NUMBER 13-17-00154-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF C.G.B., A CHILD

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

"Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties and powers normally existing between them." *In re L.J.N.*, 329 S.W.3d 667, 671 (Tex. App.—Corpus Christi 2010, no pet.) (citing *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). While parental rights are of a constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). "A parental rights termination proceeding encumbers a value 'far more precious than any property right' and is consequently governed by special

rules." *In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012). "Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the 'death penalty' of civil cases." *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring). "Whereas most termination cases result from [an investigation] and involve the Department [of Family and Protective Services], which has standards and guidelines to follow prior to attempting termination, this case was not [referred to the Department] and is a private dispute." *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.).

A court may order the termination of a parent-child relationship if it shown by clear and convincing evidence that a parent has met at least one of the statutory factors listed in section 161.001 of the family code, coupled with an additional finding by clear and convincing evidence that termination is in the child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)–(2) (West, Westlaw through 2017 R.S.); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002) (noting the two-prong test in deciding parental termination and that one act or omission of conduct satisfies the first prong); *In re E.M.N.*, 221 S.W.3d 815, 820–21 (Tex. App.—Fort Worth 2007, no pet.). "Clear and convincing evidence" is defined as the "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West, Westlaw through 2017 R.S.). "This intermediate standard falls between the preponderance of the evidence standard in civil proceedings and the reasonable doubt standard of criminal proceedings." *In re L.J.N.*, 329 S.W.3d at 671. This heightened standard of review is mandated not only by the family code, *see* TEX. FAM. CODE ANN. § 161.001, but also the Due Process Clause of the United States

Constitution. *In re E.N.C.*, 384 S.W.3d 796, 805 (Tex. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)). "It is our obligation to strictly scrutinize termination proceedings and strictly construe the statute in favor of the parent." *In re L.J.N.*, 329 S.W.3d at 673.

I. ISSUES PRESENTED

This accelerated appeal concerns an order terminating appellant LMC's (Mother) parental rights to CGB (Child), her 11-year-old daughter.[1] *See* TEX. R. APP. P. 28.4. By three issues, Mother asserts that: (1) the evidence was factually and legally insufficient to support termination of her parental rights; (2) she was not effectively represented by counsel during the proceedings; and (3) the relief granted by the trial court exceeded the relief requested by the appellees, TB's (Father) and MLB's (Paternal Grandmother) pleadings. We reverse and remand.

II. BACKGROUND

A. Procedural History

Child was born on July 14, 2005. Mother and Father divorced on May 26, 2009. Both parents were appointed joint managing conservators, with Mother designated as the parent entitled to determine the Child's residence. On May 5, 2010, Paternal Grandmother filed a petition in intervention, asking to be appointed sole managing conservator of Child and requesting that Mother be ordered to pay child support. Paternal Grandmother alleged Mother was exhibiting behavior outside of her workplace

[1] Pursuant to rule of appellate procedure 9.8, we will utilize initials or aliases throughout this opinion. *See* TEX. R. APP. P. 9.8 (Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases).

that caused an involuntary mental commitment and that Mother had been hospitalized for mental illness one other time in April 2010. Father was in agreement that Paternal Grandmother should take custody of Child. On May 26, 2010, Paternal Grandmother and Mother were appointed temporary joint managing conservators, with Paternal Grandmother being able to determine Child's residence. Mother was given supervised visitation of Child with Maternal Grandmother as the supervisor. Mother was also ordered to pay child support and to seek psychological help.

Paternal Grandmother filed a motion to modify prior orders on June 25, 2010 claiming that Mother (1) had violated the court's orders by not keeping Paternal Grandmother informed of her current address and employment, (2) went within 100 yards of Child's school, and (3) went within 100 yards of Paternal Grandmother's business. Paternal Grandmother asked for Mother's visitation to cease until further order of the trial court, and after a hearing on the motion in which the trial court deferred its ruling, the trial court added an additional temporary order preventing Mother from texting or calling Paternal Grandmother and Father or exercising visits with Child until further order from the trial court. It appears this was later amended and visitation between Mother and Child resumed.

