In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-21-00012-CV

IN THE INTEREST OF R.W., A CHILD

On Appeal from the County Court at Law No. 2
Gregg County, Texas
Trial Court No. 2019-187-CCL2

Before Morriss, C.J., Burgess and Stevens, JJ.
Opinion by Justice Stevens
Concurring Opinion by Justice Burgess

O P I N I O N

Following a bench trial, the trial court terminated Mother's parental rights to R.W.[1] on three grounds specified in the Texas Family Code—Section 161.001(b)(1), subsections (D), (N), and (O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (N), (O) (Supp.). The trial court further found that termination was in R.W.'s best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (Supp.). On appeal, Mother challenges the legal and factual sufficiency of the evidence supporting the trial court's findings.[2] Although we find that the trial court's ground (D) finding was not based on legally or factually sufficient evidence, we find that its ground (O) and best-interest findings are supported by legally and factually sufficient evidence. We, therefore, modify the judgment by deleting the ground (D) finding and, as modified, affirm the trial court's judgment.

I. Standard of Review

"The natural right existing between parents and their children is of constitutional dimensions." *In re E.J.Z.*, 547 S.W.3d 339, 343 (Tex. App.—Texarkana 2018, no pet.) (quoting *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). "Indeed, parents have a fundamental right to make decisions concerning 'the care, custody, and control of their children.'" *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). "Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial." *Id.* (quoting *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014)). "'Clear and convincing

[1]To protect the confidentiality of the child, we refer to the appellant as Mother and to the child by initials. *See* TEX. R. APP. P. 9.8(b)(2).

[2]The trial court's order also terminated the parental rights of R.W.'s father (Father). Father has not appealed.

evidence' is that 'degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *Id.* (quoting TEX. FAM. CODE ANN. § 101.007) (citing *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009)). Based on this standard, we are required to "engage in an exacting review of the entire record to determine if the evidence is . . . sufficient to support the termination of parental rights." *Id.* (quoting *A.B.*, 437 S.W.3d at 500).

"In our legal sufficiency review, we consider all the evidence in the light most favorable to the findings to determine whether the fact-finder reasonably could have formed a firm belief or conviction that the grounds for termination were proven." *In re L.E.S.*, 471 S.W.3d 915, 920 (Tex. App.—Texarkana 2015, no pet.) (citing *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam); *In re J.L.B.*, 349 S.W.3d 836, 846 (Tex. App.—Texarkana 2011, no pet.)). "We assume the trial court, acting as fact-finder, resolved disputed facts in favor of the finding, if a reasonable fact-finder could do so, and disregarded evidence that the fact-finder could have reasonably disbelieved or the credibility of which reasonably could be doubted." *Id.* (citing *J.P.B.*, 180 S.W.3d at 573).

"In our review of factual sufficiency, we give due consideration to evidence the trial court could have reasonably found to be clear and convincing." *Id.* (citing *In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006) (per curiam)). "We consider only that evidence the fact-finder reasonably could have found to be clear and convincing and determine 'whether the evidence is such that a fact[-]finder could reasonably form a firm belief or conviction about the truth of the . . . allegations.'" *Id.* (quoting *H.R.M.*, 209 S.W.3d at 109 (quoting *In re C.H.*, 89 S.W.3d 17, 25

(Tex. 2002)) (citing *In re J.F.C.*, 96 S.W.3d 256, 264, 266 (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, then the evidence is factually insufficient." *Id.* (quoting *J.F.C.*, 96 S.W.3d at 266).

"Despite the profound constitutional interests at stake in a proceeding to terminate parental rights, 'the rights of natural parents are not absolute; protection of the child is paramount.'" *Id.* (quoting *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (quoting *In re J.W.T.*, 872 S.W.2d 189, 195 (Tex. 1994)) (citing *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003))). "A child's emotional and physical interests must not be sacrificed merely to preserve parental rights." *Id.* (quoting *In re C.A.J.*, 459 S.W.3d 175, 179 (Tex. App.—Texarkana 2015, no pet.) (citing *C.H.*, 89 S.W.3d at 26)).

"Only one predicate finding under Section 161.001[b](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re O.R.F.*, 417 S.W.3d 24, 37 (Tex. App.—Texarkana 2013, pet. denied) (quoting *A.V.*, 113 S.W.3d at 362); citing *In re K.W.*, 335 S.W.3d 767, 769 (Tex. App.—Texarkana 2011, no pet.)). Yet, because the trial court's finding under ground D "may have implications for . . . parental rights to other children," due process demands that we review the trial court's findings under this ground. *In re N.G.*, 577 S.W.3d 230, 234 (Tex. 2019) (per curiam).

II. Background

The Department of Family and Protective Services (Department) removed two-year-old R.W. from Mother's care on February 1, 2019, pursuant to the trial court's order for protection of

a child in an emergency. *See* TEX. FAM. CODE ANN. § 262.102. The removal was based on Mother's inability to maintain appropriate housing and to provide a safe and stable environment for R.W.

Jessica Kenney, a Department caseworker, testified that, when she initially met with Mother in February 2019, Mother was residing in a homeless shelter. Mother was required to leave the shelter, though, due to "behaviors with her son and also with the staff." When Mother found a place to live outside of the shelter, Kenney could not perform the required background checks because "there were multiple people living in the home that wouldn't agree to give [her] information." Kenney testified that, at the time she concluded her work on the case after approximately six months, she did not believe that it was in R.W.'s best interest to be placed back with Mother.

