IN THE
TENTH COURT OF APPEALS

No. 10-16-00132-CV

IN THE INTEREST OF E.W., C.W., AND S.W., CHILDREN

From the 87th District Court
Freestone County, Texas
Trial Court No. 15-092B

MEMORANDUM OPINION

In March 2015, the Department of Family and Protective Services filed its original petition in this case for protection of a child, for conservatorship, and for termination in suit affecting the parent-child relationship. The petition identified J.W., A.W., E.W., C.W., and S.W., who were then fifteen, ten, seven, six, and four years old, respectively, as the subject of the suit. J.W.'s and A.W.'s parents are Appellant M.W. (alias Adam) and his former wife A.H.[1] E.W.'s, C.W.'s, and S.W.'s parents are Adam and Appellant S.S. (alias Megan). In July 2015, the trial court heard the case regarding J.W. and A.W. and ultimately appointed A.H. as permanent managing conservator and Adam as possessory

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[1] Adam and A.H. are also the parents of two adult children, K.W. and M.W. Jr.

conservator of the two children. In March 2016, the trial court then terminated Adam's and Megan's parental rights to E.W., C.W., and S.W. following a bench trial. The trial court found that Adam and Megan had both violated Family Code subsections 161.001(b)(1)(D) and (E) and that termination was in the children's best interest.

Adam's and Megan's appellate counsel filed a notice of appeal. Their counsel has now filed an *Anders* brief and a motion to withdraw. Counsel asserts that he has diligently reviewed the record and that, in his opinion, the appeal is frivolous. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *In re E.L.Y.*, 69 S.W.3d 838, 841 (Tex. App.—Waco 2002, order) (applying *Anders* to termination appeal).

Counsel's brief meets the requirements of *Anders*; it presents a professional evaluation demonstrating why there are no arguable grounds to advance on appeal. *See In re Schulman*, 252 S.W.3d 403, 407 n.9 (Tex. Crim. App. 2008) ("In Texas, an *Anders* brief need not specifically advance 'arguable' points of error if counsel finds none, but it must provide record references to the facts and procedural history and set out pertinent legal authorities."); *Stafford v. State*, 813 S.W.2d 503, 510 n.3 (Tex. Crim. App. 1991). Counsel has carefully discussed why, under controlling authority, there is no reversible error in the trial court's order of termination. Counsel has informed us that he has: (1) examined the record and found no arguable grounds to advance on appeal; (2) served a copy of the brief and counsel's motion to withdraw on Adam and Megan; and (3) informed Adam and Megan of their right to obtain a copy of the record and of their right to file a *pro se*

response. *See Anders*, 386 U.S. at 744, 87 S.Ct. at 1400; *Stafford*, 813 S.W.2d at 510 n.3; *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978); *see also Schulman*, 252 S.W.3d at 409 n.23. Adam and Megan have filed a *pro se* response, raising several issues, but none are arguable grounds to advance in this appeal.

First, Adam and Megan contend that the evidence is insufficient to support the trial court's termination of their parental rights to E.W., C.W., and S.W. In a proceeding to terminate the parent-child relationship brought under section 161.001, the Department must establish by clear and convincing evidence two elements: (1) one or more acts or omissions enumerated under subsection (b)(1) of section 161.001, termed a predicate violation; *and* (2) that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b)(1), (2) (West Supp. 2016); *Swate v. Swate*, 72 S.W.3d 763, 766 (Tex. App.—Waco 2002, pet. denied). The factfinder must find that both elements are established by clear and convincing evidence, and proof of one element does not relieve the petitioner of the burden of proving the other. *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976); *Swate*, 72 S.W.3d at 766. "Clear and convincing evidence" is defined as "that measure or degree of proof which 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." *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

Both legal and factual sufficiency reviews in termination cases must take into consideration whether the evidence is such that a factfinder could reasonably form a firm

belief or conviction about the truth of the matter on which the petitioner bears the burden of proof. *In re J.F.C.*, 96 S.W.3d 256, 264-68 (Tex. 2002) (discussing legal sufficiency review); *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (discussing factual sufficiency review).