On August 25, 2011, temporary orders were again modified by the trial court naming Father a joint managing conservator with primary care and Mother as temporary joint managing conservator. Paternal Grandmother was dismissed as a party from the case. Mother's visitation was to be supervised by Father's current spouse, RB (Wife). Mother was ordered to pay child support, continue treatment for mental illness, and attend parenting classes.

On January 10, 2012, after an alleged altercation between Mother, Father, and Wife, Father filed a motion to modify which asked to suspend Mother's visitation and possession rights. In addition, Paternal Grandmother filed an amended motion in intervention and requested to be appointed a joint managing conservator in place of Mother. At the hearing on January 18, 2012, the trial court appointed Father, Mother, and Paternal Grandmother joint managing conservators of Child. Mother was granted visitation to be supervised by Katy Adams, a licensed professional counselor, ordered to pay child support, and ordered to comply with the doctor's recommendations for treating her mental illness.

Subsequently all parties filed various motions to modify, with Mother asking for standard visitation and Father and Paternal Grandmother seeking enforcement of child support and sanctions. On March 4, 2013, Father and Paternal Grandmother were appointed joint managing conservators with Mother being granted possessory conservatorship. Pursuant to modified orders, Mother's visitation was to be supervised by Angela Frost,[2] both parents were ordered to pay a portion of Frost's supervision costs (Mother was to pay $70, while Father was to pay $30 for each visit), and Mother was ordered to pay Father child support.[3]

In early 2014, Father and Paternal Grandmother filed motions to enforce the child support order, while Mother filed motions to modify visitation and the current orders that were in place. Mother filed a notice of nonsuit on November 12, 2014, signed by her

[2] Katy Adams's supervision was cost-prohibitive for Mother at $120.00 per hour, and the parties agreed to Angela Frost as a supervisor based on Father and Paternal Grandmother's recommendation.

[3] Mother had at least thirty-seven visits with Child when Frost was supervising. Each visit cost Mother $70, coming to a total of more than $2,500.00. Mother had previously struggled to afford visitations with Adams and Mother testified about struggling to make ends meet within her household.

former counsel who withdrew that same day. However, Mother's current counsel had filed a notice of appearance in October 2014. In November 2014, a judgment for the child support arrears was also granted by the trial court against Mother.

In April 2015, Mother again filed a motion to modify the current orders. In June 2016, Father and Paternal Grandmother filed their original petition to terminate parental rights, claiming that Mother: (1) left Child with a non-parent with no intent to return; (2) endangered the physical or emotional well-being of Child; and (3) constructively abandoned Child, and that termination was in Child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(A), (E), (N), & (b)(2). Through her counsel, Mother filed an answer to the petition to terminate Mother's rights. In January of 2017, the trial court held a bench trial on the petition to terminate. The trial court found no abandonment by Mother, but found that Mother had violated section (E) of section 161.001(b)(1) and that termination of Mother's parental rights was in the best interest of Child. *See id*.(b)(1)(E) & (b)(2).

B. Trial on the Merits

1. Mother's Witnesses

During the bench trial, Mother called Paternal Grandmother, who testified that she does not want Child to have a relationship with Mother and considered Wife to be Child's mother. She also stated that Child has lived with Father since May 2011 and that Father is a wonderful parent. Paternal Grandmother admitted that Father had a prior criminal history and had attended drug and alcohol rehabilitation programs two times in the past. Paternal Grandmother spoke of an incident where Mother caused a disturbance at Paternal Grandmother's business years prior, but admitted that Father had also

vandalized property at her business previously because he was “sick” with his addictions and had been terminated from his employment at her business. Paternal Grandmother testified that Father currently works for her business and is in a good place because of Wife. Paternal Grandmother also felt that Mother had “too many opportunities,” worked as an exotic dancer at multiple establishments in the local area, posted troubling information on her social media accounts, and had violent tendencies. Paternal Grandmother admitted that she last spoke to Mother in December 2013 and has no idea what Mother does anymore. She was also aware that visitation with Adams was cost-prohibitive for Mother. However, Paternal Grandmother stated Child sees Frost for anxiety and the residual effect of Mother’s “serial abandonment” and believed all of Child’s issues stem from Mother.