Mother reported to Kenney that she was frightened of Father and stated that she moved from Texarkana to Longview to escape domestic violence by Father. According to Mother, R.W. was present when Father hit her. As a result, Mother got a protective order against Father and has not spoken with Father since 2018. Mother testified that she has an older child by a different father who lives with her paternal grandmother because Mother was "[d]ealing with the domestic issue with [Father]."

Mother was advised by her Family Based Safety Services (FBSS) caseworker that it was in her best interest to leave Texarkana and move to Longview and get help. As a result, Mother moved to a shelter in Longview and later moved to a home on Cherrywood. Mother left Longview because she saw Father and his girlfriend almost every time she went to the library.

Mother then moved to Lewisville, Arkansas, to stay with a family member. When that situation did not work out, Mother walked to Texarkana rather than to Longview, because Texarkana was closer.

Jessica Lopez, a conservatorship specialist with the Department, testified that, between the time she was assigned to the case in September 2019 and the time of trial in November 2020, Mother had five or six different residences. After Mother left a domestic violence shelter in Longview, she moved to a residence in Longview. After that, Mother moved to Texarkana, Arkansas, where she lived in a shelter. She then moved to Lewisville, Arkansas, where she lived with her cousin. When Mother left her cousin's house, she walked from Lewisville to Texarkana and was almost hit by a truck on her journey. Mother stayed with friends after she arrived in Texarkana.

According to Lopez, Mother was unable to meet R.W.'s basic needs, such as food, shelter, and clothing, and could not provide a stable and safe environment for R.W. Lopez testified that such an environment would include a home with a designated sleeping area and access to running water, food, and utilities. Such an environment would also include positive interactions with other children and adults, as well as extracurricular activities to promote R.W.'s educational status. Lopez testified that, to thrive, children need a loving, caring home that incorporates structure and stability. According to Lopez, Mother was unable to provide such a home.

Although Mother had obtained an apartment in Texarkana approximately one month before trial, Lopez had not seen that residence at the time of trial. Lopez stated that Mother was

employed at Pilgrim's Pride at the time of trial but had been working there for less than one month.

Katrina Hines-Ligon, a licensed professional counselor, testified that she counseled Mother on referral from the Department for a total of ten sessions. Hines-Ligon was primarily concerned with Mother's ability to maintain stable housing throughout ten counseling sessions over a six-month timeframe. When Mother began counseling, she was living in a shelter. Then she moved in with a cousin and later moved back to a shelter. Hines-Ligon opined that, if Mother continued to experience housing instability, it would be difficult for a child to thrive in such an environment. According to Hines-Ligon, a child requires stability and routine to know that the parent will provide for their basic needs. Housing instability detracts from the child's ability to thrive.

One of Mother's counseling goals centered on her ability to be a protective parent and in modeling appropriate behaviors for R.W. Those goals remained unmet at the conclusion of counseling. Being a protective parent includes both the physical and emotional protection of the child. The goal of being a protective parent was impaired in this case due to "inconsistency in housing stability" as well as concerns regarding Mother's medical problems.

Hines-Ligon explained that Mother had been diagnosed with post-traumatic stress syndrome and an undescribed personality disorder. She was unable to complete her counseling goals and was unsuccessfully discharged from counseling with the main concern of housing instability together with medical concerns regarding seizures Mother had experienced. Although Mother demonstrated an understanding of her role and responsibilities as a parent, she was

unable to handle daily stressors, thus contributing to the issue of housing instability. Hines-Ligon expressed further concern that Mother was not motivated to attend doctors' appointments to address her medical issues. The goal of becoming a protective parent was realistic and reasonable; Hines-Ligon did all she could to help Mother meet her counseling goals. She believed that, with additional time, Mother might have been able to deal with some of those issues.

Mother was required to perform the "standard services" in her family service plan (Plan). Those included keeping in contact with Kenney, visitation with R.W., completion of a psychological evaluation, completion of therapy, and drug testing. Mother was also required to obtain and maintain stable housing. Mother's drug tests were always negative.

Mother initially attended visitation routinely, and then she visited "more sparingly." Mother would often cancel visitation on the day of the scheduled visit and told Kenney that she only wanted visitation once a month due to transportation and medical issues. At one point, Mother spoke to Kenney about relinquishing custody of R.W., and that was likewise a factor in Mother's request to decrease visitation. During the time Kenney was working on the case, Mother was employed at a call center.

LaTerrian Wiley, an employee of Family Resources, testified that she supervised visitation between R.W. and Mother on four or five occasions. During visitation, Wiley observed that Mother was not engaged with R.W., was nonchalant, and watched R.W., who was three years' old, play by himself. Although R.W. attempted to engage with Mother, she did not

interact with him and pushed him away. Mother typically left visitation before the allotted time and canceled several visits as well.

For approximately three months, virtual visits were required due to the COVID-19 pandemic. In-person visits resumed in June 2020. Since that time, Mother had not visited R.W. in person. Instead, Mother opted to continue with virtual visits and likewise requested that her visits be cut back. After seven virtual visits, Mother discontinued visitation. According to Lopez, Mother did not engage well with R.W. during those visits and did not demonstrate the ability to interact with him. It did not appear to Lopez that Mother had a bond with R.W.

