COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

		§	No. 08-22-00038-CV
IN THE INTEREST OF:		§	Appeal from the
G.C.S., JR.,		§	65th District Court
	a Child	§	of El Paso County, Texas
		§	(TC# 2020DCM6512)

O P I N I O N

Appellants T.A. (Mother) and G.S.M. (Father) appeal the trial court's judgment terminating their parental rights to G.C.S., Jr., who is the child who is the subject of the underlying suit.[1] In separate appeals, Mother and Father contend the evidence presented at trial was legally and factually insufficient to support the termination of their parental rights to G.C.S., Jr.[2] We affirm.

I. BACKGROUND

In three settings between December 2021 and February 2022, the trial court presided over

[1] We refer to the parties by aliases, "T.A." and "G.S.M.," respectively. *See* TEX. R. APP. P. 9.8(b)(2). The child subject of this suit is referred to as "G.C.S., Jr."

[2] The factual background of this case includes references to a separate termination case filed in the 65th District Court of El Paso County, trial cause number 2020DCM5405. In that case, the Department sought the termination of the parental rights of T.A. (Mother) as to her three biological children, Z.A., L.A., and G.C.S., Jr. Of Mother's three children, Father is only the biological father of the youngest child, G.C.S., Jr. In the separate case (2020DCM5405), the trial court issued orders returning G.C.S., Jr. to Father's care and custody. Subsequently, however, the Department removed G.C.S., Jr. and filed the underlying termination suit, which involves Mother, Father, and G.C.S., Jr., docketed as trial cause number 2020DCM6512.

a final hearing on the petition to terminate parental rights filed by the Texas Department of Family and Protective Services (the Department). The Department presented testimony from an investigator and a caseworker. The attorney ad litem presented testimony from Father. Although Mother did not appear, she was represented by appointed counsel throughout the final hearing.[3]

A. Investigator's testimony

Kimberly Blair-Santaella, an investigator with the Department, testified that she received an intake on October 14, 2020, involving an allegation of neglectful supervision with respect to Mother and her three children, G.C.S., Jr., Z.A., and L.A. Blair-Santaella responded to the police station where she learned that Mother had been involved in a car accident. At the time of the accident, Mother was traveling with two of her three children, three-year-old G.C.S., Jr., and seven-year-old Z.A. Police alleged that mother had been driving while intoxicated and her children were not properly restrained while riding in her car. She was also accused of leaving L.A., her nine-year old autistic son, at home by himself. Following the interview, the Department determined that Mother's conduct endangered the safety and well-being of all three children and took custody of all three because there was no alternative caregiver available at the time.

Blair-Santaella testified regarding her interview of Mother at the police station. Mother claimed she had only had two beers and she merely planned to go around the corner to buy a pizza for her children. Mother explained she left L.A. at home because he liked watching YouTube and she would return quickly. She said she did not own car seats for her children and gave no response as to why they were not wearing seatbelts. Mother said that a friend had been with her in the car at the time of the accident but left the scene. Mother acknowledged that she had previous involvement with CPS while she was living in California. She described that she had lost her

[3] At the first session, Mother's attorney asked for a continuance but it was denied. At the following session, Mother's attorney reported that his client, who was incarcerated at the time, indicated she wanted a new attorney appointed to represent her. That request was also denied. In this appeal, Mother has not assigned any error to either of those rulings.

parental rights to four other children due to a previous addiction to methamphetamine. Mother admitted that she occasionally drank alcohol.

Blair-Santaella testified that Mother appeared to be minimizing the incident, viewing it as not a "big deal." She provided contact information for G.S.M., her husband, asserting he would possibly care for the three children. G.S.M is G.C.S., Jr.'s biological father, and Z.A.'s and L.A.'s step-father. Blair-Santaella successfully contacted Father and informed him of the incident involving Mother. He offered to care for all three children, not just G.C.S., Jr. He told Blair-Santaella he would call to set up a meeting after he bailed Mother out of jail.

On December 14, 2020, the trial court held an adversary hearing wherein the trial court granted the Department's request for termination as to Z.A. and L.A., but not as to G.C.S., Jr. because Father was designated as a non-offending parent and had no part in Mother's neglectful supervision. At that point, the trial court ordered that G.C.S., Jr. be reunified with Father and the Department was ordered to return G.C.S., Jr. to his Father. Upon issuance of the reunification order, Blair-Santaella went to find Father to inform him of the court's order. She located him at a grocery store where he claimed to be working for tips, helping customers with putting their groceries in their cars. Blair-Santaella told Father that a court hearing had taken place and reunification had been ordered. She followed him to his apartment.

Blair-Santaella testified that Father's apartment was small and the front living room had lots of children's and women's clothing thrown about all over the place. Blair-Santaella testified the apartment felt cold and lacked heat. She saw a propane tank with a heating apparatus on the floor of the kitchen, a broken toilet, exposed wiring, and one bed. There was no access to hot water. Father reported that Mother was living with him but she was not currently staying there because she had stomach issues and needed a working toilet.

Blair-Santaella testified that Father had refused to be reunified with G.C.S., Jr. only,

expressing instead that he wanted Mother, himself, and the three children all living together. Responding to his request, Blair-Santaella expressed she had concerns, both about Mother living with Father, and about the unsafe conditions of the apartment. Father told her he was working on repairing the electrical wiring, the lack of heat, and the broken toilet; and he conveyed his firm belief that Mother should live with him as she was his wife.

The same day, Blair-Santaella met with Mother and she confirmed that she was not living at Father's apartment because the toilet was not working properly. She also reported she would not leave G.C.S., Jr. alone with Father, and Father had agreed with her, because he would need Mother to care for the child while he worked.