Mother’s next witness was Father. Father admitted to being fired in early 2010 for breaking windows at his mother’s business. He stated he was reinstated for work in 2011 and currently works at Paternal Grandmother’s business in a management role. Father believed that Paternal Grandmother liked Mother when he and Mother were first married. Father testified that Mother and Wife also got along well until an incident outside a local sushi restaurant in 2012, where Mother threatened Wife. Father stated he follows the court orders, has not spoken to Mother since 2011 at a visitation with Adams, and has not attempted contact with Mother since 2013. Father testified to a prior DWI conviction, drug use including cocaine, methamphetamines, steroids, alcohol, and prescription medication, and to spending time at substance abuse treatment facilities. He said in 2011 he turned his life to God and “is on a better path.” Father admitted to a relapse with alcohol in 2012, when he was experiencing marital discord with Wife.

Father admitted that Child was living with him when this relapse occurred, but stated he left the home when he consumed alcohol.

Mother called her sister ("Beth") as a witness. Beth stated she visits Mother often and knows Mother misses Child. Beth said Mother is a wonderful parent to her young son, "Bob",[4] and that Mother had truly changed since 2010. Beth also testified regarding an assault that occurred between herself and Mother in early 2013. Beth believed Mother was "drugged" at an outing and that was the cause of the violence between them. Beth testified the assault occurred before Bob was born, and Beth refused to press charges.

Multiple family members and friends of Mother testified regarding her parenting of Bob, although many of them had never met Child. One witness testified that, even though he knew Mother's history, he believed Mother had changed and stated it was "time to re-establish" the relationship because people can "heal and mature." Mother's cousin "Claire" testified and stated that Mother had put her issues behind her and talks about Child frequently. Claire testified that after Maternal Grandfather was in a bad automobile accident, the family became close and had been together frequently. Mother's other cousin, "Mia", stated that Mother was outstanding with Bob and that Mother has a strong family who would "embrace" Child if she was allowed to see Mother. Mia testified that she was not aware of any court orders or past psychiatric issues, but stated she assumed the information Paternal Grandmother's attorney was referring to was not as clear cut as it sounded.

[4] Bob is Mother's three-year-old son of whom she has sole custody. Bob is Child's half-brother.

The Maternal Grandmother spoke of her close relationship with Mother. She feels Mother is a wonderful parent and helps babysit Bob when Mother needs assistance. The Maternal Grandmother stated that she has not seen Child in over three years and everyone in their family misses Child very much. She feels it would be in Child's best interest to spend time with Mother. On cross-examination, the Maternal Grandmother stated she believes Father's family is not allowing visits, she did not know about the prior non-suit filed by Mother, and that the visitation with Child stopped when Bob was born. The Maternal Grandmother testified about how she was appointed to supervise visitation between Mother and Child, but "things"—such as vandalism, property being trashed, and being stalked—started happening around her home after she was appointed by the trial court and she was frightened, so she asked to be removed as the supervisor.

Mother testified that she currently works doing data entry, but formerly worked as an exotic dancer. Mother stated she is current with her child support obligation to Child, and although she has used drugs in the past, she no longer uses. Mother testified that the last time she saw Child was November 2013. Mother stated she showed up to the visitation at Frost's office and Paternal Grandmother was there with Wife. She was pregnant with Bob and felt intimidated by Paternal Grandmother's presence because she believed Paternal Grandmother has problems with her. Mother also talked about her personal issues with Frost and a complaint she filed against Frost with the state licensing board because Frost appeared to be sleeping during the visitation sessions.[5] Additionally, Mother stated that Frost has yelled at her in front of Child and allowed Child

[5] Photos taken by Mother that allegedly depict Frost sleeping were admitted into evidence.

to be dropped off late and picked up early from visitation, depriving Mother of her full time with Child.

Mother claimed her "soul was tortured not seeing [Child]." She also testified that she had never been involved with child protective services regarding Bob and the assault with her sister, Beth, occurred before she was pregnant with Bob. Mother said it hurt her that Paternal Grandmother considered Wife to be Child's mother and Mother would have never tried to cut Father out of Child's life. Mother believed that there was no need for Paternal Grandmother to be a conservator for Child anymore. Mother also testified that she was seeing Dr. Raul Capitaine, a psychiatrist, for her mental issues and took medication for the anxiety she suffered being away from Child.