Although Mother completed some of the services required of her by the Plan, Lopez testified that all services were not completed. Although Mother completed her psychological evaluation, the Plan also required Mother to follow all recommendations made as a result of her psychological evaluation. As a result of her psychological evaluation, Mother was required to undergo a complete psychiatric assessment to ensure that she was mentally stable and was taking the proper medication. Mother did not complete that aspect of the Plan.

Mother's Plan further required regular attendance at all scheduled visitations with R.W., which Mother failed to do. Instead of giving the required twenty-four-hour notice of cancellation, Mother sometimes did not show up for a scheduled visit without calling to cancel, contrary to the provisions of her Plan.

Mother, likewise, did not complete required counseling with Stenet Frost. After Mother was discharged unsuccessfully from counseling with Frost, Mother was referred to a new

counselor. She did not complete that counseling. Likewise, Mother did not complete the required psychiatric assessment.

When Lopez initially met with Mother, Mother was completing a parenting course. Mother was required not only to attend the parenting classes, she was also required to demonstrate those tools and techniques learned in the course. Although Mother completed the parenting class, she was unable to demonstrate her parenting skills.

One goal of the Plan, in particular, was that Mother "show the ability to parent and protect the child." Lopez testified that Mother failed to demonstrate this ability. The Plan also required Mother to demonstrate that she learned "to control angry feelings and actions to prevent harm to others." This goal was not met. Mother was likewise unable, as required by the Plan, to "use parenting practices that meet the emotional and developmental needs of the child."

Lopez testified that, during the case, Mother failed to demonstrate the ability to put the needs of R.W. ahead of her own. According to Lopez, Mother failed to demonstrate the ability to "change the pattern of behaving that resulted in the abuse/neglect," as required by the Plan. Mother had not built a support network to help ensure R.W.'s safety, also as required by the Plan. When asked about her support group a few months before trial, Mother stated that she did not have one because they were unreliable. In Lopez's opinion, Mother was unable to provide a safe and stable home environment for R.W., and the return of R.W. to Mother would create both physical and emotional dangers for him.

Mother testified that she understood that R.W. was removed from her care due to drug issues and abandonment but stated that she did not have drug issues and never smoked or drank. She testified that she never abandoned R.W.

Contrary to the testimony offered by the Department, Mother stated that her in-person visits with R.W. always went well and that she always interacted with him. She always asked him how his day was, what he was doing, and whether he was okay. She always brought him snacks and meals when she visited. It was more difficult for Mother to interact with R.W. virtually, as there were four other children making noise in the background, along with the foster mother trying to calm them down.

Mother explained that Lopez did not communicate well with her and only told her about visits at the last minute and that it was then too late for her to get off from work. Mother claimed that, at one point, Lopez referred to her as "retarded." Mother testified that she graduated from Texas High School with As and Bs and was not in "special classes."

Mother explained that she suffers from tremors as a result of beatings by Father. She testified that she was under a doctor's care for that condition and that she took medication for it. Mother also suffered from post-traumatic stress syndrome, and most recently, from seizures. Her doctor had not prescribed any medication for the seizures.

III. The Evidence Is Insufficient to Support the Trial Court's Ground (D) Finding

The trial court found that Mother knowingly placed or knowingly allowed R.W. to remain in conditions or surroundings that endangered his physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D). Ground (D) focuses on R.W.'s environment, and the

Department had the burden of proving by clear and convincing evidence that that environment endangered R.W.'s physical or emotional well-being. *See In re L.C.*, 145 S.W.3d 790, 795 (Tex. App.—Texarkana 2004, no pet.). "In evaluating termination under ground (D), however, we are to examine the time prior to [R.W.'s] removal to determine whether the environment of the home posed a danger to [his] physical or emotional well-being." *L.E.S.*, 471 S.W.3d at 926 (citing *L.C.*, 145 S.W.3d at 795; *see In re Y.Z.*, No. 04-20-00429-CV, 2021 WL 469014, at *3 (Tex. App.—San Antonio Feb. 10, 2021, no pet.) (mem. op.) ("The time period relevant to a review of conduct and environment under statutory ground D is prior to the children's removal.") (citing *In re J.R.*, 171 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2005,)); *see In re T.B.*, No. 09-20-00172-CV, 2020 WL 6787523, at *7 (Tex. App.—Beaumont Nov. 19, 2020, no pet.) (mem. op.); *In re M.H.*, No. 02-15-00263-CV, 2016 WL 489780, at *15 (Tex. App.—Fort Worth Feb. 5, 2016, no pet.) (mem. op.).