Due to concerns that Mother and Father were residing in the same home, and the home was inappropriate for G.C.S., Jr. due to electrical hazards and lack of heat and utilities, the Department determined that G.C.S., Jr. had to be removed a second time. The next day, December 15, 2020, the Department filed an original petition for termination of parental rights with affidavit attached and obtained temporary managing conservatorship of C.G.S.,Jr. For a short time, G.C.S., Jr. was placed with the Child Crisis Center, and after January 2021, he then was placed with three different foster homes. As of December 28, 2021, G.C.S., Jr. has resided in a foster home in Laredo, Texas.

Blair-Santaella began an investigation on the newly instituted case and testified that, throughout her investigation, Mother continued to live with Father. Blair-Santaella reported that she provided Father general referrals to assist him with his apartment's safety concerns. However, there were barriers to Father obtaining assistance because he was not a legal citizen. Father told Blair-Santaella the apartment belonged to a friend who allowed him to stay. He claimed he was talking with his friend about making repairs. Father also told Blair-Santaella that he did not want any of his adult children to be considered as caretakers for G.C.S., Jr. as he did not want to burden them.

Blair-Santaella further testified that Mother had two previous cases involving G.C.S., Jr. In a 2017 case, Mother was validated for neglectful supervision after G.C.S., Jr. and Z.A. were left alone in a vehicle for about thirty minutes. In a May 2020 case, Mother was ruled out for neglectful supervision.

On cross examination, Blair-Santaella acknowledged she did not call Father's landlord to inquire further about the conditions of the apartment, did not offer governmental assistance so that Father could get another apartment, and did not offer job training to Father. Blair-Santaella noted, however, that she gave Father referrals for general assistance with Project Vida and Project Amistad. However, she did not explain those programs to him or assist him with calling for assistance. Blair-Santaella reiterated she had concerns separate from Father's minimal income such as the dangerous environment of his home and the fact that he continued to live with Mother.

B. Caseworker's testimony

Caseworker Alexis Conrad testified she visited with Mother on January 7, 2021, to discuss her service plan. Their meeting took place on the porch of Father's apartment. Mother claimed she had not been using drugs nor had she had "that much" to drink when she had the car accident. Mother spoke about the removal of her four other children in California due to her previous addiction to methamphetamine and claimed she had not used drugs for many years. Mother claimed she had an apartment elsewhere and was not living at the apartment with Father. Conrad had earlier visited Mother's apartment. From her visit, Conrad noted safety concerns with that apartment due to its small size, the lack of a refrigerator or stove, a leaky bathroom, and Mother's report that it had been broken into twice during the pendency of the case. Mother reported she was evicted from her apartment in October 2021, after which she went to live with Father.

When asked about later visits with Mother, Conrad testified she also spoke with Mother at Father's apartment, on December 7, 2021. On that occasion, Conrad had observed clothing and

trash on the couch, a propane tank attached to a fire pit in the middle of the kitchen, and standing water in the bathroom that Mother used to mop the apartment. Conrad took photos depicting the conditions of the apartment, which were admitted into evidence.

Conrad detailed the service plan ordered by the trial court for safe return of the children to Mother and Father. Of the services ordered, Mother completed an Outreach, Screening, Assessment and Referral (OSAR). However, she failed to participate in any of the other services offered to include undergoing a psychological evaluation, parenting classes, drug testing, and an assessment to address her alcohol usage. Additionally, Mother failed to attend almost all of the twice-weekly visitations that were set up for her, as she only visited G.C.S., Jr. five times during the pendency of the case. Conrad testified that Mother minimized her alcohol usage and failed to acknowledge its effect on her children. Also, she had no plan to care for G.C.S., Jr. if he was returned to her. Conrad further testified that Mother was currently detained on the Driving While Intoxicated charge that led to the removal of her other two children.

Conrad testified that Father was not initially attentive to his case and it was difficult to communicate with him to set up meetings. Father missed a Family Strengths and Needs Assessment (FSNA) that was scheduled for him in February 2021, at the beginning of the case. Conrad made several efforts to contact Father after that missed FSNA meeting and was not able to meet with him again until August 2021. During the August 2021 meeting, Father was very open and expressed his desire to have all three children in his home because he wanted his family together. Father also discussed his concerns about Mother and stated that Mother had not been living with him, which contradicted Mother's account. Father was offered resources to help him with rental assistance and Conrad assisted him with filling out applications. Father thereafter completed FSNA and OSAR assessments. After the OSAR assessment, the Department did not request any recommended services because Father did not have any significant substance abuse

issues.

In terms of visitation, Father initially visited G.C.S., Jr. when the child was placed at the El Paso Child Crisis Center in December 2020. From January 2021 to August 2021, however, he had no visits with G.C.S., Jr. as the child was then placed in foster homes outside of El Paso. In August 2021, however, Father began to consistently attend his weekly, virtual visitations with G.C.S., Jr., but these visits stopped at Father's request in late November 2021. Conrad testified that Father had told her he felt it would help G.C.S., Jr. with behavioral problems of the child, which were then occurring at the foster home. Conrad described that Father and G.C.S., Jr. communicated well during their visits when they were held. Father would ask G.C.S., Jr. what he had been up to and he would encourage him to behave. Father let G.C.S., Jr. know he was proud of him and he loved him. Although the visits lessened around November 2021, phone visits were reinstituted in January 2022. Conrad reported those visits were positive.