On cross-examination, Paternal Grandmother's counsel introduced tax returns and questioned Mother's income stream. Mother stated that Bob's father assisted her with bills when necessary. Regarding her erratic behavior, Mother explained that in 2010, she was having a breakdown. Mother admitted to going to Paternal Grandmother's place of business and sending harassing voicemails to Father. Mother stated she attended therapy twice a month and Alcoholics Anonymous meetings following those incidents. Mother also relayed that the altercation between Father, Wife, and herself was in relation to Child telling Mother she was not being fed. Mother testified that she did not visit Child for six months when Adams was the appointed supervisor because she could not afford the visitation fee and she stopped visiting with Frost to avoid confrontations with Father's family and Frost.

Father's counsel questioned Mother regarding the 2014 motion to modify she filed asking the trial court to remove Frost from supervising visitation and her filing of the notice

of non-suit. Mother stated she was not aware of the non-suit and hired her current counsel to get another hearing on her motion to modify. Mother also admitted she was aware of the court orders and the restrictions and stated that is why she felt she could not be around Child. Mother stated she thought calling or writing Child would violate the no-contact order with Father's family and that she did not want to cause trouble. Mother stated her only criminal conviction was for obstruction of a highway, even though she was asked about an incident in 2015, where a former friend tried to assault her and the police were called. Mother explained her friend had recently been released from prison and needed a place to stay, so she tried to help her friend out. However, after the incident, Mother evicted her friend.

2. Father and Paternal Grandmother's Witnesses

During Paternal Grandmother and Father's case-in-chief, counsel called Frost to testify. Frost explained she was a licensed professional counselor with a doctorate in clinical psychology. Frost stated she was an expert in traumatology and was certified by the trial court. Frost explained she was approached by Father to see Child and supervise visitations with Mother. Frost testified she was reading, not sleeping, in the photos taken by Mother. Frost said she supervised Mother and Child's visits for nine months, and at the last visit, Mother handed over a sack for Child, touched her stomach,[6] and said she was going to the hospital. Frost testified that Mother also gave her a letter that same day, which related to the grievance Mother filed. Frost relayed that she has not spoken to Mother since that day and would not be willing to supervise visitation with

[6] Mother testified that she was well into her pregnancy by this time and felt that she was having contractions. Bob was born a month later.

Mother if it was reinstated.

Frost began seeing Child again for counseling in 2015 due to Child speaking about not seeing her Mother and the family's concern over Child's feelings of abandonment. Frost said her goal during counseling was to check on Child's emotional health, and when she asked if Child missed or thought about Mother, Child responded not until after Child's birthday, and that Child then cried. Frost claimed Child cried because she was not remembered by Mother on her birthday. Frost stated that the goal of counseling was to raise Child's self-esteem. When asked about the visitations between Mother and Child, Frost relayed that Mother would grab Child and hold her on the sofa when the visits were ending. Frost believed that Mother grabbing Child in that manner was very traumatic and constituted Child being held against her will because Frost stated she could tell Child wanted to be with Wife. Frost did not believe the lack of visitation between Mother and Child has adversely affected Child. Child has told Frost that she does not want to think about missing Mother and does not know how she would feel about reconciling with Mother. Child wrote feelings down on paper and spoke to Frost about it. Frost believed Child has no interest in reunification with Mother because she had a fear of being left. Frost testified that the sporadic visits had affected Child's emotional well-being, that allowing visits would be detrimental and dangerous, and Child would feel like she did not count if Mother was allowed to come and go in Child's life. Frost did not recommend visitation, believed Child would not regret termination, and stated that nothing would help Child if Mother was allowed back into Child's life.

On cross-examination, Frost admitted that Mother's complaint against her made her angry and that she took it personally. Frost also disputes that she slept through any

visitation between Mother and Child. Even though she testified that she only spoke to Paternal Grandmother's counsel prior to the hearing, Mother's counsel showed Frost an e-mail sent to her by Paternal Grandmother to help with Frost's testimony, which she admitted she read. Frost stated Child seemed "exasperated" by being asked about her feelings regarding Mother. Frost also testified that she supervised thirty-seven visits with Mother and Child.