> In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.

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 factfinder could reasonably have found to be clear and convincing. *Id.*

> [T]he inquiry must be "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." A court of appeals should consider whether disputed evidence is such that a reasonable factfinder 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 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. (footnotes and citations omitted); *see C.H.*, 89 S.W.2d at 25.

We begin with the sufficiency of the evidence to establish that Adam and Megan violated Family Code subsections 161.001(b)(1)(D) and (E). Termination under subsection 161.001(b)(1)(D) requires clear and convincing evidence that the parent has

"knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." TEX. FAM. CODE ANN. § 161.001(b)(1)(D). Termination under subsection 161.001(b)(1)(E) requires clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." *Id.* § 161.001(b)(1)(E).

To endanger 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 also In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996). The specific danger to a child's physical or emotional well-being need not be established as an independent proposition, but it may be inferred from parental misconduct. *See Boyd*, 727 S.W.2d at 533.

> When termination of parental rights is based on section D, the endangerment analysis focuses on the evidence of the child's physical environment, although the environment produced by the conduct of the parents bears on the determination of whether the child's surroundings threaten his well-being. *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Section D permits termination if the petitioner proves parental conduct caused a child to be placed or remain in an endangering environment. *In re R.D.*, 955 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, pet. denied).
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> It is not necessary that the parent's conduct be directed towards the child or that the child actually be injured; rather, a child is endangered when the environment creates a potential for danger which the parent is aware of but disregards. *In re S.M.L.*, 171 S.W.3d at 477. Conduct that demonstrates awareness of an endangering environment is sufficient to show endangerment. *Id.* (citing *In re Tidwell*, 35 S.W.3d 115, 119-20 (Tex. App.—Texarkana 2000, no pet.) ("[I]t is not necessary for [the mother] to have had certain knowledge that one of the [sexual molestation] offenses

> actually occurred; it is sufficient that she was aware of the potential for danger to the children and disregarded that risk by … leaving the children in that environment.")). In considering whether to terminate parental rights, the court may look at parental conduct both before and after the birth of the child. *Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Section D permits termination based upon only a single act or omission. *In re R.D.*, 955 S.W.2d at 367.

Jordan v. Dossey, 325 S.W.3d 700, 721 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

Under subsection 161.001(b)(1)(E), the relevant inquiry is whether evidence exists that the endangerment of the child's well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *In re K.A.S.*, 131 S.W.3d 215, 222 (Tex. App.—Fort Worth 2004, pet. denied); *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 83-84 (Tex. App.—Dallas 1995, no writ).

> Additionally, termination under subsection (E) must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. [*In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.)]; *see* TEX. FAM. CODE ANN. § 161.001[(b)](1)(E). It is not necessary, however, that the parent's conduct be directed at the child or that the child actually suffer injury. *Boyd*, 727 S.W.2d at 533; *J.T.G.*, 121 S.W.3d at 125. The specific danger to the child's well-being may be inferred from parental misconduct standing alone. *Boyd*, 727 S.W.2d at 533; *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied).

In re T.T.F., 331 S.W.3d 461, 483 (Tex. App.—Fort Worth 2010, no pet.).

The following evidence was presented at the trial in this case. Both Adam and Megan admitted that they have established a pattern of having a dirty home, cleaning it up, and then, after a period of time, reverting to the dirty home. Adam conceded that the situation has been reoccurring in his life since even before he met Megan. He

acknowledged that he has a fifteen-year history with the Department, mainly due to allegations of lack of cleanliness of the home and neglect of the children. Megan testified that since E.W. was born, she has been involved in about twenty-five to thirty Department investigations, mostly concerning allegations about the home's condition.

