Opinion issued June 16, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00023-CV

In re R.W., E.W., and B.W.

Mother, Appellant

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2009-04633J

MEMORANDUM OPINION

In this accelerated appeal, a mother challenges the trial court's decree terminating her parental rights to her minor children, R.W., E.W., and B.W., and naming the Department of Family and Protective Services ("the Department") as the children's sole managing conservator. The mother contends that the evidence

is legally and factually insufficient to support the trial court's termination findings under section 161.001. *See* TEX. FAM. CODE ANN. § 161.001 (West Supp. 2010). She further contends that the evidence is legally and factually insufficient to support the appointment of the Department as the sole managing conservator of the children. We hold that the evidence is factually insufficient to support the trial court's best interest finding under section 161.001, but that the evidence is sufficient to support the appointment of the Department as the sole managing conservator. We therefore reverse the trial court's judgment terminating the mother's parental rights and remand for a new trial, but affirm the judgment of conservatorship of R.W., E.W., and B.W.

Background

In September 2008, the Department received a complaint that the mother was neglecting her three children, who were all under the age of three. Tanya Dehart-Clark, a caseworker at the Department's Family Based Services, investigated the complaint. She found the mother's residence to be very hazardous to the children. According to Dehart-Clark, things were everywhere, animal urine and feces covered the floor, and an unknown substance covered the place where the children ate. The children were dirty, had colds, and ran around "with no shoes, nothing on." Dehart-Clark observed that the children appeared otherwise healthy and exhibited no signs of physical abuse. She stated that the mother was in

an abusive relationship with her husband, who is the father of R.W., E.W., and B.W.[1] Dehart-Clark stated that the mother had been diagnosed as bipolar and had told Dehart-Clark that she took medication. Neither the mother nor the father was employed at the time.

After Dehart-Clark's visit, the Department provided the mother with homemaker services to make her residence suitable for children, and with daycare services. The mother used the homemaker services one time, but refused to answer the phone or door when a representative from the homemaker services attempted to provide her with further help. Subsequently, the children's daycare sent the Department a letter which stated that the children had bumps, bruises, and scratches. The daycare also said that the children had to be bathed and given a change of clothes each day when they arrived because they came dirty to the daycare. The Department attempted to place the children with the mother's aunt. Under the aunt's care, the children's condition did not improve, and they continued to come dirty to the daycare. The Department then petitioned the trial court for custody of the children. In June 2009, the trial court granted temporary managing conservatorship of the children to the Department.

In August 2009, Tammie Flye, a caseworker at Child Protective Services, developed a family service plan for the mother to obtain the return of her children.

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[1] The trial court also terminated her husband's parental rights. He is not a party to this appeal.

The Department filed the plan with the trial court. The trial court signed additional orders that the mother was to complete to obtain the return of her children. The orders required the mother (1) to complete substance abuse program, (2) to complete a psychological evaluation and follow all recommendations, (3) to participate in counseling, (4) to complete parenting classes, (5) to complete a drug and alcohol assessment and follow all recommendations, (6) to complete random drug tests, (7) to remain drug free, (8) to refrain from engaging in criminal activity, (9) to maintain stable housing, (10) to maintain stable employment, and (11) to complete all additional services outlined in the family service plan. The family service plan had substantially similar requirements for the mother to complete as those in the trial court's orders. In addition, the service plan specifically required the mother (1) to participate in individual counseling; (2) to complete domestic violence classes, (3) to provide a signed lease agreement to verify stable housing for at least six months, and (4) to provide pay-stubs to verify employment for at least six months. The target date for completion of the service plan was July 31, 2010.

Flye set up services for the mother on two occasions so that the mother could comply with some of the requirements of the service plan and the orders of the trial court. The Department paid for the services. On both occasions, the mother did not respond to the service providers' phone calls, nor did she show up

for appointments with the service providers. After these two failed attempts, the Department continued to try to help the mother obtain services, but no longer paid for them. According to Flye, the mother never used the services. The mother told Flye that she was not using the services because her husband would not allow her to use them. In February 2010, the husband moved to Wisconsin. That same month, the mother moved into the house of her boyfriend, Jason McDaniel. The mother did not provide the Department with a lease agreement or proof of any contributions indicating that she was residing at Jason's house. According to Flye, the mother did not attend any domestic violence classes, and she refused on more than one occasion to submit to a drug test that the Department had set up. Flye testified that the Department considered a refusal to take a drug test to be a positive result. She was not aware of any actual positive tests. The mother has never been arrested or charged with any crime. In August 2010, past the one year deadline for completion of the family service plan, the mother began attending parenting classes, but she failed to complete them. She completed five of the eight parenting classes.