"A child is endangered when the environment creates a potential for danger that the parent is aware of, but disregards." *In re N.B.*, No. 06-12-00007-CV, 2013 WL 1605457, at *9 (Tex. App.—Texarkana May 8, 2012, no pet.) (mem. op.). "[S]ubsection (D) permits termination [of parental rights] based on a single act or omission [by the parent]." *In re L.C.*, 145 S.W.3d 790, 797 (Tex. App.—Texarkana 2004, no pet.); *see In re A.B.*, 125 S.W.3d 769, 777 (Tex. App.—Texarkana 2003, pet. denied). "Inappropriate, abusive, or unlawful conduct by a parent . . . can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection (D)." *In re C.J.B.*, No. 05-19-00165-CV, 2019 WL 3940987, at *6 (Tex. App.—Dallas Aug. 21, 2019, no pet.) (mem. op.). "Endanger,"

as used in the definition of Ground D, "means to expose to loss or injury; to jeopardize." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *see L.E.S.*, 471 S.W.3d at 923. "Although 'endanger' means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (per curiam) (quoting *Boyd*, 727 S.W.2d at 533). A parent's awareness of the potential for danger and a disregard of that risk is sufficient to show endangerment. *In re N.R.*, 101 S.W.3d 771, 776 (Tex. App.—Texarkana 2003, no pet.).

Mother's involvement with the Department began when Mother's case was referred to Kenney by Mother's FBSS caseworker. Kenney's first meeting with Mother took place while Mother was living in a domestic violence shelter in Longview. Mother was asked to leave the shelter for undefined "behaviors with her son and also with the staff." Kenney testified that she did not know where Mother went after that, but eventually she "got a place on Cherrywood" in Longview. Kenney could not get background checks for the other occupants of that home, but Mother was visiting with the child at that time.

The trial court's order of emergency removal was dated February 1, 2019. Consequently, the timeframe we are required to examine under ground (D) is that period prior to February 1, 2019. *See L.E.S.*, 471 S.W.3d at 926. Although the record is unclear, it is apparent that R.W. was removed after Mother left the shelter in Texarkana and before Mother moved into the home on Cherrywood in Longview.

Prior to February 1, 2019, the evidence reflects that Mother was living in a shelter in Texarkana but moved to the shelter in Longview "due to the domestic violence." According to Kenney, the FBSS worker and Mother both indicated that Mother moved from Texarkana to the domestic violence shelter in Longview. Mother explained to Kenney that she was in a domestic violence shelter in Texarkana but "they moved her" to the Longview shelter because of Father's "stalking tendencies." Drugs were not a factor in the FBSS case, and Mother has never tested positive for drugs.

According to Mother, she came to the Longview shelter "before this case got started." Mother stated, "[M]y previous caseworker just told me that it was in my best interest for me to move to Longview to get help." When Mother left with R.W. to go to the shelter in Longview, she brought R.W.'s clothes and "milk, shoes, diapers and everything for him that [she] had." At some undefined time, Mother got a protective order against Father. Mother has not spoken to Father since 2018.

Lopez testified that the removal happened during the FBSS stage, and there were "concerns about [Mother's] ability to maintain a safe and stable home environment" for R.W. Lopez did not elaborate on what those specific concerns were. Lopez further testified that she became Mother's caseworker in September 2019 and that Mother had lived at several different residences after September 2019. We are not permitted, for purposes of our ground (D) analysis, to consider this evidence. The remainder of Lopez's testimony focuses on the timeframe after R.W.'s removal as well. Although the record contains evidence that R.W.'s physical and emotional well-being could be endangered in the future by Mother's inability to maintain stable

housing throughout the course of the case, there is a dearth of evidence on the issue of whether Mother knowingly placed or knowingly allowed R.W. to remain in conditions or surroundings that endangered his physical or emotional well-being prior to his removal by the Department.

A. Housing Instability

There is no evidence in the record that Mother's housing instability endangered R.W.'s physical and emotional well-being. The testimony in this regard largely centers on Mother's frequent moves during the pendency of this case and does not center on the timeframe prior to R.W.'s removal. The evidence of "housing instability" prior to R.W.'s removal consists of the scant testimony that Mother resided with R.W. in two domestic violence shelters—one in Texarkana and one in Longview. There is no evidence of the length of time Mother lived in each of those shelters, and there is no evidence that anything to which R.W. was exposed at those shelters endangered his physical or emotional well-being. Kenney testified that, when R.W. came into the Department's care, he appeared to be developmentally above average. She described him as "a great child." The record is devoid of any testimony that he was malnourished, unkept, or in any way physically or emotionally neglected. There is no evidence that Mother mistreated R.W. or abandoned him before the removal.

Although there are certain circumstances that will support removal based on unsavory living conditions—or even homelessness—those cases do not generally uphold termination findings based solely on those factors. *See In re M.C.*, 917 S.W.2d 268, 269–70 (Tex. 1996) (per curiam) (unsanitary conditions coupled with evidence that, on one occasion, children were found wandering on a highway at night and, on another occasion, mother left children alone in

car with the engine running and the children drove the car into the neighbor's house); *In re A.N.*, No. 02-14-00206-CV, 2014 WL 5791573, at *18 (Tex. App.—Fort Worth Nov. 6, 2014, no pet.) (mem. op.) ("During Father's homelessness, he refused to stay in shelters for any length of time and constantly moved the children from place to place," "exposed his children to environments where known drug users were present, and subjected his children to sleeping on pallets behind an abandoned bar and to panhandling on the highway in the heat of summer."). On the other hand, evidence that the Department removed the children and sought to terminate the mother's parental rights because the children—who lived in public housing with the mother—were found alone on one occasion while the mother was working, were hungry and dirty, and did not have enough beds was insufficient to support termination under ground (D). *Ybarra v. Tex. Dep't of Human Servs.*, 869 S.W.2d 574, 578–80 (Tex. App.—Corpus Christi 1993, no writ). As in *Ybarra*, the evidence in this case fails to show that R.W.'s living conditions posed "a real threat of injury or harm." *Id.* at 577.