Conrad stated that Father was always very understanding and open and he asked lots of questions when he needed clarification. However, she did not believe it was in G.C.S., Jr.'s best interest to be placed with Father, as the child had remained with his siblings in foster care and had been receiving care that was suitable to his development. In contrast, Father had not addressed concerns regarding the safety of his apartment and he repeatedly demonstrated he would allow Mother to live with him in his home.

When asked about the Department's specific concerns, Conrad reiterated their concerns about Father's home environment had centered on the electrical wiring, the lack of heat, and the carbon monoxide emitting from the stove. The Department believed that G.C.S., Jr. could be harmed if he touched the fire-pit in the kitchen or slipped in the laundry room. Conrad also testified the home contained neither a bedroom nor even bedding for G.C.S., Jr. Father not only lacked clothing for the child, but he also had no items to engage the child in learning activities nor

otherwise meet his daily needs. Conrad opined that Father had known of the Department's safety concerns since December 2020, but he had not done anything to remedy the problems raised with him. Additionally, Father had not taken advantage of the resources offered by the Department. Conrad did not believe that Father had demonstrated an ability to be protective of G.C.S., Jr. given that Mother had been in the home as recently as December 7, 2021, and she would possibly reside with Father if she was released from incarceration. Conrad stated that the Department's concern was that Father wished for his family to be together and he relied on Mother to provide primary child care while he worked outside of the home. As such, because Mother had not addressed her substance abuse problems, Father would be relying on an unsafe individual to care for G.C.S., Jr.

Conrad explained that she attempted to see if G.C.S., Jr. could be placed with their maternal aunt or maternal grandmother, but neither was in a position to care for G.C.S., Jr. The maternal grandmother could not take the children because she was dealing with health problems, and the maternal aunt already had six children of her own and could not take on another three.

Focusing more closely on G.C.S., Jr., Conrad testified the child was then 5 years of age. G.C.S., Jr. currently resided in a foster home with his sister Z.A., with whom he had a close bond, given they had remained together throughout all their placements. The Department's goal was for all three of Mother's children to be adopted together. However, the older child had special needs and it would be challenging to find a home that could take all three children. Conrad stated that the current foster home was able to care for G.C.S., Jr. was providing for his emotional and physical needs, and was making sure that he received services, such as individual therapy. Conrad said that she has seen G.C.S., Jr. improve in terms of his speech and ability to communicate, and that he is very active and engages in a lot of play.

Conrad testified she believed that Mother's parental rights should be terminated because she had not completed services, and G.C.S., Jr. was doing better outside of her care. He reported

he did not want to return to Mother because she would spank him. Conrad believed it was in the child's best interest to terminate Father's rights because, even though he had good conversations with his child, his home was not safe, he could not provide G.C.S., Jr. with his basic needs, and he had no support system in place, other than Mother.

Conrad acknowledged she did not attempt to call Father's landlord so that the apartment's safety concerns could be addressed. She said that she provided information regarding resources to Father but she did not provide him with homemaker services. Conrad told Father about section 8 housing's online application. Father had in the past asked for help with accessing the internet but he did not ask for help with the section 8 housing application. Conrad acknowledged that Father did not have access to a computer, given that he was currently participating in the hearing while at the courthouse instead of participating virtually like the rest of the participants. Father also did not speak English and was hard of hearing. Conrad stressed that not all of the problems in the home required monetary expenditures, but some did. Conrad stated that Father's January 25, 2021, service plan was translated for Father but it was not signed by him.

In terms of visitation, Conrad testified that the Department never offered to transport Father to the foster homes where G.C.S., Jr. had been placed in Dallas or Sherman, Texas, nor did it offer to bring G.C.S., Jr. to El Paso so that Father could visit personally with him. Conrad stated that G.C.S., Jr. was never placed in an El Paso foster home, but instead, was moved 666 miles away to Kaufman County. Conrad admitted that it would have been challenging for Father to gather the funds so that he could travel to visit G.C.S., Jr. and said that the Department did not offer him assistance in that regard.

Conrad stated that Father was required to take drug tests as part of his service plan, which Father complied with and always tested negative. Conrad testified that she did not help Father find a better job. Conrad admitted that initially the Department alleged that Father had not complied

with the OSAR assessment and that he violated the Subsection P controlled substance usage ground, but that this was incorrect since there was no indication that he had an illegal substance abuse issue. She also stated that since January 6, 2022, Mother had been incarcerated so she was no longer living with Father. Conrad was asked to admit that the danger from having Mother live with him was now gone and that the only issues remaining concerned poverty. Conrad responded that the danger was that Father's pattern of behavior indicated that he would let Mother return to the home when she was released.

Conrad testified the changes they wanted Father to make were for him to tape the electrical wires against a wall or place the wires behind furniture so the wires would not be hazardous to G.C.S., Jr. they wanted to make sure that "the ends of furniture weren't poking out, that there weren't significant issues with heavy furniture falling," and they wanted the propane tank and cooking element removed from the kitchen. Conrad further stated that these changes would not have required financial resources and that in the fourteen months that Father had been aware of the needed changes, he had not addressed these concerns. Additionally, the Department was concerned about Mother returning to live in the home, and Father's failure to attempt to obtain better employment.

C. Father's testimony

At the start of Father's testimony, the appointed attorney ad litem asked him whether he understood that the Department was seeking a termination of the legal relationship between him and his child. Father initially responded by asking whether that meant he would have to forget his child.[4] He next asked, "But how? I mean, I love my baby, I love my son. How could I let him go by himself somewhere elsewhere? I can't go see him. I can't go see him." Following his response,

[4] A party's general appearance before a trial court indicates a submission to the court's jurisdiction, constituting a general appearance and therefore, waiving any complaint as to service. *In Interest of D.M.B.*, 467 S.W.3d 100, 103 (Tex. App.—San Antonio 2015, pet. denied); *see also* TEX. R. CIV. P. 120 (providing that entrance of general appearance has same force and effect as if citation has been issued and served as provided by law).

the ad litem questioned him about the several months of time during 2021 wherein he made no effort to maintain contact with his child.