Department Caseworker Rhonda Young testified that the Department became involved with the family in 2009 because there were concerns about inappropriate supervision of the children and lack of cleanliness in Adam's and Megan's home. Each child living in the home seemed to have some type of aggression issues, and J.W. specifically had a "very big hygiene issue" and was cutting herself. The Department initially referred the case to Family-Based Safety Services (FBSS), but Adam and Megan were unable to complete the services. Young therefore got involved and began making weekly visits to the home in May 2010. Adam testified that the children were removed in 2010 because there were roaches in the house "real bad."

Young testified that after the children were removed, the home was often clean. As the children were returned to the home, however, Young began having to remind Adam and Megan to keep the home clean. It became part of their regular conversation. Young described that after E.W. and C.W. returned to the home, there were always toys, clutter, and food on the floor. Adam and Megan would explain that the children had just eaten or that they had just not had a chance to clean it up, but there were times when the food buildup on the floor was such that Young told them that they had to steam clean the

carpet. Just before J.W. and A.W. returned to the home, Young also had to help Adam and Megan develop a chore list so that every person in the household—both parents and children—would know exactly what they were responsible for each day. Young stated that she explained to Adam and Megan several times that if the house continued to stay dirty, then the children would have to be removed again. Young also warned Adam and Megan that another removal of the children would more than likely result in their parental rights being terminated because they had already worked the services offered by the Department.

Young testified that in May 2011, the Department dismissed the case but continued performing periodic home checks because of ongoing concerns. When Young made these periodic visits, she had to tell Adam and Megan to clean the home. Young additionally explained, "[Adam and Megan] can't seem to identify that there are unnecessary risks in their lives in their home." Young stated that Adam and Megan would address risks when the risks were pointed out to them but never did anything *until* the risks were pointed out. For instance, on two occasions, S.W. had burned her hands on a stove because Adam and Megan continued to use the stove even though the glass on the stove door had fallen out and had broken. Young had to explain to Adam and Megan that they could not continue to use a stove that was a threat to their child. On another occasion, the air conditioning went out in the home when it was almost summertime. Adam and Megan told the landlord that it needed to be fixed but otherwise did nothing to resolve the issue

even though the children were at risk of heatstroke and death. Therefore, the Department had to intervene.

Megan acknowledged that, on the day that the children were removed from the home for the second time, she told the Department investigator who had come to her home that she was not going to let him inside because "the house was dirty." When asked by the Department's counsel if the word "dirty" really described the condition of the home at that time, Megan replied, "No." Megan stated that the home was actually "[n]asty," and she admitted that it posed a danger to the children. Megan then identified photographs taken of the home on the day of the second removal of the children and affirmed that the photographs fairly and accurately depicted the condition of the home on that day. The photographs, which were admitted as evidence, show thousands of roaches on the ceiling, holes in the walls, a bed black from dirt, and food lying in the yard. Adam also admitted that the concrete floor was nasty, disgusting, and not sanitary for the children at that time.

Megan conceded that the home had deteriorated "over an extended period of time" into the condition shown in the photographs. Megan stated that she would tell herself every day that she needed to do something about the condition of the home, but when asked by the Department's counsel if it was fair to say that the "circumstance with the filth in your house went on for several years," Megan replied, "Yes." Megan also admitted that she knew that the children were in the home in that condition every day

and that the children were being harmed by the living conditions. Again, however, when asked by the Department's counsel what she did on a daily basis during the approximately five hours between when her children went to school and when she left for work, she replied that she would run errands or "just sit at home" in the filth. Megan explained that she and Adam were simply not good at cleaning. Adam further admitted that he was not working and therefore home all the time. When asked by the Department's counsel why he could not keep the floor clean enough for the children to live on, Adam explained that he was "running after" M.W. Jr., who had a lot of behavioral issues.