In September 2010, Tyesha Jacobs became the caseworker assigned to the mother's case. Jacobs stated that, during her time as the caseworker, the mother failed to complete any of the requirements ordered by the trial court. According to Jacobs, the mother stated that she was employed at Wal-Mart, but that she had to

leave that job because she could not provide the employer with a valid Texas identification card. The mother never provided pay-stubs from Wal-Mart to the Department. In October 2010, the mother refused to submit to a random drug test. Both Jacobs and Flye sat down with the mother a number of times to explain to her exactly what she needed to do to obtain the return of her children. Jacobs said that the mother had called her more than twenty times at the Department. She added that the mother did not call regularly, but, on the days she phoned, she called many times. Jacobs returned two or three phone calls to the mother.

Due to the mother's lack of compliance with the service plan and the trial court's orders, the Department petitioned to have the mother's parental rights terminated. In November 2010, the trial court conducted a bench trial on the Department's parental-termination suit. At the beginning of trial, the Department asked the court to take judicial notice of its prior orders in the case including additional temporary orders, ordering the family service plan. The trial court took judicial notice of the orders.

During the trial, the mother offered a diagnostic review form from Tri-County MHMR dated August 2010. The document indicated that the mother had a mixed anxiety disorder. The mother testified that the separation from her children caused her anxiety. She stated that she was not diagnosed with other mental health

problems and was not prescribed any medication. She submitted the form to the Department.

The mother testified that when the Department originally came to her house, she was going through a rough time. She maintained that her situation had changed when she moved in with her boyfriend, Jason, in February 2010. She was then in a stable environment. She testified that she intended to live with the children at Jason's house, which his father, Jeff McDaniel, owned. Jason agreed to help her raise the children. According to the mother, she and Jason were engaged to be married. She had no intention to reunite with her husband. She admitted that she was still legally married to him, but said that he had filed for divorce in Wisconsin. The husband had not served her with divorce papers. She testified that she had visited her children since the Department took custody of them. According to the mother, these visits went great. The children called her "mama," and they were upset at the end of the visits. One time, R.V. held onto her, crying that he did not want her to leave. The mother said that if she received custody of her children, she would be a better mother.

The mother testified that she understood that she had to meet the conditions of the service plan. On cross examination, the Department asked the mother if she participated in individual counseling. She responded that she was not aware the service plan required her to do that. The Department asked her if she did domestic

violence counseling. She responded that she went to counseling every Wednesday, but had not yet gotten the paperwork to verify her attendance. The Department asked her if she underwent a substance abuse assessment. She responded that she went to AA meetings every Thursday because she thought it constituted substance abuse assessment. She acknowledged that the Department had made multiple referrals for her to receive a substance abuse assessment, but she said her husband would not take her, and she did not know how to drive their car which had a stick-shift transmission. The mother admitted that she had completed none of the requirements of the family service plan. She testified that she is a high-school graduate.

Jason, the mother's boyfriend, testified that he planned to marry the mother. He has known the mother since 2001 when the two were in high school together. He said that he had never been arrested. He stated that his father would allow him to live at the house his father owned as long as he wanted. Jason further testified that he has been an employee at his father's company for thirteen years. He received a salary of $3,100 a month plus benefits and health care coverage. He said that he could put the mother's children on his health care plan. He stated that he is financially able and willing to support the mother and her children. He testified that he was waiting till the end of the month to file for divorce from the father on the mother's behalf. Jason's father, Jeff, also testified. He said that the

house where the mother and Jason were living was clean and suitable for children. He gave the mother and Jason permission to stay at the house as long they needed to raise the children. He said he would act as a grandparent to the children and treat them like his family.