B. Domestic Violence

The Department points to the fact that the record contains evidence that R.W. was present when Father hit Mother and argues that, because Mother exposed R.W. to domestic violence by allowing him to remain in Father's presence, termination is appropriate under ground (D). *See In re R.D.*, 955 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, pet. denied) ("subsection D permits termination if the party proves a parental act or omission caused a child to be placed or remain in an endangering environment"); *see In re C.S.L.E.H.*, No. 02-10-00475-CV, 2011 WL 3795226, at *4 (Tex. App.—Fort Worth Aug. 25, 2011, no pet.) (mem. op.) ("Inappropriate,

abusive, or unlawful conduct by persons who live in the child's home or with whom the child is compelled to associate on a regular basis in his home . . . can create an environment that endangers the physical and emotional well-being of a child.") (citing *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.)).

Although Mother testified that R.W. was present when Father hit Mother, there is no evidence that Father ever lived in the same home with Mother and R.W., that R.W. was present on more than one such occasion when Father hit Mother, or that Father was in the home occupied by Mother and R.W. when Father hit Mother. There is likewise no evidence in the record that R.W. was compelled to associate with Father on a regular basis in his home. The record reflects, however, that Mother sought refuge in two different domestic violence shelters to remove herself and R.W. from Father's abusive behavior and obtained a protective order against Father. This evidence shows that Mother did not permit R.W. to remain in conditions or surroundings that endangered his physical or emotional well-being. *See In re N.B.*, No. 06-12-00007-CV, 2012 WL 1605457, at *9 (Tex. App.—Texarkana May 8, 2012, no pet.) (mem. op.) (evidence that children were living in home with known drug user who abused Mother, that law enforcement was sometimes called to the house due to the violence, that there was constant yelling and screaming, and that abuser had a criminal history of child endangerment was sufficient to support termination of Mother's parental rights under ground (D)); *In re B.C.*, No. 2-06-180-CV, 2007 WL 939642, at *3 (Tex. App.—Fort Worth Mar. 29, 2007, no pet.) (per curiam) (mem. op.) (ample evidence of domestic violence between parents, as well as violence against child himself, created endangering environment for child in the home); *D.O. v.*

Tex. Dep't of Human Servs., 851 S.W.2d 351, 354 (Tex. App.—Austin 1993, no writ), *disapproved on other grounds by In re J.F.C.*, 96 S.W.3d 256, 257 (Tex. 2002) (evidence of child's residence in unstable household where violence frequently occurred and where ex-felons who engaged in ongoing criminal activity resided was sufficient to sustain termination based on finding that parent allowed child to remain in surroundings that endangered physical or emotional well-being).

Here, the evidence showed that, to the extent that R.W. was exposed to domestic violence, Mother removed him from exposure to future incidents of violence by taking refuge in a domestic violence shelter. Had she failed to do so, Mother could have been found to have endangered R.W.'s physical or emotional well-being. *See In re L.W.*, 609 S.W.3d 189, 200 (Tex. App.—Texarkana 2020, no pet.) ("Similarly, 'a parent's failure to remove [herself] and [her] children from a violent relationship endangers the physical and emotional well-being of the children.'") (quoting *In re B.E.T.*, No. 06-14-00069-CV, 2015 WL 495303, at *5 (Tex. App.—Texarkana Feb. 5, 2015, no pet.) (mem. op.) (quoting *In re I.G.*, 383 S.W.3d 763, 770 (Tex. App.—Amarillo 2012, no pet.)).

Considering the entire record, we conclude that the evidence is both legally and factually insufficient to support the trial court's findings by clear and convincing evidence under ground (D). We sustain this point of error.

IV. The Evidence Is Sufficient to Support the Trial Court's Finding Under Ground (O)

Termination based on ground (O) requires a finding, by clear and convincing evidence, that the parent

> failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department . . . for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

TEX. FAM. CODE ANN. § 161.001(b)(1)(O). Mother claims that the Department did not meet its burden of proof to establish that she failed to comply with the trial court's order requiring her to complete the requirements of the Plan.

Among other things, the Plan required Mother to:

- "[P]articipate in psychological evaluation through Winstead Psychological Services" and "follow ALL recommendations made by the assessment."

- "[A]ttend and actively participate in weekly counseling with Stenet Frost . . . until the therapist conveys that all therapeutic goals have been reached and there are no further concerns of the ability to effectively parent."

- "[C]ontinue to participate and finish her parenting class through Wellness Pointe. When completed [Mother] will . . . need to demonstrate what she has learned in her parent-child visits."

- "[O]btain and maintain safe and hazard-free housing for the family prior to the return of [R.W.] A worker will make both announced and unannounced visits to the home. [Mother] will also ensure that the home is free of any individual who has CPS history and/or criminal history in order to ensure safety in the home."