Young testified that she did not see Adam's and Megan's home in person at the time of the second removal of the children, but after being shown the photographs taken at the time of the second removal, Young stated that the condition of the home at the time of the second removal was "[a]lmost identical with a few exceptions" to the condition that the home had been in in 2010 when the Department had to get involved. Young specifically affirmed that the clutter in the front yard, the holes in the walls, and the dirty bed depicted in the photographs taken at the time of the second removal were there "in the very beginning as well." The only difference that Young noted was that the "filthy" concrete floor shown in the photographs taken at the time of the second removal had been "carpet that had a huge bare patch in it that had to be steam cleaned" in 2010.

In addition to the condition of the home, Megan admitted that the school had

contacted her and Adam about the cleanliness of the children. Adam acknowledged that he had gone to the school for J.W. because she had reported to the school that she did not have any feminine products and that he and Megan would not let her take a shower at home. Adam also conceded that A.W. had an issue of wearing dirty clothes to school "one time." But Adam denied the allegations J.W. reported to the school, testifying that J.W. bathed daily and explaining that Megan bought feminine products for J.W. but that J.W. would not carry them to school. Megan also attested that they were working with the children on their hygiene and that J.W. was "doing her hygiene before she left the house" for school. Megan stated, "[B]ut between the house and the school, I don't know what happened."

Psychologist Dr. James Shinder testified that he looks at eight factors in determining whether a home is unsanitary to such an extent that it is a danger to the health and safety of the children living in it. After considering the factors in this case, Dr. Shinder concluded that Adam's and Megan's home was unsanitary such that it was dangerous to the health and safety of the children living in it. Dr. Shinder explained that the hygiene and cleaning habits in the home were not acceptable. He pointed to the "extensive documentation" that the children were being bathed at school and to the problems with hygiene products. He also noted the "extensive documentation" of roaches and other insects in the home. He pointed to the trash accumulation and the

home being "heavily infested" with ferret feces.[2] He also noted that the structure of the home was decaying and that there were some wiring and plumbing problems. Dr. Shinder thus concluded that the home had "many, many risk factors" and was not only dangerous because of the potential for accidental injury to the children but also because of the great potential for illness to the children.

Adam and Megan argue that Dr. Shinder should not have been allowed to testify. Rule of Evidence 702, however, allows "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702. Dr. Shinder was therefore permitted to provide expert opinion testimony. *See id.* Adam and Megan also question the credibility of Dr. Shinder's testimony. But we do not weigh credibility issues that depend on the appearance and demeanor of the witnesses, for that is solely the province of the factfinder. *See In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Even when credibility issues appear in the record, we defer to the factfinder's determinations as long as they are reasonable. *See id.* The trial court, as the factfinder, was thus entitled to believe Dr. Shinder's testimony.

Considering all of the evidence in the light most favorable to the trial court's

[2] Adam and Megan testified that they had two ferrets in the home at the time of the second removal of the children.

findings, we believe that a reasonable factfinder could have formed a firm belief or conviction that Adam and Megan knowingly placed or knowingly allowed E.W., C.W., and S.W. to remain in conditions or surroundings that endangered their physical or emotional well-being. Also, considering the evidence as a whole, we believe that a factfinder could have reasonably formed a firm belief or conviction that Adam and Megan knowingly placed or knowingly allowed E.W., C.W., and S.W. to remain in conditions or surroundings that endangered their physical or emotional well-being. Accordingly, we believe that the evidence is legally and factually sufficient to establish that Adam and Megan violated Family Code subsection 161.001(b)(1)(D). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D); *J.F.C.*, 96 S.W.3d at 266.

Only one predicate violation under subsection 161.001(b)(1) is necessary to support an order of termination when there is also a finding that termination is in the children's best interest. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003). Therefore, we need not address whether we believe that the evidence is legally and factually sufficient to establish that Adam and Megan violated Family Code subsection 161.001(b)(1)(E). We turn to the sufficiency of the evidence to establish that termination was in the children's best interest.