As of the time of the trial, the children were ages three, four and five. They were in three separate foster care placements. These were not adoptive placements. The Department was seeking adoptive homes for the children. The Department's goal was to place all three children in one home, but that had not occurred by the time of trial. Jacobs, the current caseworker, testified that it was possible that the children would be adopted but she did not know if they would be adopted together. Jacobs stated that B.W., the youngest, was doing very well in his placement. He was independent, capable of dressing himself and was potty-trained. The older children, R.W. and E.W., had behavioral issues in their placements and at school. Both children have ADHD and take medication to treat it. Jacobs testified that this was due to "learned behavior" resulting from a lack of supervision when they were with the mother, but later admitted that it was possible that their behavioral problems could result from their separation from the mother. Jacobs testified that foster care would be a safer and more stable placement for the children. Flye, the original caseworker, testified that the mother was unstable because she was unemployed and had no independent means to support her

children. Flye stated that the mother had no answer when Flye asked her what she would do to support her children if Jason told her to leave his house. Flye testified that because the mother was mentally unstable she could not provide a stable environment for her children.

During closing argument, the attorney ad litem representing the children stated that he had seen photos of Jason's house, where the mother currently resides, and it appeared to be clean and in a nice neighborhood. He nevertheless concluded termination of the mother's rights was "probably" in the best interest of the children given that the mother failed to do what the Department required.

In December 2010, the trial court signed a judgment terminating the mother's parent-child relationship with R.W., E.W., and B.W. and appointing the Department as the children's sole managing conservator. The trial court found by clear and convincing evidence that: (1) the termination of the mother's parental relationship was in the best interest of the children; (2) the mother knowingly placed or allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children, and (3) the mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of her children. The mother filed a motion for new trial and a statement of appellate points. The trial

court denied the mother's motion for new trial and found that her appeal was not frivolous. *See* TEX. FAM. CODE ANN. § 263.405(d) (West Supp. 2010).

Termination of Parental Rights

The mother challenges the legal and factual sufficiency of the evidence supporting the court's findings that (1) she failed to comply with the provisions of a court order establishing the actions necessary for her to obtain the return of her children, (2) she knowingly placed or allowed the children to remain in conditions which endangered the children's physical or emotional well-being, and (3) the termination of her parental rights was in the best interest of the children.

Standard of Review

In order to terminate parental rights under section 161.001 of the Family Code, the petitioner must establish that the parent engaged in conduct enumerated in one or more of the subsections of section 161.001(1) and must also show that termination of the parent-child relationship is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001; *Richardson v. Green*, 677 S.W.2d 497, 499 (Tex. 1984). The petitioner must prove both prongs and may not rely solely on a determination that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001; *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). "Only one predicate finding under section 161.001(1) is necessary to

support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A .V.*, 113 S.W.3d 355, 362 (Tex. 2003).

It is well-established that parental rights are of constitutional dimension and are "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (*quoting Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1976)). Because of the great importance of parental rights, grounds for termination must be supported by clear and convincing evidence rather than a mere preponderance. TEX. FAM. CODE ANN. § 161.001; *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002). Clear and convincing evidence refers to a degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the truth of the allegations sought to be proved. *In re C.H.*, 89 S.W.3d at 25. This intermediate standard falls between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). While the proof must be more than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed. *Id.* Termination proceedings should be strictly scrutinized, and involuntary termination statutes are strictly construed in favor of the parent. *Holick*, 685 S.W.2d at 20–21.

When reviewing the legal sufficiency of the evidence in a case involving termination of parental rights, we determine whether the evidence is such that a

factfinder could reasonably form a belief or conviction that there existed grounds for termination under § 161.001(1) and that termination was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(1), (2); *In re J .F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). In doing so, we examine all evidence in the light most favorable to the finding, assuming that the "factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.*, 96 S.W.3d at 266. We must also disregard all evidence that the factfinder could have reasonably disbelieved or found to be incredible. *Id.* However, we must not disregard all of the evidence that does not support the finding, as doing so could "skew the analysis of whether there is clear and convincing evidence." *Id.*

When conducting a factual sufficiency review of the evidence in a termination of parental rights case, we examine the entire record to determine whether "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," that the two prongs of section 161.001 were met. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.F.C.*, 96 S.W.3d at 266. If the evidence that could not be credited in favor of the finding is so great that it would prevent a reasonable factfinder from forming a firm belief or conviction that either termination was not in the best interest of the child, or none of the grounds under section 161 .001(1) was proven, the evidence will be factually insufficient and the

termination will be reversed. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.F.C.*, 96 S.W.3d at 266.