Mother was also required to meet certain Plan goals, among which were to:

- "[S]how the ability to parent and protect [R.W.]"
- "[D]emonstrate an ability to provide appropriate caregivers in the absence of the parents."
- "[D]emonstrate an ability to provide basic necessities such as food, clothing, shelter, medical care, and supervision for [R.W.]"
- "[B]uild a support network that will help ensure the safety of [R.W.]"

Lopez testified that, although Mother completed her psychological evaluation through Winstead Psychological Services, she failed to follow all recommendations made as a result of her psychological evaluation. As a result of her evaluation, Winstead recommended that Mother undergo a complete psychiatric assessment to ensure that she was mentally stable and that she was taking the proper medication. Mother failed to undergo such an assessment.

Although Mother was required to participate in weekly counseling with Frost until such time as Frost determined that her therapeutic goals were met and that there were no further concerns regarding Mother's ability to effectively parent, Mother did not complete this counseling and was unsuccessfully discharged. Mother was then referred to a new counselor, and likewise did not complete that counseling.

Mother completed her parenting class, as required by the Plan. Lopez testified, though, that she was unable to demonstrate her parenting skills and failed to meet the Plan's goal of demonstrating the ability to parent and protect R.W.

Throughout the course of the case, Mother had difficulty with her housing situation. When she lived on Cherrywood in Longview, Kenney could not get background checks for the

other occupants of that home, as required by the Plan. Kenney explained that there were multiple people living in the home that would not agree to provide her with their information. After Mother left the residence on Cherrywood, she moved to Texarkana, Arkansas, where she resided in a shelter for an unspecified period. When Mother left the shelter, she moved in with her cousin in Lewisville.

Lopez testified that this was the last residence at which the Department visited Mother in June 2020. Lopez stated that Mother was angry that she showed up at her residence unannounced and demanded two to three days' notice before a home visit, contrary to the Plan's requirements. Although the house had lights, running water, and food, Mother was unable to remain in the home due to a falling out with her cousin. According to Lopez, Mother's cousin had married a sex offender. This situation resulted in a heated argument between Mother and her cousin—the end result of which was that Mother left and walked to Texarkana. In Texarkana, Mother stayed with some friends for an unspecified period and got her own apartment approximately one month before trial. Lopez testified that, based on this course of events and on her interactions with Mother, Mother was not able to provide a safe and stable environment for R.W., as the Plan required, and was unable to meet the Plan's goal of providing for his basic needs, such as food, shelter, and clothing.

In contrast, Mother testified that she had an apartment and had developed a good relationship with her property manager. The manager had volunteered to have her daughter babysit for Mother. Mother stated that she knew she was required to get a job and provide a

stable income during the case but that she had to quit her job at the call center to attend visitation with R.W.

Mother was also required by the Plan to meet the twin goals of demonstrating the ability to provide appropriate caregivers in the absence of the parents and to build a support network to help ensure R.W.'s safety. Mother reported to Lopez only a few months before trial that she did not have a support network because they were unreliable. Mother testified that, although she had not spoken with her mother about it, she would ask her to babysit R.W. while Mother was at work.

Although Mother disputed much of the evidence offered under ground (O) and completed some of the Plan's requirements, this ground "does not quantify any particular number of provisions of the family service plan that a parent must not achieve in order for the parental rights to be terminated" and "does not encompass an evaluation of a parent's partial achievement of plan requirements to determine whether or not the parent failed to comply." *In re J.S.*, 291 S.W.3d 60, 67 (Tex. App.—Eastland 2009, no pet.); *see In re B.H.R.*, 535 S.W.3d 114, 122 (Tex. App.—Texarkana 2017, no pet.) (declining to reverse termination where mother achieved some of the plan's goals); *In re C.M.C.*, 273 S.W.3d 862, 874–76 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (declining to reverse termination on mother's argument of substantial compliance with service plan); *In re T.T.*, 228 S.W.3d 312, 317–21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (affirming termination where mother failed to comply with four of seven requirements and father failed to comply with three of seven requirements); *In re C.D.B.*, 218 S.W.3d 308, 311–12 (Tex. App.—Dallas 2007, no pet.) (affirming termination based on

mother's partial compliance with service plan); *In re A.D.*, 203 S.W.3d 407, 411–12 (Tex. App.—El Paso 2006, no pet.) (affirming termination because mother failed to meet family service plan's material requirements including drug assessment, finding a job, and providing a safe home). Despite the fact that Mother completed some of the Plan's requirements, the evidence established that several of the Plan's requirements, as previously discussed, were not accomplished. "[Mother's] inability to provide stable housing and basic necessities . . . are significant deficiencies." *J.S.*, 291 S.W.3d at 67.

Viewing the evidence in the light most favorable to the trial court's ground (O) finding, we conclude that a reasonable fact-finder could have formed a firm belief or conviction that Mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of R.W. Accordingly, Mother's challenge to the sufficiency of the evidence supporting the trial court's termination finding is overruled. Because we find sufficient evidence to support the trial court's finding under ground (O), we need not address Mother's challenge to the sufficiency of the evidence supporting ground (N).

V. Sufficient Evidence Supports the Finding that Termination Was in R.W.'s Best Interests

Mother also challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of her parental rights was in R.W.'s best interests.