3. Trial Court's Ruling

At the close of evidence, the trial court stated:

> You know, this has been one of the most difficult cases for the court. I have really struggled with this case with the options that are available to the court.
>
> . . . .
>
> Therefore, the court finds by clear and convincing evidence that [Mother] engaged in conduct which endangered the emotional well-being of the child. Looking at the totality of the circumstances, [Mother] was arrested. She has abandoned [Child] for the last three years. She has told [Child] that her father and wife were getting a divorce, more multiple arrests, public intoxications, all of these actions the court believes that this conduct endangered the emotional well-being of [Child].
>
> . . . .
>
> This is probably one of the most emotional decisions I have ever made. So don't think I am not [sic] taking it lightly.

The trial court ordered Mother's parental rights terminated on statutory ground E and in the best interest of Child. *See id*. This appeal followed.

III. SUFFICIENCY CHALLENGE

By her first issue, Mother challenges the legal and factual sufficiency of the evidence to terminate her parental rights.

A. Standard of Review

In a legal sufficiency review, we look at all of 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. *In re J.F.C.*, 96 S.W.3d at 266. We "must consider all of the evidence, not just that which favors the verdict." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Furthermore, we must assume that the factfinder resolved disputed facts in favor of its findings if a reasonable factfinder could do so, and we disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *In re J.F.C.*, 96 S.W.3d at 266. If, after conducting a legal sufficiency review, we determine that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude that the evidence is legally insufficient and render judgment in favor of the parent. *Id*.

We review challenges to the factual sufficiency of the evidence in a termination proceeding by giving "due deference to a jury's factfindings," and we do not "supplant the jury's judgment" with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam). In our review, we should "inquire 'whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the [] allegations'" from the entire record. *Id*. (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)) (editorial marks in original). "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*. However, in applying this standard, we must not be so rigorous in our analysis that the only fact findings that could withstand review are those established

beyond a reasonable doubt. *Id*.

B. Applicable Law and Discussion

Applying the applicable standards of review for sufficiency of the evidence, we examine all the evidence presented during the termination hearing. *See J.F.C.*, 96 S.W.3d at 266.

1. Section 161.001(b)(1)(E)

Section 161.001(b)(1)(E) requires a showing 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." TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Under subsection (E), endangerment encompasses "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). "Instead, endanger means to expose the child to loss or injury or to jeopardize his emotional or physical well-being." *Id*. The trial court must determine whether "evidence exists that the endangerment of the child's physical well-being was the direct result of Appellant's conduct, including acts, omissions, or failures to act." *In re M.E.-M.N.*, 342 S.W.3d 254, 262 (Tex. App.—Fort Worth 2011, pet. denied). "It is not necessary that the parent's conduct be directed at the child or that the child actually be injured; rather, a child is endangered when the environment or the parent's course of conduct creates a potential danger which the parent is aware of but disregards." *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see In re R.S.-T.*, No. 04-16-00724-CV, ___ S.W.3d ___, ___, 2017 WL 2124484, at *13–14 (Tex. App.—San Antonio May 17, 2017, no pet.) (regarding what the trial court can consider

under subsection E for termination).

Termination under subsection 161.001(b)(1)(E) "must be based on more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required." *In re C.A.B.*, 289 S.W.3d 874, 883 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Courts can consider conduct that did not occur when the child was present, including conduct before birth or after the child was removed from the parent's care. *See Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

The trial court found Mother committed conduct endangering the emotional well-being of Child. The bulk of the evidence presented to the trial court regarding bad behavior on the part of Mother occurred years prior. However, Mother did admit to not seeing or visiting Child since 2013. Mother filed documents to modify the visitation arrangements, but different events delayed an outcome to the modifications requested. Child demonstrated through a letter in 2016 that she felt "hurt" and "betrayed" by Mother's lack of visitation in her life. "A fact finder may infer that a parent's lack of contact with the child and absence from the child's life endangered the child's emotional well-being." *In re R.A.G.*, No. 08-16-00178-CV, ___ S.W.3d ___, ___, 2017 WL 105131, at *3 (Tex. App.—El Paso Jan. 11, 2017, no pet.).