Texas Family Code section 161.001(1)(O)-Failure to Comply with Court Order

The mother asserts that the evidence is insufficient to support termination under section 161.001(1)(O) because the Department never admitted into evidence the trial court's order setting forth the actions necessary for the mother to obtain the return of her children, and the trial court never took judicial notice of the order. The mother concludes that the Department therefore did not comply with section 161.001(1)(O).

In order for a court to terminate parental rights under section 161.001(1)(O), the court must find by clear and convincing evidence that the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." TEX. FAM. CODE ANN. § 161.001(1)(O) (West Supp. 2010).

A trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed. *Trimble v. Tex. Dep't. of Protective & Regulatory Servs.*, 981 S.W.2d 211, 215 (Tex. App.—

Houston [14th Dist.] 1998, no pet.); *see also* TEX. R. EVID. 201. "A court may take judicial notice, whether requested or not." TEX. R. EVID. 201(c). But when the court takes judicial notice, it must notify the parties and give them an opportunity to challenge that decision. *See* TEX. R. EVID. 201(e).

The mother relies on *In re C.L.*, where our sister court held that the evidence was legally insufficient to support termination under 161.001(1)(O) because no evidence existed of the trial court's order setting forth the actions necessary for the parent to obtain the return of her children. 304 S.W.3d 512, 517 (Tex. App.—Waco 2009, no pet.). There, the court held that the trial court did not take judicial notice of its prior orders in its file, including the one requiring a family service plan, because the Department did not ask the trial court to take notice of them, and the court did not announce that it was taking notice. *Id.* at 516. Here, in contrast, the Department requested the court to take judicial notice of its prior orders in the case—and, specifically, the order requiring that the mother to comply with the family service plan. The trial court announced that it was taking judicial notice of the orders. The mother did not challenge its decision. Accordingly, the trial record contains the order that established the actions necessary for the mother to obtain the return of her children as 161.001(1)(O) requires. *See Trimble*, 981 S.W.2d at 215; *see also* TEX. R. EVID. 201.

The mother further asserts that the evidence is insufficient to support termination under section 161.001(1)(O) because the mother was in an abusive relationship with her husband, who would not allow her to obtain the services necessary to complete the family service plan. The mother's response that her failure to comply was due to her abusive relationship with her husband is unavailing.

We note that the Family Code does not excuse a failure to comply in assessing whether a violation of section 161.001(1)(O) has occurred. *See In re M.C.G.*, 329 S.W.3d 674, 675–76 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *see also In re J.S.*, 291 S.W.3d 60, 67 (Tex. App.—Eastland 2009, no pet.); *Wilson v. State*, 116 S.W.3d 923, 929 (Tex. App.—Dallas 2003, no pet.). But, any excuse for failing to complete a family services plan can be considered part of the best interest determination. *See In re T.N.F.*, 205 S.W.3d 625, 631 (Tex. App.—Waco 2006, pet. denied); *see also Holley v. Adams*, 544 S.W.2d 367, 371 (Tex. 1976); *In the Interest of S.K.S.*, 648 S.W.2d 402, 404 (Tex. App.—San Antonio 1983, no writ). Importantly, the abusive relationship with her husband does not account for the mother's non-compliance during the period after her husband moved to Wisconsin. Her husband moved to Wisconsin in February 2010, and his relationship with the mother ended. The trial court conducted a bench trial on the Department's parental-termination suit in November 2010.

From February 2010 till November 2010, the mother continued to not comply with trial court's orders. For example, in October 2010, the mother refused to submit to a random drug test. The mother responds that she tried her best to comply with the court's orders after her husband left. She completed most of her parenting classes and supposedly attended AA and domestic violence classes. The Family Code, however, does not provide for substantial compliance with a family services plan. *See In re M.C.G.*, 329 S.W.3d at 676.