Father stated that he and Mother went to see G.C.S., Jr. in 2020, a month or two after he was removed. Father claimed that he would attempt to visit G.C.S., Jr. but that they would only let Mother in to see him because he was not on the list. Father admitted that he did not visit G.C.S., Jr. from January 2021 to September 2021. For that period, he claimed he was not advised by the Department that he could talk with his son. When he had contact from the Department, he called G.C.S., Jr. every Friday. He also asserted the CPS worker had not contacted him during the Christmas holidays of 2021. He asserted that only recently had the Department "started telling [him]" how he could talk with his son.

When asked whether he wanted G.C.S., Jr. to live in his home with him, Father said he intended to move him to a house where he would be safe. Father testified he would follow any rules the court told him to follow, including fixing the safety concerns in his apartment. Father also acknowledged that Mother had more work to do to overcome her addiction to substances. On cross examination, Father claimed he did not tell the Department that he did not want to be reunified with G.C.S., Jr., but rather, he expressed that he wanted all three children to be placed with him. He further stated he wanted to find a place where he could have the children and Mother could not see them. Father admitted he had initially told the caseworker that Mother only had a few drinks when she was arrested for driving while intoxicated. Father acknowledged he was aware that his children were not returned to him due to the conditions of his home and the fact that Mother lived with him. He acknowledged he had not yet made repairs, asserting it was because he had not yet been told whether he would get his son back. Father claimed that the Department never offered him housing or employment assistance.

D. Recommendation of the court appointed special advocate

The court appointed special advocate (CASA) recommended termination of both Mother's and Father's parental rights expressing concerns about safety risks and inadequate housing. She based her recommendation on evidence of Father failing to make required changes and risk that Father would allow Mother to reside with him.

E. The final judgment

At the conclusion of the final hearing, the trial court issued a judgment terminating Mother's parental rights on Subsections (E), (N), and (O) grounds, and terminating Father's parental rights on Subsections (D) and (N) grounds. Specifically, the trial court found that Mother had 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, constructively abandoned G.C.S., Jr., and 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. And as to Father, the trial court found that Father had placed or allowed G.C.S., Jr. to remain in conditions or surroundings that endangered his physical or emotional well-being, and that he had constructively abandoned G.C.S., Jr. The trial court also found that termination of Mother and Father's parental rights would be in G.C.S., Jr. 's best interest. Each parent filed a notice of appeal.

II. DISCUSSION

Mother and Father filed separate briefs. Both parents raise four issues respectively, all of which involve legal and factual sufficiency challenges to the predicate termination grounds and to the trial court's determination of the child's best interest. For convenience and to avoid unnecessary repetition of applicable law and standards of review, we group issues that are common to each of the parent's briefing.

A. Standard of Review and Applicable Law

The natural right of a parent to the care, custody, and control of their children is one of constitutional magnitude. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Interest of D.T.*, 625 S.W.3d 62, 69 (Tex. 2021). Such rights, however, are not without limitation. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). "Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *Id.*

A court may terminate a parent's right to his or her child if it finds by clear and convincing evidence both that: (1) the parent committed an act prohibited under Texas Family Code section 161.001(b)(1), and (2) that termination is in the child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(1), (2); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). Although the existence of one predicate ground is sufficient to uphold the termination of parental rights on appeal, the court of appeals must still always review the sufficiency of any findings made under subsections (D) or (E) as part of due process, since those findings can affect a parent's right to be a parent to their other children. *See Interest of N.G.*, 577 S.W.3d 230, 237 (Tex. 2019). On appeal, "the reviewing court must undertake 'an exacting review of the entire record with a healthy regard for the constitutional interests at stake.'" *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) (quoting *In re C.H.*, 89 S.W.3d at 26).

When reviewing the legal sufficiency of the evidence in a termination case, we consider all of the evidence in the light most favorable to the trial court's 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.P.B.*, 180 S.W.3d at 573 (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). We give deference to the fact finder's conclusions, indulge every reasonable inference from the evidence in favor of that finding, and presume the fact finder resolved any disputed facts in favor of its

findings, so long as a reasonable fact finder could do so. *Interest of K.A.C.*, 594 S.W.3d 364, 372 (Tex. App.—El Paso 2019, no pet.). We disregard any evidence that a reasonable fact finder could have disbelieved, or found to have been incredible, but we do not disregard undisputed facts. *Id.*

In a factual sufficiency review, the inquiry is whether the evidence is such that a fact finder could reasonably form a firm belief or conviction about the challenged findings. *See id.* We must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing. *Id.* A court of appeals should consider whether disputed evidence is such that a reasonable fact finder could not have resolved that disputed evidence in favor of its finding. *Id.* If the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

B. Analysis

On appeal, Mother's first three issues challenge the legal and factual sufficiency of the evidence supporting the trial court's findings on the predicate termination grounds under sections 161.001(b)(1)(E), 161.001(b)(1)(N), and 161.001(b)(1)(O). Similarly, Father's first two issues challenge the legal and factual sufficiency of the evidence supporting the trial court's findings on the predicate termination grounds under sections 161.001(b)(1)(D) and 161.001(b)(1)(N).