Because of the high standard of evidence required in parental termination cases, legal sufficiency requires this Court to look "at all of the evidence in the light most favorable to the finding to determine whether a reasonable finder of fact could have formed a firm belief or conviction that its finding was true." *See In re J.F.C.*, 96 S.W.3d at 266. "We must consider all of the evidence, not just that which favors the verdict."

In re J.P.B., 180 S.W.3d at 573. Mother's lack of visitation for an extended period of time was sufficient evidence to support a legally sufficient finding based on section 161.001(b)(1)(E). *See* TEX. FAM. CODE. ANN. § 161.001(b)(1)(E). Based on the totality of the evidence presented, we hold the evidence was legally sufficient. *See In re J.F.C.*, 96 S.W.3d at 266.

2. Best Interest of the Child

Having found sufficient evidence to support section 161.001(b)(1)(E), we next determine if there was clear and convincing evidence that termination of Mother's parental rights was in the children's best interests. *See* TEX. FAM. CODE. ANN. § 161.001(b)(2); *In re J.F.C.*, 96 S.W.3d at 261. We must decide how to "reconcile 'a parent's desire to raise [the] child with the State's responsibility to promote the child's best interest.'" *In re O.R.F.*, 417 S.W.3d 24, 39 (Tex. App.—Texarkana 2013, pet. denied) (citing *In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012)). "There is a strong presumption that a child's interest is best served by preserving the conservatorship of the parents; however, clear and convincing evidence to the contrary may overcome that presumption." *Id*. "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.).

In deciding what is in the "best interest of the child," we look to the following factors, known as the *Holley* factors, to make a proper determination. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The *Holley* factors include, but are not limited to:

> (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 to promote the best interest of the child, (6) the plans for the child by these individuals

> or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent.

In the Interest of B.R., 456 S.W.3d 612, 615–16 (Tex. App.—San Antonio 2015, no pet.) (quoting *Holley*, 544 S.W.2d at 371–72). "These factors are not exhaustive; some listed factors may be inapplicable to some cases; other factors not on the list may also be considered when appropriate." *In re D.C.*, 128 S.W.3d 707, 716 (Tex. App.—Fort Worth 2004, no pet.). "Furthermore, undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest of the children." *Id*. "On the other hand, the presence of scant evidence relevant to each *Holley* factor will not support such a finding." *Id*. "Additionally, the Family Code lists thirteen similar factors for determining the parents' willingness and ability to provide a safe environment." *In re J.I.T.P.*, 99 S.W.3d 841, 846 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing TEX. FAM. CODE ANN. § 263.307 (West, Westlaw though 2017 R.S.)).

In evaluating the *Holley* factors, we look at the following:

(a) the desires of the child

Child was eleven years old at the time of trial. Father and Wife provide a good, stable home for her, and Mother does not dispute that. Testimony from multiple witnesses spoke of how Child is attached to her family and thriving in her current environment. Testimony from Mother's witnesses dealt more with her ability to see Child and become a larger part of her life, not necessarily removing Child from her current environment. Mother expressed that she wants Child to live with her eventually and can provide for Child financially, but also stated that she would never try to remove Father

from Child's life. Frost testified that Child felt abandoned and heartbroken by Mother not being a steady fixture in her life; but it was Frost's opinion that Child did not want a relationship with Mother.

We do note that although it is apparent from the record that Child spoke with both the trial court and amicus attorney, this Court was not provided with any record of what those discussions entailed. The trial court appeared to weigh the Child's statements heavily in making its determination. "Where we have only a partial record of the trial proceedings, we presume that the omitted portions support the trial court's ruling. This presumption specifically applies in family law cases where the judge conducts interviews in chambers with a minor." *Long v. Long* 144 S.W.3d 64, 69 (Tex.App.—El Paso 2004, no pet.); *Voros v. Turnage,* 856 S.W.2d 759, 763 (Tex.App.—Houston [1st Dist.] 1993, writ denied) (holding that where complaining party failed to request a record of a child in chambers, the reviewing court will presume that the evidence is sufficient to support the judge's findings); *Ohendalski v. Ohendalski,* No. 09–05–222–CV, 2006 WL 2788600, at *5 (Tex.App.—Beaumont Sept.28, 2006, no pet. h.) (presuming evidence from unrecorded in chambers interview supports judge's findings and finding no abuse of discretion). Based on the trial court's ruling, we must presume that the in chambers testimony from Child would support the determination by the trial court. This factor would weigh in favor of termination.