"There is a strong presumption that keeping a child with a parent is in the child's best interest." *In re J.A.S., Jr.*, No. 13-12-00612-CV, 2013 WL 782692, at *7 (Tex. App.—Corpus Christi Feb. 28, 2013, pet. denied) (mem. op.) (citing *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam)). "Termination 'can never be justified without the most solid and substantial

reasons.'" *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.) (quoting *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976)).

In determining the best interests of the child, courts consider the following *Holley* factors:

> (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 individuals seeking custody, (5) the programs available to assist these individuals, (6) the plans for the child by these individuals, (7) the stability of the home, (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent.

Id. at 818–19 (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)); *see In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012); *see also* TEX. FAM. CODE ANN. § 263.307(b). "There is no requirement that the party seeking termination prove all nine factors." *N.L.D.*, 412 S.W.3d at 819 (citing *C.H.*, 89 S.W.3d at 27). Further, we may consider evidence used to support the grounds for termination of parental rights in the best-interest analysis. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). "A parent's inability to provide adequate care for her child, lack of parenting skills, and poor judgment may be considered when looking at the child's best interests." *N.L.D.*, 412 S.W.3d at 819 (citing *In re C.A.J.*, 122 S.W.3d 888, 893 (Tex. App.—Fort Worth 2003, no pet.)).

R.W. was almost two years old when he was placed in the Department's conservatorship and was three years old at the time of trial. Due to his young age, R.W.'s desires cannot be determined. However, "[w]hen children are too young to express their desires, the fact[-]finder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent." *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—

Houston [14th Dist.] 2014, no pet.). Although the evidence showed that R.W. loved Mother and hugged her when he saw her, his interactions with his foster parents were described as more personal than his interactions with Mother. The evidence further showed that R.W. was bonded to his foster parents and called his foster mother "Mommy." R.W. fit in "really well" with his current foster family, and he was physically affectionate with the family and interacted well with them. R.W.'s last visit with Mother was several months before trial, and at that time, he did not seem to recall any memories of living with Mother. The first *Holley* factor weighs in favor of termination.

As for the second and third *Holley* factors, it is apparent that, given his young age, R.W.'s emotional and physical needs now and in the future are great. *See In re L.W.*, 609 S.W.3d 189, 203 (Tex. App.—Texarkana 2020, no pet.) ("young children require a great deal of time, attention, and protection"). Lopez testified that Mother was unable to meet R.W.'s physical and emotional needs and had failed to demonstrate the ability to parent and protect R.W. Mother lived in five or more residences over the course of the case, sometimes living with friends and relatives or in shelters. Although Mother had started a new job and leased an apartment approximately one month before trial, she had failed to show—over the course of the case—that she was able to maintain stable housing and employment. "A parent who lacks stability, income, and a home is unable to provide for a child's emotional and physical needs." *In re C.A.J.*, 459 S.W.3d 175, 183 (Tex. App.—Texarkana 2015, no pet.) (quoting *In re J.T.G.*, No. 14-10-00972-CV, 2012 WL 171012, at *17 (Tex. App.—Houston [14th Dist.] Jan. 19, 2012, pet. denied) (mem. op.)).

As for the fourth *Holley* factor, Lopez testified that Mother failed to demonstrate the ability to parent and protect R.W. Hines-Ligon testified that, although Mother demonstrated an understanding of her role and responsibilities as a parent, she was unable to handle daily stressors, thus contributing to the issue of housing instability. Hines-Ligon expressed further concern that Mother was not motivated to attend doctors' appointments to address her medical issues. Those issues impeded Mother's ability to become a protective parent. Kenney described Mother's relationship with R.W. as "more like a friendship," and she found it difficult to place limits on R.W. Conversely, it was apparent that Mother loved R.W. and managed, despite her domestic problems with Father, to take good care of him. When the Department removed R.W. from Mother, he was described as "very smart" and developmentally above average.

R.W.'s foster mother is a stay-at-home mom whose family is licensed as a foster family through the Methodist Children's Home. She was previously an elementary school teacher for thirteen years and testified that she has significant experience with a variety of elementary-aged children. She sought out counseling for R.W. due to fears and anger outbursts that are now resolved. He attended Mother's Day Out, was learning skills, and came home singing songs that he had learned. She described R.W. as a leader who initiated most of the play with foster mother's other son, who was R.W.'s age. We find that the fourth *Holley* factor weighs in favor of termination.

With respect to plans for the future, foster mother testified that she would like to adopt R.W. She stated that she was aware of his needs and desires and was comfortable making a permanent commitment to him. Foster mother stated that she had no concerns about the ability

to provide for R.W. moving forward in life and stated that she would ensure that he received emotional and physical caregiving in the future—including counseling—should that be required.

Mother testified that, in the circumstance that R.W. was returned to her, she would make sure her apartment was equipped for him. Mother did not have a support system, though, and had not researched day care options for R.W. She testified that she would ask her mother if she could babysit R.W. while she was at work. On balance, we find that the sixth and seventh *Holley* factors weigh in favor of termination.

We conclude that the eighth *Holley* factor is neutral. The only act or omission by Mother that would indicate that the existing parent-child relationship is not a proper one is Mother's request to visit less often with R.W. than her Plan permitted. Mother explained that her work schedule and transportation issues often did not allow her to visit and that she had difficulty communicating with Lopez about when visits would take place. The virtual visits necessitated by the COVID-19 pandemic and the description of Mother's inability to interact with R.W. during those visits can be accounted for by the fact that visiting with a young child on a screen is a difficult endeavor, even in the best of circumstances.