The mother does not dispute that the children were in the custody of the Department for nine months or that the Department removed the children because of abuse or neglect after it made attempts to offer her social services. In addition, undisputed testimony from the caseworkers and the mother establishes that she did not comply with most, if not all, of the requirements ordered by the court. Specifically, the mother failed to maintain stable employment, to submit to random drug tests on a number of occasions, to participate in individual counseling, to complete a drug and alcohol assessment, to complete parenting classes, and to complete domestic violence classes. Viewing the entire record, we conclude that the trial court could have formed a firm belief or conviction that the mother failed to comply with the provisions of a court order that established the actions necessary for her to obtain the return of her children. *See* TEX. FAM. CODE ANN. § 161.001(1)(O); *see also In re J.F.C.*, 96 S.W.3d at 266. Accordingly, we hold

that the evidence is legally and factually sufficient to support the court's finding on this ground.[2]

Best Interest of the Children

The mother challenges the legal and factual sufficiency of the trial court's finding, pursuant to section 161.002(2), that termination was in her children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(2) (West Supp. 2010).

A strong presumption exists that a child's best interests are served by maintaining the parent-child relationship. *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The Department has the burden to prove by clear and convincing evidence that termination is in the children's best interest. *In the Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). The same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) may be probative in determining the best interests of the child. *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re L.M.*, 104 S.W.3d at 647. In *Holley v. Adams*, the Texas Supreme Court provided a nonexclusive list of factors that the trier of fact in a termination case may use in determining the best interest of the child. 544 S.W.2d at 371–72. These factors include (1) the desires of the

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[2] Because we have concluded that the evidence is sufficient to support the trial court's finding under section 161.001(1)(O), and because a finding as to any one of the acts or omissions enumerated in section 161.001(1) is sufficient to support termination, we need not address the mother's second issue challenging the trial court's findings under section 161.001(E). *See In re A.V.*, 113 S.W.3d at 362.

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. *Id.* These factors are not exhaustive, and there is no requirement that the Department prove all factors as a condition precedent to parental termination. *In re C.H.*, 89 S.W.3d at 27; *Adams v. Tex. Dep't of Family & Protective Servs.*, 236 S.W.3d 271, 280 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Termination of the parent-child relationship is not justified when the evidence shows that a parent's failure to provide a more desirable degree of care and support of the child is due solely to misfortune or the lack of intelligence or training, and not to indifference or malice. *Clark v. Dearen*, 715 S.W.2d 364, 367 (Tex. App.—Houston [1st Dist.] 1986, no writ).

For legal sufficiency purposes, we consider those factors that support the finding that termination was in the child's best interest. *Yonko v. Dep't of Family & Protective Servs*, 196 S.W.3d 236, 243 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We then balance the factors presented in the legal sufficiency argument

against the evidence that undercuts any finding that termination is justified under the statute. *In re C.T.E.*, 95 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. If, in light of the entire record, the disputed evidence that weighs against termination is so significant that a factfinder could not reasonably have formed a firm belief or conviction that termination was justified, then the evidence is factually insufficient to support termination. *Id.* A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of termination. *Id.* at 266–67.

The mother's acts or omissions

When the mother was responsible for the children, she allowed them to live in unsanitary conditions. Under the mother's care, the children's residence had animal urine and feces covering the floor. On one occasion, Dehart-Clark observed that the children were dirty and without shoes or clothes. She stated that other than being dirty the children appeared healthy and exhibited no signs of physical abuse. The children's daycare reported that the children had to be cleaned and changed each day when they arrived. Since 2008, the mother has never had stable employment. She currently lives with her boyfriend, in what appears to be a

clean house, but has no legal right to reside there. When the caseworker asked the mother what she would do to provide for her children if her boyfriend asked her to leave his home, she did not have an answer. She failed to comply with the conditions in the family service plan and court orders even after the Department explained to her that it was necessary for her to complete these requirements to obtain the return of her children. The mother's acts or omissions are some evidence that termination is in the children's best interest.

Programs available to assist the mother

There is evidence in the record that since 2008, the mother has disregarded the Department's attempts to assist her. When the Department found her house to be hazardous to the health of her children, it offered her homemaker's services. The mother used the services one time and then refused to answer phone calls or the door when a representative attempted to help further. The mother's initial caseworker twice set up services for her so that she could complete her family service plan. The mother failed to attend her appointments and to answer the service providers' phone calls. The mother attended parenting classes, but failed to complete the course.