(b) the emotional and physical needs of the child now and in the future
(c) the emotional and physical danger to the child now and in the future

The emotional and physical needs of the children are of paramount concern. There was ample testimony that Child is thriving in her current home with Father. No

party disputes that evidence.

But it is also undisputed that Mother has had issues in the past which are relevant to the best interest issue. The trial court can consider past events in making the determinations of best interest. *See May v. May,* 829 S.W.2d 373, 377 (Tex. App.—Corpus Christi 1992, writ denied) (holding that evidence of past misconduct or neglect permits the inference of likely future misconduct). However, it is similarly undisputed that most, if not all, of Mother's worrisome conduct occurred long in the past, and that since the birth of her second child several years ago, Mother has taken steps to remediate these issues and to better herself as a parent. In the past, Mother had two involuntary mental commitments in 2010; however, Mother also sought mental health treatment and testified she is currently under a doctor's care to treat her anxiety issues. Mother testified to arrests for Class C misdemeanor public intoxication and a misdemeanor obstruction-of-a-highway conviction, and to having conflicts with family and friends. However, each of these incidents occurred at least three years prior to the termination hearing and prior to Mother's pursuit of medical treatment and the birth of her second child.

While Mother has a past history of poor behavior, so does Father. Mother formerly worked as an exotic dancer, admitted to prior use of drugs and alcohol, and admitted to mental health commitments. Father had a conviction for DWI, used multiple drugs, and went to two substance abuse rehabilitation facilities.

Mother exercised visitation with Child when she was allowed to, even when she had to pay to see her Child. Based on testimony presented, Mother had thirty-seven hourly visits with Child under Frost's supervision at $70 a visit, costing Mother over $2,500

to see Child for periods of an hour at a time. Mother experienced financial difficulties and did not always have steady employment. Visitation was disrupted early on between Mother and Child when Mother could not afford the initial supervisor Adams's fee. Following Frost's appointment as supervisor, Mother paid Frost and attended visitation regularly until there were personal issues between Mother and Frost. Mother did not feel comfortable with Frost and filed a motion to modify. Although the delay in hearing the motion to modify was mainly due to Mother's actions regarding her legal counsel, Mother testified she stayed away from Child because she was under the impression that is what the court orders mandated.

To be sure, Child's feelings of abandonment as testified about are relevant to our best-interest analysis. However, when considering all the testimony of the parties involved, it is apparent that Mother did not wholly abandon Child, and that any lack of contact was due, at least in part, to circumstances beyond Mother's control. She has requested additional periods of visitation with Child throughout the pendency of the case. Mother paid fees to visit Child multiple times.

Although Child has been hurt emotionally by the lack of visitation, it has not always been for Mother's lack of effort. Mother has changed her behavior in the last three to four years. Mother has attempted visitation as often as possible. Mother attended thirty seven visitations before having issues with Frost. Although Mother had not visited in over three years, she did have motions to modify on file with the trial court. "Evidence that a person has recently improved her life weighs against a finding that termination is in the best interest of the child." *In re N.L.D.*, 412 S.W.3d at 823. While the trial court can take prior history into account, it should also take into account lack of negative history

and Mother's improved behavior over the last few years. This factor weighs against termination.

(d) the parental abilities of the individuals seeking custody
(e) the programs available to assist these individuals to promote the best interest of the child
(f) the plans for the child by these individuals or by the agency seeking custody
(g) the stability of the home or proposed placement

"A child's need for permanence through the establishment of a 'stable permanent home' has sometimes been recognized as the paramount consideration in a best-interest determination." *Id*. "Therefore, evidence about the present and future placement of the children is relevant to the best-interest determination." *Id*.