Nevertheless, considering the *Holley* factors, and in light of all of the evidence, we conclude that the trial court could have reasonably formed a firm belief or conviction that termination of Mother's parental rights was in R.W.'s best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). We, therefore, overrule this issue.

VI. Conclusion

Although we conclude that the evidence was insufficient to terminate Mother's parental rights under ground (D), the evidence under ground (O) was sufficient, as was the evidence that termination was in R.W.'s best interests. We, therefore, modify the trial court's judgment to delete the ground (D) finding and affirm the judgment, as modified. *See* TEX. R. APP. P. 43.2(b) (empowering courts of appeals to "modify the trial court's judgment and affirm it as modified").

Scott E. Stevens
Justice

CONCURRING OPINION

I concur with the majority opinion in this case. I write separately to address a potential problem with relying solely on ground O to support termination of a parent's parental rights.

This case presents an unusual situation where the evidence is not only insufficient to support termination based upon a primary ground—knowingly placing or allowing the child to remain in conditions or surroundings that endangered the child's physical or emotional well-being (ground D)—but the record also establishes that Mother did not abuse or neglect R.W. in any manner and did not engage in any conduct—such as drug use, criminal behavior, assaultive conduct, or dangerous behavior—or keep the child in squalid conditions that might otherwise justify the severe penalty of parental-rights termination. Rather, the sole factor leading to the institution of this termination proceeding against Mother was her inability to obtain and maintain

suitable housing, and our sole basis for affirming the judgment terminating her parental rights is her failure to comply with the provisions of a court-ordered service plan establishing the actions necessary for the parent to obtain the return of the child (ground O).

Of course, the cases are legion that state termination of parental rights may be based on ground O where the evidence is otherwise insufficient to support termination under other statutory grounds. *See In re T.A.G.*, No. 04-20-00565-CV, 2021 WL 1988249, at *2 (Tex. App.—San Antonio May 19, 2021, no pet. h.) (mem. op.) (termination upheld on ground O only); *In re L.G.*, No. 06-18-00099-CV, 2020 WL 4229330, at *10 (Tex. App.—Texarkana July 24, 2020, no pet.) (mem. op.) (finding evidence insufficient on grounds D and E, but sufficient evidence under ground O); *In re L.C.L.*, 599 S.W.3d 79, 86 (Tex. App.—Houston [14th Dist.] 2020, pet. filed) (en banc) (finding evidence insufficient under grounds D and E, but sufficient under ground O); *In re V.A.*, 598 S.W.3d 317, 331 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (evidence insufficient under ground D, but sufficient under ground O). Yet, given the fundamental liberty interests at stake in a parental-rights termination case, it is doubtful that a mere failure to comply with a court-ordered service plan would satisfy due process where the only basis for instituting the termination procedure is the financial insecurity of the parent. Mere financial insecurity that does not endanger the health, safety, or welfare of a child cannot be the basis for termination of parental rights; likewise, the failure to comply with a court-ordered service plan, where the only basis for instituting the plan is the parent's financial insecurity—by itself—would not pass muster. To hold otherwise would allow the Department to obtain

termination of parental rights for financial insecurity by simply pointing to the parent's failure to complete a court-ordered service plan. This scenario is known as a "process termination."

Of course, the service plan in this case was ordered via a temporary order, and "a temporary order is superseded by entry of a final order of termination, rendering moot any complaint about the temporary order." *In re A.K.*, 487 S.W.3d 679, 683 (Tex. App.—San Antonio 2016, no pet.). Although a petition to terminate parental rights "must be supported by an affidavit" based on "personal knowledge and stating facts sufficient to" establish "(1) there is an immediate danger to the . . . child," TEX. FAM. CODE ANN. § 262.101, "Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant," *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). Thus, the allegations in the Department's request for entry of the service plan supported the trial court's temporary order. Nevertheless, there is a difference between a temporary order requiring compliance with a service plan and the entry of a final order terminating the parent's parental rights for failing to comply with the court-ordered service plan. The former seeks to preserve the parent-child relationship, whereas the latter permanently ends that relationship. Accordingly, the final order terminating parental rights for failing to comply with the court-ordered service plan implicates due process.

Therefore, in the unusual circumstances of this case—where the action to terminate a parent's rights arises only as a result of conditions created by financial insecurity—it is not enough for the Department to show that the parent failed to comply with the court-ordered

service plan. Rather, to satisfy due process in that instance, the Department must also prove by clear and convincing evidence at the final trial that there is a nexus between the parent's financial insecurity and endangerment to the child's physical or emotional well-being.

Here, however, there is clear and convincing evidence that such a nexus existed. In this case, the record amply demonstrates that Mother's continued lack of housing would ultimately endanger this four-year-old child. The record also amply demonstrates that the Department expended great effort to find housing for Mother and R.W. and was unable to do so primarily due to mother's inability to get along with others. Consequently, the record in this case establishes the required nexus between the service plan and the protection of the child's safety and well-being necessary to justify termination under ground O by itself. Accordingly, I concur with the majority opinion.

Ralph K. Burgess
Justice

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Date Decided: June 10, 2021