In determining the best interest of a child, a number of factors have been considered, including (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. *Holley*, 544 S.W.2d at 371-72. This list is not exhaustive, but simply indicates factors that have been or could be pertinent. *Id.* at 372. The *Holley* factors focus on the best interest of the child, not the best interest of the parent. *Dupree*, 907 S.W.2d at 86. The goal of establishing a stable, permanent home for a child is a compelling state interest. *Id.* at 87. The need for permanence is a paramount consideration for a child's present and future physical and emotional needs. *In re S.H.A.*, 728 S.W.2d 73, 92 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (en banc).

The Desires of the Children—E.W., C.W., and S.W. were eight, seven, and five years old, respectively, at the time of the termination trial. None of the three testified. When children are too young to express their desires, the factfinder may consider that the children have bonded with the foster family and are well-cared for by them. *In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Department Caseworker Shindera Jackson testified that E.W. and C.W. call their foster mother "mama" and are very bonded to her and her family. E.W. and C.W. enjoy being with their foster family and participate in outings with them. When Jackson visits them, E.W. and C.W. are excited to show her their rooms and how clean they are being.

E.W. and C.W. also talk to Jackson about school, their good behaviors, and how happy they are.

Megan, on the other hand, testified that she feels like the children are bonded to her and Adam. Sherry Mills, an employee of Lonestar Social Services who monitored the visitations between Adam, Megan, and the children during the pendency of the case, testified that she also feels like the children love their parents and are bonded to them. Mills stated that S.W.'s poor behaviors have continued, however, even though Megan has told S.W. during visitations that if she wants to come home, then she has to behave herself. S.W.'s foster mother testified that she and S.W. "have a rough time after visits." After visits, S.W. will call her foster mother names, refuse to get out of the car, bang on the wall, make noise, and scream "at the top of her lungs."

The Emotional and Physical Needs of the Children Now and in the Future and the Emotional and Physical Danger to the Children Now and in the Future—We have already discussed above the evidence establishing that Adam and Megan knowingly placed or knowingly allowed E.W., C.W., and S.W. to remain in conditions or surroundings that endangered their physical or emotional well-being. And evidence of past misconduct or neglect can be used to measure a parent's future conduct. *See Williams v. Williams*, 150 S.W.3d 436, 451 (Tex. App.—Austin 2004, pet. denied); *Ray v. Burns*, 832 S.W.2d 431, 435 (Tex. App.—Waco 1992, no writ) ("Past is often prologue."); *see also In re V.A.*, No. 13-06-00237-CV, 2007 WL 293023, at *5-6 (Tex. App.—Corpus Christi Feb. 1, 2007, no pet.)

(mem. op.) (considering parent's past history of unstable housing, unstable employment, unstable relationships, and drug usage). Often, the best interest of the child is infused with the statutory offensive behavior. *In re W.E.C.*, 110 S.W.3d 231, 240 (Tex. App.—Fort Worth 2003, no pet.). Particularly when the evidence shows that the parental relationship endangered the child's physical or emotional well-being, evidence of the parental misconduct leading to the removal and subsequent termination should be considered when reviewing the best interest of the child. *In re C.C.*, No. 13-07-00541-CV, 2009 WL 866822, at *10 (Tex. App.—Corpus Christi Apr. 2, 2009, pet. denied) (mem. op.). The trial court, as the factfinder, therefore could have inferred that Adam's and Megan's past endangering conduct might recur in the future if E.W., C.W., and S.W. were returned to the home. *See In re J.D.*, 436 S.W.3d 105, 119 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *In re B.K.D.*, 131 S.W.3d 10, 17 (Tex. App.—Fort Worth 2003, pet. denied).