As these four factors are related, we will address them together. Normally these factors apply to placements when children are placed in a temporary environment. Here, Child lives with Father full-time and this situation could be a permanent placement. There is no evidence that Father and Wife do not provide Child with an excellent home. Although Mother's motion to modify did ask for Father and Mother to be named joint managing conservators with Mother being allowed to determine residence, Mother also asked for expanded visitation and unsupervised visitation in the alternative. The trial court had multiple options to consider short of termination relating to Child's relationship with Mother. If Mother and Child progress in their relationship, then possibly a change in custody would be something to consider. Child is doing well, extremely stable, and in a loving home. However, no recent evidence was presented to refute Mother's claims on rehabilitation, employment, or an ability to provide a stable house for Child. Although these factors could be said to weigh in favor of termination, they could also be considered

to be neutral given that the "best interest standard does not permit termination merely because a child might be better off living somewhere else." *In re D.M.*, 58 S.W.3d 801, 804 (Tex. App.—Fort Worth 2001, no pet.).

(h) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one

(i) any excuse for the acts or omissions of the parent

Mother made mistakes regarding Child in the past. Father and Paternal Grandmother refer to Mother's past issues as their main support for termination. Mother had problems during the early pendency of this case that continued until 2014. However, since 2014, there was little evidence presented of Mother's bad behavior. Additionally, Mother now has a three-year-old son of whom she has sole custody of. Mother has a residence, even though she has moved frequently in the past. Father points out that Mother is not financially stable because friends and family have helped her with bills in the past. Although it is clear Mother is not as financially stable as Father, there was no testimony or evidence that she is not able to make ends meet.

The amicus attorney presented a report and gave closing arguments in this case. The amicus based her report on interviews she conducted, documentation she reviewed, and a one-time visit to Mother's home to observe Mother and Bob. Although the amicus believed Mother's behavior and food choices were inappropriate for Bob, one visit is not enough to fully understand a parent's behavior. The amicus also relied on information that was not presented as evidence to the trial court during the trial, such as meeting with Child and reviewing law enforcement incident reports not presented during the bench trial. Even if a parent's "behavior may reasonably suggest that a child would be better off with a new family, the best interest standard does not permit termination merely because a

child might be better off living elsewhere." *In re W.C.*, 98 S.W.3d 753, 766 (Tex. App.—Fort Worth 2003, no pet.).

Although Father is in a better place financially, Father and Mother have both had substantial issues, such as drug and alcohol abuse, criminal convictions, and commitments to rehabilitation and mental facilities. Father has improved his life, but also had a relapse with alcohol abuse while Child was in his custody. Mother admits to her previous issues, but has made dramatic improvements. Mother testified that she has been free from drugs, has strong family support to help her with Child and Bob, is looking for steady employment, has a home that can accommodate both of her children, and yearns for a relationship with Child. The negative evidence against Mother concerned events at least three years prior to the time of trial. Since Bob's birth, Mother has seemingly changed her life. Father and Paternal Grandmother both admitted they have not spoken to Mother in many years and do not know her current life situation.

Although Mother had acted inappropriately in the past, Mother has made strides to mature and should be entitled to rehabilitating her relationship with Child. The lack of evidence regarding any bad behavior is of note and should be considered as an important factor in determining the best interest of Child.

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." *In re H.R.M.*, 209 S.W.3d at 108. Although Mother has exhibited poor behavior and choices in the past, the progress Mother has made must be considered. *See In re N.L.D.*, 412 S.W.3d at 823. Due to the fact the negative evidence against

Mother occurred at least three years prior to the bench trial, and Mother showed great improvement since the birth of Bob, we hold the evidence was factually insufficient to support a finding that termination was in Child's best interest. Termination of parental rights is a "death penalty" option and not supported by the evidence in this case. *See In re K.M.L.*, 443 S.W.3d 101, 121. We hold the trial court improperly found it was in Child's best interest for termination of Mother's parental rights to occur.

3. Summary

Having concluded the evidence supporting termination under Section 161.001(a)(1)(E) was legally sufficient, but not in the best interest of Child, we sustain Mother's first issue.[7]

IV. CONCLUSION

We reverse the trial court's order of termination and reverse and remand for a new trial.

GINA M. BENAVIDES,
Justice

Delivered and filed the
7th day of September, 2017.

[7] Because we sustained Mother's first issue and it is dispositive, we do not need to address Mother's second and third issues. *See* TEX. R. APP. P. 47.1.