1. Endangerment under Sections 161.001(b)(1)(D) and 161.001(b)(1)(E)

We begin by addressing Father's and Mother's challenges to the endangerment findings under sections 161.001(b)(1)(D) and 161.001(b)(1)(E), respectively. Under section 161.001(b)(1)(D), parental rights may be terminated if clear and convincing evidence supports that the parent "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). Section 161.001(b)(1)(E) allows for termination if clear and

convincing evidence supports that the parent "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).

The word "endanger" as used in both of these subsections means to expose a child to loss or injury; or to jeopardize a child's emotional or physical health. *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996). 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. *Id.* "It is enough if the youth is exposed to loss or injury or his physical or emotional well-being is jeopardized." *In re P.E.W.*, 105 S.W.3d 771, 777 (Tex. App.—Amarillo 2003, no pet.). The fact finder may infer from past conduct endangering the child's well-being that similar conduct will recur if the child is returned to the parent. *J.D.S. v. Texas Dep't of Family Protective Servs.*, 458 S.W.3d 33, 41 (Tex. App.—El Paso 2014, no pet.).

Although there is significant overlap between subsections (D) and (E), we previously explained in *In re B.C.S.* the key difference between these two grounds, stating as follows:

> Subsections (D) and (E) differ in one respect: the source of the physical or emotional endangerment to the child. Subsection (D) requires a showing that the environment in which the child is placed endangered the child's physical or emotional health. Conduct of a parent or another person in the home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection D. 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 is a part of the "conditions or surrounding" of the child's home under subsection (D). The fact finder may infer from past conduct endangering the child's well-being that similar conduct will recur if the child is returned to the parent. Thus, subsection (D) addresses the child's surroundings and environment rather than parental misconduct, which is the subject of subsection (E).
>
> Under subsection (E), the cause of the danger to the child must be the parent's conduct alone, as evidenced not only by the parent's actions but also by the parent's omission or failure to act.

In Interest of B.C.S., 479 S.W.3d 918, 926 (Tex. App.—El Paso 2015, no pet.) (citations omitted). We address each parent's appeal individually beginning with Mother's appeal.

a. Mother's Appeal

Here, the evidence is sufficient to show that Mother engaged in an endangering course of conduct. Mother's involvement with the Department began when she was arrested for driving while intoxicated after she was involved in a car accident. At the time of the accident, G.C.S., Jr. and his sister were in the car, neither of them properly secured by a safety belt, and Mother's nine-year-old autistic son had been left unattended at home by himself. Although Mother was able to initially bond out of jail, the record shows she was re-incarcerated at the time of the hearing. Mother's charged criminal conduct, which exposes her to incarceration, is relevant evidence tending to show a course of conduct endangering the emotional and physical well-being of the child. *See In Interest of R.A.G.*, 545 S.W.3d 645, 651 (Tex. App.—El Paso 2017, no pet.). Mother was also validated for neglectful supervision in 2017, after G.C.S., Jr. and his sister were left alone in a vehicle for about thirty minutes. This was not Mother's first experience with children's protective services (CPS), as her parental rights to her four other children were previously terminated by authorities in California due in part to her addiction to methamphetamine. Mother reported that she was no longer addicted to methamphetamine. However, evidence of Mother's previous CPS history is a factor the trial court could take into consideration and the trial court is not required to discount a parent's long history of drug abuse, even if the parent claims they have stopped abusing drugs. *See Cervantes-Peterson v. Texas Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 254 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Interest of C.R.M.*, No. 08-21-00196-CV, 2022 WL 765848, at *7 (Tex. App.—El Paso Mar. 14, 2022, no pet.) (mem. op.).

Additionally, the trial court may properly consider Mother's failure to complete a service plan in the endangerment analysis. *See Interest of J.A.V.*, 632 S.W.3d 121, 132 (Tex. App.—

El Paso 2021, no pet.). Likewise, 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. *See In Interest of R.A.G.*, 545 S.W.3d at 652. The record shows that Mother was provided with a service plan to address her substance abuse and to assist her with her parenting skills. Other than attending her assessment which reflected that she had an "alcohol disorder, moderate level," she made no effort to engage in the offered services. Additionally, Mother visited with G.C.S., Jr. only five times throughout the entire case—four visits occurred during the first two months of the case and her final visit was in July 2021, six months before the final hearing.

Viewing the evidence in the light most favorable to the trial court's decision, we conclude there is clear and convincing evidence establishing that Mother engaged in conduct that endangered G.C.S., Jr.'s physical and emotional well-being. TEX. FAM. CODE ANN. § 161.001(b)(1)(E). We also conclude after viewing all the evidence, any disputed evidence is not so overwhelming that a fact finder could not have formed a firm belief or conviction that Mother endangered G.C.S., Jr. under subsection (E). *See In re K.A.C.*, 594 S.W.3d at 372.

We overrule Mother's first issue.

b. Father's Appeal

Here, the evidence is sufficient to show that Father's home was unsanitary and unsafe. "Unsanitary conditions can qualify as surroundings that endanger a child." *In re C.L.C.*, 119 S.W.3d 382, 392 (Tex. App.—Tyler 2003, no pet.). A lack of electricity or water for the winter months and the lack of an indoor toilet are factors that jeopardize a child's physical and emotional well-being. *In Interest of A.R.R.*, No. 01-18-00043-CV, 2018 WL 3233334, at *5 (Tex. App.—Houston [1st Dist.] July 3, 2018, pet. denied) (mem. op.); *see also Interest of M.B.*, No. 13-19-00411-CV, 2019 WL 5997509, at *5 (Tex. App.—Corpus Christi Nov. 14, 2019, no pet.) (mem. op.) (finding endangerment due to lack of electricity or running water in the home). "While poverty

should not be a basis for termination of parental rights, a parent's inability to provide basic utilities in the family home may constitute evidence of endangerment of the children's well-being." *In Interest of H.D.M.*, No. 09-18-00050-CV, 2018 WL 2974461, at *7 (Tex. App.—Beaumont June 14, 2018, pet. denied) (mem. op.). Moreover, the inappropriate or unlawful conduct of a person who lives in the home of a child is inherently part of the "conditions or surroundings" of that home. *Interest of E.A.R.*, 583 S.W.3d 898, 909 (Tex. App.—El Paso, 2019, pet. denied).