Adam and Megan testified that despite their past conduct, things would nevertheless be different this time if E.W., C.W., and S.W. were allowed to return. Both Adam and Megan stated that they believe that it would be easier with only the three children in the home. Megan said that she had some postpartum depression issues before but that those issues are in the past. Megan also explained that things have changed this time because both she and Adam are working, their apartment is very clean, and they have adequate sleeping arrangements for the children. Megan now has a chore list and is trying to arrange her work schedule so that both she and Adam are home in the

evenings when the children are home from school and when they can all work on the cleaning together. They "have the game plan worked now" and have "the stuff to where we're going to have it to apply."

But Adam acknowledged at trial that he had multiple CPS cases for lack of cleanliness back when K.W. and M.W. Jr. were the only children in his home. When asked why he thinks it would be easier with fewer children in the home this time, he replied that he has learned a lot and that he now knows how to better apply things. Megan explained, however, that she and Adam had "the stuff" to apply before and did not apply it. When Megan was asked if everyone is supposed to just take her word that she is going to apply "the stuff" this time, she replied, "Yes." But both Adam and Megan admitted that they have established a pattern of reverting to the dirty home after a period of time. Megan also acknowledged that they still have one of the ferrets in the home. The ferret does not have a cage; he sleeps in "a little spot in a closet" and otherwise roams the house.

Dr. Shinder provided his opinion, doubting that things would be different this time if E.W., C.W., and S.W. were allowed to return to Adam's and Megan's home. The Department's counsel had the following exchange with Dr. Shinder:

> Q. Now, we've heard that they've had additional counseling with other counselors and that they've now seen the light. In your opinion based on your experience with these two people, is that a likely scenario?
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> A. As I said earlier, some of the same references that I got in 2015 about keeping [the] house cleaner and working harder at it were almost

verbatim to the 2009 references. So I would have to say given the length of time that this situation has gone on and the seriousness of the problems, I have no basis to think that further effort would be put forth.

[Megan] seems to have a much lower level of energy, and I don't know if it's connected with a mild degree of depression or what, but she just doesn't have the energy level to really keep up a home after working full time it seems.

Q. And if they were still maintaining a home with, at least, one ferret in the home, would that be another issue that could indicate that they might not be serious about it?

A. I don't want to take away somebody's favorite pet, but when you have to make a choice between the favorite pet and your children and somebody keeps the favorite pet, I have to say, then, the priority is not with the children.

Dr. Shinder further testified about the emotional damage that could result for the children if they were returned to the home and the condition of the home deteriorated again like it had in the past. Dr. Shinder stated that the deterioration compromises children's self-perspective, their learning and earning potential, and their ability to relate to other children. Children may be alienated in social situations because of poor hygiene. Children also become disappointed, which diminishes their energy and may cause them to develop fears. Finally, Dr. Shinder stated, "There's no way to avoid the anger in a child who has to live in deplorable circumstance[s]."

The Parental Abilities of the Individuals Seeking Custody and the Programs Available to Assist These Individuals—Again, we have already discussed the evidence establishing that Adam and Megan knowingly placed or knowingly allowed E.W., C.W., and S.W. to

remain in conditions or surroundings that endangered their physical or emotional well-being. And in reviewing the parental abilities of a parent, a factfinder can consider the parent's past neglect or past inability to meet the physical and emotional needs of their children. *See D.O. v. Tex. Dep't of Human Servs.*, 851 S.W.2d 351, 356 (Tex. App.—Austin 1993, no writ), *disapproved of on other grounds by J.F.C.*, 96 S.W.3d at 267 & n.39. The trial court could also consider Dr. Shinder's testimony that Megan had been a Mexia State School employee who provided direct care to disabled children and adults. He said that Megan had therefore been through training and "had advantages that other people don't even have in that regard." Dr. Shinder opined that it was therefore "obvious" that Megan did not take cleaning the house and maintaining the children's hygiene seriously "given the repeated nature of the problems and the implication of living in filth and high-risk health problems."