Any excuse for the mother's acts or omissions

The mother explained that she was going through a "rough time" when the Department initially found her house in disorder. She was in an abusive

relationship with her husband. The mother told the original caseworker that she was not using the services offered by the Department because her husband would not allow her to use them. The mother testified that her husband would not take her to the services, and she did not know how to drive their car. The mother testified that she is now in a stable environment because of her boyfriend, Jason. Since her husband left, she has partially completed parenting classes and gotten a psychological evaluation, and she stated that she attends domestic violence and AA meetings. She did not, however, provide documentation of the domestic violence counseling or AA meetings to the Department. She offered no evidence to excuse her failure to complete the family service plan and the court's orders in the months after her husband's departure. This factor weighs against termination because the mother offered some excuse for her failure, and has made some effort to improve the living situation for her children.

The mother's parental abilities

Since the Department took custody of her children, the mother has visited them and called the Department over twenty times to check on them. She has partially completed parenting classes. Jason and his father testified on behalf of the mother, and have agreed to help the mother in raising the children. The mother has never been charged with a crime. The mother stated that she has an anxiety disorder because of the separation from her children. She testified that she has no

other mental health issues. She offered a copy of a psychological assessment to substantiate her claim. She has completed the twelfth grade. The mother's past neglect of the children, lack of her own residence, and continued unemployment weigh in favor of termination, but the efforts she has made since leaving an abusive relationship weigh against it.

Desires of the children

At the time of the trial, the children were too young to express with whom they desired to live. According to the mother, the children refer to her as "mama." The mother testified that her visits with the children have been "great," and the children were "upset" at the end of the visits. Her oldest child cried the last time that she visited him, and he did not want her to leave. The mother loves her children, and they are bonded to her. The Department presented no evidence that the children have bonded with their foster parents. This factor weighs against termination. *See Yonko*, 196 S.W.3d at 245 ("We agree that the child's desire to remain with a parent is only one factor to consider among many, but love for a parent cannot be ignored as a reflection of the parent's ability to provide for the child's emotional needs. Where the evidence of the parent's failures is not overwhelming, the desires of the child weigh against termination of parental rights.").

Plans for the children

The mother plans to live with the children at Jason's house. The mother and Jason intend to marry and raise the children together, and Jeff wants to act as their grandfather. Both Jason and Jeff testified to their agreement with this plan. The Department's goal is to place all three children in one adoptive home, but that goal has not been met, nor is there any evidence that indicates it is possible. The current caseworker testified that it was possible that the children could be adopted, but she did not know if they would be adopted together. As of trial, the children were in three separate foster-care placements.

Stability of the home or proposed placement

The mother contends that Jason's home is a stable environment for her children. As of trial, the mother had lived with Jason for about nine months. Jason's father testified that the house was clean and suitable for children. He added that he would allow the mother and Jason to live in the house as long as they wanted. The attorney ad litem also observed that the house appeared clean and in a good neighborhood. Jason has been gainfully employed for thirteen years. He stated he is able and willing to support the mother and her children. The mother has no legal right to remain at Jason's house, and Jason has no legal obligation to support the children. The mother is unemployed and remains legally married to

her husband. As stated, the children are in separate foster-placements, awaiting likely separate adoptive placements.

Emotional and physical needs of the children

The caseworker testified that the youngest child was doing very well in his placement and was independent, while the two older children had behavioral problems. The older children both have ADHD and require medication to treat it. They have had behavioral problems in their foster placements. The bond between the children and the mother indicates that the mother was providing for their emotional needs, and that their emotional well-being in the future is dependent upon maintaining a relationship with their mother. *See Yonko*, 196 S.W.3d at 245. The mother, however, allowed her children to be in unsanitary conditions in the past. Other than being dirty, the children appeared healthy and exhibited no signs of physical abuse. The need for permanence is also the paramount consideration for the child's present and future physical and emotional needs. The goal of establishing a stable, permanent home for a child is a compelling interest of the government. *In re S.H.A.*, 728 S.W.2d 73, 92 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). Neither the mother nor the Department has established a stable, permanent home for the children.

Analysis

The discussion of the *Holley* factors above shows some evidence that termination is in the children's best interest: the mother's neglect; an abusive relationship with her current husband; refusal to submit to random drug tests; lack of housing or employment, and a failure of less drastic measures to improve the children's situation. Therefore, viewing the evidence is a light favorable to the trial court's findings, we conclude that it could have formed a firm belief or conviction that it was in the children's best interest to terminate the mother's parental rights. *See In re J.F.C.*, 96 S.W.3d at 266.