The record shows that on December 14, 2020, when G.C.S., Jr. was returned to Father after the trial court ordered reunification, the Department's investigator went to inform Father about the reunification order and found that Father's home was not a safe environment for a child. Father's small apartment did not have heat or hot water, had a broken toilet, contained only one bed, and had exposed electrical wiring falling from the ceiling. Additionally, an open fire-pit apparatus that was attached to a propane tank was located on the floor in the middle of the kitchen. Additionally, there were lots of children's and women's clothing thrown about all over the living room, from which the Department logically inferred that Mother was living at least part-time with Father. Father confirmed that Mother was living with him and expressed that it was his duty to care for her and the children. Mother informed the investigator that she was not living with Father at the time because the toilet was not working properly. She also told the investigator that she could not allow G.C.S., Jr. to live alone with Father, a sentiment that Father agreed with, because Mother had to take care of the children while he was at work.

The record also shows that at the time of the reunification visit, Father refused to be reunified with G.C.S., Jr. alone, preferring instead that he be unified with all three children and Mother, and they could all live together as a family. Thus, in addition to the Department's concerns about the unsafe conditions within the apartment, an additional concern was raised about G.C.S., Jr.'s continued exposure to Mother's endangering conduct. When confronted with these

concerns, Father claimed he was working on repairing the unsafe wiring, the lack of heat, and the non-working toilet. He also conveyed that Mother should remain living with him because she was his wife. Despite being aware of the Department's concerns regarding his apartment and his safety plan's requirement that he maintain a safe home free from hazards, Father did nothing to fix the safety concerns and the condition of his apartment remained the same up until the final hearing Mother also resided with Father as recently as one month before her incarceration in January 2022. At the final hearing, Father testified that he would fix the safety concerns in his apartment if G.C.S., Jr. was returned to him and assured the trial court that he would not allow Mother to be near G.C.S., Jr. after she was released from jail.

Viewing the evidence in the light most favorable to the findings, a reasonable fact finder could have concluded that Father's apartment was unsafe and that G.C.S., Jr. would likely be left in the care of Mother who posed a danger to G.C.S., Jr. Therefore, we conclude there is clear and convincing evidence to show Father knowingly placed or knowingly allowed G.C.S., Jr. to remain in conditions or surroundings which endangered his physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D).

Although there is conflicting testimony regarding whether Mother lived in Father's home, and regarding the unsafe conditions of the home, the trial court could have resolved these conflicts in favor of its finding. Father argues there is no evidence that he posed a danger to G.C.S., Jr. and that the Department conceded that his apartment's safety concerns could be easily fixed. However, the trial court could have found the unsafe conditions in Father's apartment were conditions that endangered the child's physical or emotional well-being through evidence of a lack of basic utilities and the fact that Father intended for Mother to be heavily involved in raising G.C.S., Jr. Although there is some disputed evidence, we find the evidence is not so significant that a reasonable trier of fact could not have reconciled this evidence in favor of its finding and formed

a firm belief or conviction that Father knowingly placed or knowingly allowed his child to remain in conditions or surroundings which endangered his physical or emotional well-being. *See In re K.A.C.*, 594 S.W.3d at 372.

We overrule Father's first issue.

Because we conclude there was legally and factually sufficient evidence to support termination as to Father's parental rights under sections 161.001(1)(D), we need not address his second issue challenging the sufficiency of the evidence to support termination under section 161.001(1)(N). *See* TEX. R. APP. P. 47.1.; *see also In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019)(holding that due process mandates appellate review of Subsection (D) and (E) findings when the parent has preserved the issue regardless of whether the termination judgment could be affirmed on another ground).

2. Mother's Constructive Abandonment under Section 161.001(b)(1)(N)

In her second issue, Mother complains that the evidence was legally and factually insufficient for the trial court to have found by clear and convincing evidence that they each had constructively abandoned G.C.S., Jr. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N). Constructive abandonment under section 161.001(b)(1)(N) has four elements: (1) the Department had permanent or temporary conservatorship of the child for at least six months; (2) the Department made reasonable efforts to return the child to the parent; (3) the parent did not regularly visit or maintain significant contact with the child; and (4) the parent demonstrated an inability to provide the child with a safe environment. *Id.* § 161.001(b)(1)(N).

Here, as to the first element, the record shows that the Department had temporary conservatorship of the child for at least six months, as it was appointed as G.C.S., Jr. 's temporary managing conservator on December 28, 2020, and G.C.S., Jr. remained in State care until the final hearing in December 2021. The first element has been met.