Adam and Megan argue that they fully complied with the requirements of the service plan and that the trial court was therefore required to return the children to them. But a parent's compliance with a service plan does not preclude a finding that termination is in the child's best interest. *In re A.C.B.*, 198 S.W.3d 294, 298 (Tex. App.—Amarillo 2006, no pet.). A parent's performance under a service plan is merely something that the factfinder should consider in determining the best interest of the child. *Id.* And it is questionable how much the evidence showing that Adam and Megan complied with the service plan supports a finding that it would be in the children's best interest to be

returned to their home. The evidence in this case also shows that after participating in services offered by the Department on a prior occasion, Adam and Megan reverted to living in an unsanitary condition after a period of time.

Adam and Megan also argue that the trial court's appointment of Adam as possessory conservator of J.W. and A.W. supports a finding that his parental rights should not have been terminated as to E.W., C.W., and S.W. But J.W. and A.W. are older than E.W., C.W., and S.W. And the trial court's order appointing Adam as possessory conservator of J.W. and A.W. limits Adam's possession of J.W. and A.W. to times mutually agreed to in advance by Adam and his former wife and, in the absence of mutual agreement, to visitation "for not less than two (2) hours during alternating weeks and at times mutually agreed between [A.H.] and [Adam]." The order further provides, "All periods of visitation by [Adam] shall be supervised by [A.H.]."

The Plans for the Children by the Individuals or by the Agency Seeking Custody and the Stability of the Home or Proposed Placement—The factfinder may compare the parent's and the Department's plans for the children and consider whether the plan and expectations of each party are realistic or weak and ill-defined. *J.D.*, 436 S.W.3d at 119-20.

A parent's failure to show that he or she is stable enough to parent children for any prolonged period entitles the factfinder "to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption." *In re B.S.W.*, No. 14-04-00496-CV, 2004 WL 2964015, at *9 (Tex. App.—

Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem. op.). A factfinder may also consider the consequences of its failure to terminate parental rights and that the best interest of the children may be served by termination so that adoption may occur rather than the temporary foster-care arrangement that would result if termination did not occur. *D.O.*, 851 S.W.2d at 358. The goal of establishing a stable, permanent home for children is a compelling state interest. *Dupree*, 907 S.W.2d at 87.

Jackson testified that she believes that it is in E.W.'s and C.W.'s best interest to remain in their foster home and that their foster mother would like to adopt them. There was not a potential long-term placement for S.W. at the time of trial because of her behavior; however, the director of the daycare where S.W. attends had expressed an interest in adopting her. At the time of trial, the daycare director and her husband were still thinking about it. Jackson stated that these potential placements can provide a safe, stable, and clean environment for the children and can ensure that the children's medical needs are met.

As stated above, Adam and Megan testified that despite their past conduct, things would be different this time if E.W., C.W., and S.W. were allowed to return. Megan explained that both she and Adam are working, their two-bedroom apartment is very clean, and they have adequate sleeping arrangements for the children. Megan also mentioned that if the children were returned, they would look for a three-bedroom home. But again, both Adam and Megan admitted that they have established a pattern of

reverting to the dirty home after a period of time. And Dr. Shinder's testimony doubted that things would be different this time if E.W., C.W., and S.W. were allowed to return to Adam's and Megan's home.

Acts or Omissions of the Parent that May Indicate the Existing Parent-Child Relationship Is Not a Proper One and Any Excuse for the Acts or Omissions of the Parent—The evidence discussed above indicates that Adam's and Megan's relationship with the children is not a proper one. Any excuses for Adam's and Megan's acts or omissions have been discussed above.

Considering all the evidence in relation to the *Holley* factors in the light most favorable to the trial court's best-interest finding, we believe that a reasonable factfinder could have formed a firm belief or conviction that termination of Adam's and Megan's parental rights was in the children's best interest. Viewing all the evidence in relation to the *Holley* factors, we also believe that a reasonable factfinder could have reasonably formed a firm belief or conviction that termination was in the children's best interest. Accordingly, we believe that the evidence is legally and factually sufficient to establish that termination was in the children's best interest. Adam's and Megan's complaints about the sufficiency of the evidence are therefore not arguable grounds to advance in this appeal.