Given the strong presumption that a child's best interests are served by maintaining the parent-child relationship and the high evidentiary standard that the Department must meet, however, we hold that the evidence is factually insufficient to support termination. We find that this case is one where appellant's offending behavior is not egregious enough, on its own, to warrant a finding that termination is in the children's best interest. The mother allowed her children to live in unsanitary conditions and neglected their physical hygiene. "Although it is true that unsanitary conditions can qualify as surroundings that endanger a child, it is also true that most cases upholding termination of parental rights based on unsanitary home conditions do not uphold the termination findings solely based on these unsanitary conditions." *In re J.R.*, 171 S.W.3d 558, 573–74 (Tex. App.—

Houston [14th Dist.] 2005, no pet.). In *In re M.C.*, for example, the Texas Supreme Court concluded that, under the former standard of review, the evidence of unsanitary conditions was legally and factually sufficient to terminate a mother's parental rights. 917 S.W.2d 268, 269–70 (Tex. 1996). This conclusion was based on evidence of "extraordinarily unsanitary conditions" in addition to evidence that on at least two occasions the mother left the children alone in potentially dangerous conditions. *See id.* According to testimony, the children's home was infested with roaches, the children ate food off the floor and out of the garbage, and the floor and furniture were littered with food, dirty clothes, garbage, and feces. *Id.* The children often wore soiled diapers and clothes, and sometimes had dried food, feces, and mucus on their skin and clothes. *Id.* One of the children had dead cockroaches matted in her hair, and another infant had dead roaches inside her bottle. *Id.* During one summer, the mother moved the family into a house that lacked plumbing or drinking water, and the children were found suffering from severe diarrhea and vomiting. *Id.*; *cf. In re J.R.*, 171 S.W.3d at 573–74 (holding that evidence of unsanitary conditions was legally insufficient to terminate parental rights despite evidence of "deplorable" trailer in which knife was on bathroom floor, toilet bowl was completely brown, bags of trash, dirty dishes, and spoiled food were scattered throughout kitchen, and the children had ringworm, flea bites and were very thin); *Doyle v. Tex. Dep't of Protective &*

Regulatory Servs., 16 S.W.3d 390, 394–95 (Tex. App.—El Paso 2000, pet. denied) (holding that evidence of unsanitary conditions was legally insufficient to terminate parental rights despite evidence that apartment in which children lived was roach-infested); *In re P.S.*, 766 S.W.2d 833, 836–38 (Tex. App.—Houston [1st Dist.] 1989, no writ) (holding that evidence of unsanitary conditions was legally insufficient to terminate parental rights despite evidence of "deplorable" apartment in which dirty diapers and soiled clothing were scattered throughout, kitchen sink was filled with dirty dishes, garbage was all over, refrigerator was virtually empty, and environment was generally unkempt and unclean).

The evidence adduced at trial does not rise to same level as the facts in *In re M.C.* When Dehart-Clark initially visited the mother's home, she observed that the house was unsanitary and the children were dirty. The daycare also reported that the children came dirty and unwashed to daycare. Dehart-Clark added, however, that the children appeared healthy. There is no evidence that the children suffered from any illness, malnutrition or physical abuse. They did not suffer from diarrhea or vomiting. There is no evidence that they ate contaminated food or that the mother's house was infested with insects or rodents. There is no evidence that the mother's house lacked plumbing or drinking water.

Further, the mother's failure to comply with the service plan was not due to indifference or malice toward her children. *See Dearen*, 715 S.W.2d at 367. She

has visited with her children while they have been in the Department's custody, contacted the Department many times concerning the children, and made attempts to comply with the requirements of the service plan since her husband moved out of the state. Her children are bonded to her, and she has a plan to raise the children with Jason who testified that he has agreed to provide for them. The children are currently separated from each other in non-adoptive placement foster care. Given the nature of the mother's offending behavior and the bond between her and her children, coupled with the children's uncertain future in regard to an adoptive placement, the factfinder could not have reasonably formed a firm belief that terminating the parental rights of the person with whom the children have the best chance of being a family together, is in their best interest. We hold that the evidence adduced at trial is factually insufficient to support the finding that termination of the mother's parental rights is in their best interest.