"Under the second element, 'returning the child to the parent, per section 161.001(1)(N)(i), does not necessarily mean that the child has to be physically delivered' to the individual." *In Interest of G.P.*, 503 S.W.3d 531, 533 (Tex. App.—Waco 2016, pet. denied) (quoting *In re D.S.A.*, 113 S.W.3d 567, 573 (Tex. App.—Amarillo 2003, no pet.)). Courts have previously held that this element can be satisfied by preparing and administering a service plan. *Id.*

The record shows that the Department made reasonable efforts to return G.C.S., Jr. to Mother. A family service plan was prepared that provided Mother with opportunities to participate in services to restore her parental rights, including counseling services and parenting classes. The preparation and administration of the service plan shows that the Department made reasonable efforts to reunite Mother with G.C.S., Jr. Additionally, the Department explored the possibility of placing G.C.S., Jr. with their maternal grandmother or maternal aunt but neither of them was equipped to take the children into their residences. The Department's efforts to place the child with relatives also constitutes legally and factually sufficient evidence that reunification was attempted. *See In re K.J.T.M.*, No. 06-09-00104-CV, 2010 WL 1664027, at *3 (Tex. App.—Texarkana Apr. 27, 2010, no pet.) (mem. op.) (finding the department's attempts "although futile," to place child with relative supported finding of reasonable efforts to return child to father). The second element has been met.

Mother failed to regularly visit and maintain significant contact with G.C.S., Jr., as she only visited with him a total of five times during the pendency of the case. *See M.C. v. Texas Dep't of Family and Protective Servs.*, 300 S.W.3d 305, 310 (Tex. App.—El Paso 2009, pet. denied). Additionally, Mother failed to demonstrate an ability to provide the child with a safe environment. In 2017, Mother was validated for neglectful supervision for leaving him alone in a car for half-an-hour. Additionally, Mother had a recent arrest for driving while intoxicated that involved an accident and Mother's failure to secure G.C.S., Jr. with either a car seat or safety belt. Mother also

failed to participate in any of her service plan's recommended services, was evicted from her apartment, was unemployed, and was incarcerated at the time of the final hearing. Based on this evidence, we find that Mother demonstrated an inability to provide the child with a safe environment. *See In re J.J.O.*, 131 S.W.3d 618, 630 (Tex. App.—Fort Worth 2004, no pet.) (finding attending only half of her parenting classes, lacking steady housing and employment, and missing the opportunity for counseling and a psychological evaluation demonstrated inability to provide child with safe environment). The third and fourth elements have been met.

After a careful review of the entire record under the applicable standards of review, we conclude the evidence is legally and factually sufficient to establish by clear and convincing evidence that Mother constructively abandoned G.C.S., Jr. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N); *M.C.*, 300 S.W.3d at 311; *see also In re H.R.*, 87 S.W.3d 691, 699 (Tex. App.—San Antonio 2002, no pet.) (holding evidence sufficient to support finding that parent constructively abandoned child where parent failed to fulfill requirements of court-ordered service plan and rarely visited child).

We overrule Mother's second issue.

Because we conclude there was legally and factually sufficient evidence to support termination as to Mother's parental rights under sections 161.001(1)(E) and 161.001(1)(N), we need not address her third issue challenging the sufficiency of the evidence to support termination under section 161.001(1)(O). *See* TEX. R. APP. P. 47.1.

3. Best interest of the child

Mother's fourth issue and Father's third issue contend the Department failed to prove by clear and convincing evidence that termination of either of their parental rights was consistent with the best interest of the child.

The existence of a predicate termination ground is not enough to allow a trial court to order

termination of parental rights; termination of parental rights must also be in the child's best interest. *See In re B.C.S.*, 479 S.W.3d at 923. A determination of best interest necessitates a focus on the child, not the parent. *See id.* at 927. There is a strong presumption that it is in the child's best interest to preserve the parent-child relationship, but that presumption may be rebutted. *Id.* Nine non-exhaustive factors (the *Holley* factors) should be considered in our analysis of the best interest issue:

> (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.
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> *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).

The Department is not required to prove all the Holley factors as a condition precedent to parental-rights termination. *See In re C.H.*, 89 S.W.3d at 27. We also must bear in mind that permanence is of paramount importance in considering a child's present and future needs. *In re B.C.S.*, 479 S.W.3d at 927. "While no one factor is controlling, analysis of a single factor may be adequate in a particular factual situation to support a finding that termination is in the best interest of the child." *In Interest of J.M.T.*, 519 S.W.3d 258, 268 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

a. The Child's Desires

We begin with the child's desires. In this case, G.C.S., Jr. was 5 years old at the time of the final hearing and too young to voice his desires as to placement. When a child is too young to express his desires, the fact finder may consider that the child has bonded with the foster family, is well cared for by them, and has spent minimal time with a parent. *See In re R.A.G.*, 545 S.W.3d

at 653 ("Evidence that a child is well-cared for by his foster family, is bonded to his foster family, and has spent minimal time in the presence of a parent is relevant to the best interest determination under the desires of the child factor."). The evidence shows that G.C.S., Jr. had only been at his foster home for one month at the time of the final hearing, but that he had adjusted well to the foster home and was getting along with the foster family. Additionally, G.C.S., Jr. was at the foster home with his sister with whom he has bonded; and the Department's plan is to place G.C.S., Jr. and his siblings in the same home so that this bond can be strengthened. The evidence further shows that the current foster home is providing G.C.S., Jr. with a home meeting his emotional and physical needs, and his foster family is making sure that he attends individual therapy. G.C.S., Jr. is also thriving in foster care, as his speech and ability to communicate has improved. Additionally, as previously established, Mother and Father had limited contact with G.C.S., Jr. throughout the duration of the case. The evidence related to this factor weighs in favor of the trial court's best interest finding.

b. The Child's Emotional and Physical Needs/Emotional and Physical Danger to the Children

