaction with her children during their visits. Also, no evidence was presented that during the time period in which termination proceedings were pending that P.M. ever presented any emotional or physical danger to her children.

The evidence presented at trial revealed that at some critical point, P.M. realized she needed to sever her relationship with the children's father or risk losing her children.

[2] Contrary to caseworker Watson's opinion, the court appointed special advocate noted after closing arguments that C.A.M. did not want to return home if it was unsafe.

At that point, P.M. chose her children and is no longer living with their father. She lived in Pampa and the children's father was living in Amarillo. The evidence also showed the children's father was solely responsible for making the home unsafe and he was the object of the search warrant that resulted in P.M.'s arrest. Caseworker Watson testified she visited P.M.'s home "three times or so" and did not see any of the father's belongings in the living area. She further testified that she found the home to be suitable and appropriately furnished.

P.M.'s relationship with her children was described as appropriate and caseworker Watson testified that visits between P.M. and the children went well. Even after the visits were discontinued due to P.M.'s arrest following execution of the search warrant of which she was not a target, she maintained contact with the Department. Caseworker Watson confirmed that P.M. completed the services required by the Department but had not provided supporting documentation on AA or NA attendance.

We are mindful that short-term, improved conduct does not conclusively negate the probative value of irresponsible choices. *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009). But here, P.M. herself was a child (sixteen years old) when her son was born. For many years she was co-dependent and subject to domestic violence and control by the children's father. Although C.A.M. witnessed the domestic violence, he did not fear his mother and she never harmed him or her daughter.

Also, after closing arguments, the children's attorney ad litem offered his recommendation. That recommendation was "the Department needs to continue at least looking at this situation. . . . I feel like [P.M.] would have rights – should have the rights

to visit with her children." He continued, "[i]t appears to me that [P.M.] has done what she's supposed to . . . I think it would be the Department needs to stay in . . . ."

Undoubtedly, termination in many cases is warranted. However, in some cases termination is undeserved and cannot stand, especially in evaluating whether termination is in a child's best interest. *See In re R.J.*, 568 S.W.3d 734, 760 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (finding evidence factually insufficient to support a best interest finding given the parents' improvements); *In re Z.B. & Z.B.*, No. 07-16-00026-CV, 2016 Tex. App. LEXIS 7420, at *16-19 (Tex. App.—Amarillo July 12, 2016, no pet.) (mem. op.) (finding the evidence was not clear and convincing to support a best interest finding); *In re Z.W.M.*, No. 07-15-00316-CV, 2016 Tex. App. LEXIS 1341, at *38 (Tex. App.—Amarillo Feb. 9, 2016, no pet.) (mem op.) (concluding the evidence was factually insufficient to support the strong presumption that a child's best interest is best served by preserving the conservatorship of the parents); *In re A.H.*, 414 S.W.3d 802, 807 (Tex. App.—San Antonio 2013, no pet.) (finding evidence insufficient to support best interest finding based on no more than a scintilla of evidence from caseworker and noting "the best interest standard does not permit termination merely because a child might be better off living elsewhere"); *In re S.R.L.*, 243 S.W.3d 232, 236 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (concluding evidence insufficient to support best interest finding where evidence showed positive changes in parent's life and judge commented that the parent "[had] never done anything bad" to his children); *In re W.C.*, 98 S.W.3d 753, 766 (Tex. App.—Fort Worth 2003, no pet.) ("finding evidence factually insufficient to support best interest finding where mother, despite past bad conduct, had 'made significant progress,

improvements, and changes in her life,' had a good support system in place, and had done everything possible to have her children returned").

Under a legal sufficiency review where we credit evidence that supports the finding if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so, the testimony presented in support of termination weighs in favor of the trial court's best interest finding. However, under a factual sufficiency review, we conclude the Department did not satisfy its heightened burden of proof regarding the children's best interests and that a reasonable fact finder could not have formed a firm belief or conviction that termination of P.M.'s parental rights was in her children's best interests. This is particularly evident given caseworker Watson's testimony that she could not say it was in the children's best interests for them to not have contact with their mother.

Although caseworker Watson testified the children were doing well in their foster home and the foster parents were willing to provide a permanent home, the evidence was insufficient to rebut the presumption that the children's best interests would be served by preserving the parent-child relationship. There was no evidence that P.M.'s children's physical and emotional interests were being sacrificed to preserve P.M.'s parental rights. Mindful that termination proceedings are strictly construed in favor of a parent, we conclude the trial court's best interest finding is not supported by factually sufficient evidence and therefore, does not meet the threshold of clear and convincing evidence required to justify the finding. Without sufficient evidence to support a best interest finding, the termination order cannot stand. We sustain P.M.'s sole issue questioning the trial court's best interest finding.

CONCLUSION

The trial court's *Order of Termination* is reversed and the cause is remanded to the trial court for a new trial, including the issuance of any temporary orders concerning the temporary conservatorship and support, as well as possession of and access to the children. Any retrial of this matter must commence no later than 180 days after this court issues mandate. TEX. R. APP. P. 28.4(c).

Patrick A. Pirtle
Justice