Next, Adam and Megan contend in their *pro se* response that their trial counsel provided ineffective assistance. Their trial counsel, however, was retained, and several

of our sister courts have held that an ineffective-assistance-of-counsel claim does not lie in a parental termination case where counsel is retained. *See In re Z.C.*, No. 12-15-00279-CV, 2016 WL 1730740, at *2 (Tex. App.—Tyler Apr. 29, 2016, no pet.) (mem. op.); *In re J.B.*, No. 07-14-00187-CV, 2014 WL 5799616, at *5 (Tex. App.—Amarillo Nov. 6, 2014, no pet.) (mem. op.); *In re V.G.*, No. 04-08-00522-CV, 2009 WL 2767040, at *12 (Tex. App.—San Antonio Aug. 31, 2009, no pet.) (mem. op.); *see also In re C.J.*, No. 04-14-00663-CV, 2015 WL 1089660, at *2 (Tex. App.—San Antonio Mar. 11, 2015, no pet.). Furthermore, to overcome the strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). When the record is silent regarding the reasons for counsel's conduct, a finding that counsel was ineffective would require impermissible speculation by the appellate court. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)). The record is silent in this case as to trial counsel's reasons for his actions and decisions. To conclude that trial counsel was ineffective would therefore call for speculation, which we will not do. *See Jackson*, 877 S.W.2d at 771; *Gamble*, 916 S.W.2d at 93. Adam's and Megan's complaints about ineffective assistance of counsel are therefore not arguable grounds to advance in this appeal.

Finally, Adam and Megan complain in their *pro se* response that the emergency removal of the children was done illegally; however, their complaint is moot because the trial court has entered a final order of termination in this case. *See L.F. v. Dep't of Family & Protective Servs.*, No. 01-10-01148-CV, 2012 WL 1564547, at *14 (Tex. App.—Houston [1st Dist.] May 3, 2012, pet. denied) (mem. op.). Adam's and Megan's complaints about the emergency removal of the children are therefore not arguable grounds to advance in this appeal.

Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to determine whether the case is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346, 349-50, 102 L.Ed.2d 300 (1988). An appeal is "wholly frivolous" or "without merit" when it "lacks any basis in law or fact." *McCoy v. Court of Appeals*, 486 U.S. 429, 439 n.10, 108 S.Ct. 1895, 1902 n.10, 100 L.Ed.2d 440 (1988).

We have reviewed the entire record and counsel's brief and have found nothing that would arguably support an appeal. *See Bledsoe v. State*, 178 S.W.3d 824, 827-28 (Tex. Crim. App. 2005) ("Due to the nature of *Anders* briefs, by indicating in the opinion that it considered the issues raised in the briefs and reviewed the record for reversible error but found none, the court of appeals met the requirement of Texas Rule of Appellate Procedure 47.1."); *Stafford*, 813 S.W.2d at 509. Accordingly, we affirm the trial court's order of termination.

We deny counsel's motion to withdraw in accordance with *In re G.P.*, 503 S.W.3d

531, 534-36 (Tex. App.—Waco 2016, pet. denied). If Adam or Megan, after consulting with counsel, desires to file a petition for review, counsel is still under a duty to timely file with the Texas Supreme Court "a petition for review that satisfies the standards for an *Anders* brief."[3] *See In re P.M.*, 520 S.W.3d 24, 27-28 (Tex. 2016).

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray concurring with a note)*
Affirmed
Opinion delivered and filed September 13, 2017
[CV06]

* (Chief Justice Gray concurs in the judgment of the Court to the extent it affirms the trial court's judgment of termination of parental rights. A separate opinion will not issue.)

[3] We do not address whether counsel's duty requires the filing of a petition for review or a motion for rehearing in the Texas Supreme Court in the absence of the client's professed desire to do so in *Anders* proceedings.