The need for permanence is a paramount consideration for a child's present and future physical and emotional needs. *In re R.A.G.*, 545 S.W.3d at 653. As already discussed, the evidence supports the trial court's finding that Mother's conduct endangered G.C.S., Jr.'s physical or emotional well-being. The evidence also supports the trial court's finding that Father knowingly placed G.C.S., Jr. in unsafe surroundings which endangered G.C.S., Jr.'s physical or emotional well-being. A fact finder may infer that past conduct endangering the well-being of a child may recur in the future if the child is returned to the parent. *Id.* The evidence related to these factors weighs in favor of the trial court's best interest finding.

c. Parenting abilities

In reviewing the parenting abilities of a parent, a fact finder can consider the parent's past

neglect or past inability to meet the physical and emotional needs of the children. *Interest of O.E.R.*, 573 S.W.3d 896, 907-08 (Tex. App.—El Paso 2019, no pet.). As previously discussed, both Mother and Father chose to have infrequent contact with G.C.S., Jr. Mother's last visit with G.C.S., Jr. was six months before the final hearing. Although Father visited with G.C.S., Jr. every week for three months, he made no effort to keep in contact with the Department at the beginning of the case and did not visit with G.C.S., Jr. for many months. The Department acknowledged that the visits that Father had with G.C.S., Jr. went very well and Father testified that he loved G.C.S., Jr. However, a father's love for his child will not "obviate[] the fact that [he] is unable to provide [his child] with a safe, stable home." *See In re K.C.*, 88 S.W.3d 277, 279 (Tex. App.—San Antonio 2002, pet. denied). The trial court could have inferred from this evidence that Mother and Father had poor parenting abilities. *See Interest of R.S.*, No. 01-20-00126-CV, 2020 WL 4289978, at *9 (Tex. App.—Houston [1st Dist.] July 28, 2020, no pet.) (mem. op.) (stating parent's failure to visit with child on a regular basis was circumstance from which fact finder could conclude that parent was unwilling or unable to fulfill child's most basic emotional and physical needs). This factor weighs in favor of the best interest finding.

d. Programs available to assist those individuals to promote the child's best interest

In determining the best interest of the child in proceedings for termination of parental rights, the trial court may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013). The Department developed a service plan for Mother that she agreed to comply with. The evidence showed that Mother made no effort to complete any of the services in her service plan. Mother's failure to complete the court-ordered service plan demonstrates that she is unwilling to take advantage of the services offered by the Department and brings her parenting abilities into further doubt. *See In Interest of I.L.G.*, 531 S.W.3d 346, 355-56 (Tex. App.—Houston [14th Dist.] 2017,

pet. denied).

As for Father, the evidence showed that he complied with his service plan insofar as submitting to drug tests which came out negative, and regarding his participation in required assessments. Additionally, there was no need for Father to participate in counseling because his assessment did not indicate such was necessary. However, Father failed to comply with his service plan's requirement that he maintain a safe home free from hazards, as the evidence showed that his home continued to exhibit the same safety defects right up until the final hearing. Father's failure to correct the safety concerns brings his parenting abilities into further doubt. *See id.*

This factor weighs in favor of the best interest finding.

e. Plans for the Child / Stability of the Home of Proposed Placement

The Department's long-term goal in this case is unrelated adoption and for G.C.S., Jr. and his other two siblings to remain together. However, there is no evidence that his current foster family would adopt him. "Evidence about placement plans and adoption are, of course, relevant to best interest." *In re C.H.*, 89 S.W.3d at 28. "However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor[.]" *Id.* Instead, the entire record must be examined when assessing best interest, "even if the agency is unable to identify with precision the child's future home environment." *Id.*

Here, Mother conveyed no plan for G.C.S., Jr., as she did not attend the hearing. Father conveyed that his plan was to secure a home that was safe for G.C.S., Jr. and he promised to keep Mother away from G.C.S., Jr. until she obtained counseling. Father gave no specifics as to how he would accomplish what he had not otherwise accomplished throughout the case. *In re H.D.M.*, 2018 WL 2974461, at *7 (stating evidence of a parent's inability to maintain stable employment may support a conclusion that termination is in the child's best interest). The trial court could have determined that Father had no realistic plans for providing G.C.S., Jr. with a safe home and that

G.C.S., Jr. 's current foster home will continue to provide a safe, stable, and nurturing home for him.

After considering the entire record, we find that the trial court's finding that termination is in the child's best interest is supported by legally and factually sufficient evidence.

We overrule Mother's fourth issue and Father's third issue.

4. Appointment of the Department as Managing Conservator

Lastly, Father's fourth issue contends the trial court abused its discretion when it appointed the Department as the child's permanent managing conservator. We review a trial court's appointment of a non-parent as sole managing conservator for abuse of discretion and reverse only if we determine the appointment is arbitrary or unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). Courts have previously held that when evidence is sufficient to terminate parental rights, a trial court does not abuse its discretion in appointing the Department as the child's sole managing conservator. *See Interest of T.N.R.*, No. 14-21-00473-CV, 2022 WL 370035, at *7 (Tex. App.—Houston [14th Dist.] Feb. 8, 2022, no pet.) (mem. op.). Because the trial court terminated Father's rights to the child, and we hereby affirm that decision, we cannot say that the trial court abused its discretion in appointing the Department as the child's sole managing conservator.

Accordingly, we overrule Father's fourth issue.

III. CONCLUSION

We affirm the trial court's judgment terminating Mother and Father's parental rights.

GINA M. PALAFOX, Justice

August 9, 2022

Before Rodriguez, C.J., Palafox, J., and Marion, C.J. (Ret.)
Marion, C.J. (Ret.)(Sitting by assignment)
Rodriguez, C.J., dissenting