Conservatorship of the Children

Lastly, the mother questions the legal and factual sufficiency of the evidence supporting the appointment of the Department as the sole managing conservator of the children. She asks that she be appointed sole managing conservator.

The termination of parental rights and the appointment of a non-parent as sole managing conservator are two distinct issues, requiring different elements, different standards of proof, and different standards of review. *Compare* TEX.

FAM. CODE ANN. § 161.001 *with* TEX. FAM. CODE ANN. § 153.131(a) (West 2008); *See also Earvin v. Dep't. of Family & Protective Servs.*, 229 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re J.A.J.*, 243 S.W.3d 611, 615–17 (Tex. 2007); *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). A rebuttable presumption exists that it is in a child's best interest for his parents to be named his joint managing conservators. TEX. FAM. CODE ANN. § 153.131(b) (West 2008). In order to rebut this presumption and appoint someone other than a parent as sole managing conservator of the child, a court must find that appointment of a parent would "significantly impair the child's physical health or emotional development." TEX. FAM. CODE ANN. § 153.131(a) (West 2008); *In re J.A.J.*, 243 S.W.3d at 616. Additionally, "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship[.]" TEX. FAM. CODE ANN. § 153.002 (West 2008).

Unlike the standard of proof for termination of parental rights, the findings necessary to appoint a non-parent as sole managing conservator need only be established by a preponderance of the evidence. TEX. FAM. CODE ANN. § 105.005 (West 2008); *In re J.A.J.*, 243 S.W.3d at 616. Likewise, the standard of review for the appointment of a non-parent as sole managing conservator is less stringent than the standard of review for termination of parental rights. *In re J.A.J.*, 243 S.W.3d at 616. We review a trial court's appointment of a non-parent as sole managing

conservator for abuse of discretion only. *Id.* (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)). Therefore, we reverse the trial court's appointment of a non-parent as sole managing conservator only if we determine that it is arbitrary or unreasonable. *Id.* "Because different standards apply, evidentiary review that results in reversal of a termination order may not yield the same result for a conservatorship appointment." *Id.*

In *Earvin*, this court reversed the trial court's termination of a father's parental rights, but affirmed the trial court's appointment of the Department as the sole managing conservator of the child. 229 S.W.3d at 351. In reversing the termination of the father's parental rights, we held that clear and convincing evidence did not support the trial court's determination that the father placed the child in conditions that would endanger the physical and emotional well-being of the child or demonstrated an inability to provide for the child. *Id.* However, we also held that there was sufficient evidence that the father was not willing to provide the child with an environment that was in the best interest of the child. *Id.* The *Earvin* court noted that the father failed to comply with the court-ordered service plan by failing to attend parenting courses, to submit to random drug tests, and to participate in counseling. *Id.* In addition, he had visited the child only one time while she was in the Department's custody. *Id.* Based on the evidence, the

Earvin court concluded that the trial court did not abuse its discretion in appointing the Department as the sole managing conservator of the child. *Id.*

The facts here are similar to those in *Earvin*. Here, the Department originally took custody of the children because of the mother's neglect. The children were living in hazardous and unsanitary conditions, and they were dirty and unwashed. The Department offered the mother services and set up the family service plan to address her neglect. The mother disregarded the services offered and failed to complete the service plan, including completion of parenting classes. Evidence exists that Jason's house is clean and suitable for children. However, the mother does not have a legal right to reside there, and Jason has no legal obligation to provide for the children. The mother has no independent means to support her children because she is unemployed and is not developing skills to facilitate her employment. When the mother was asked what she would do if Jason told her to leave, she had no answer. In addition, she remains legally married to her husband and has refused to submit random drug tests. The children are very young and therefore need a caregiver who can reliably provide them with support. No other relative was available to assume care of these children. For the foregoing reasons, the trial court's decision was not arbitrary or capricious in determining that the appointment of the mother would not be in the children's best interest and would

significantly impair their physical or emotional development. We affirm the trial court's judgment of conservatorship.

Conclusion

We reverse the trial court's judgment terminating the mother's parental rights and remand for a new trial. We affirm the trial court's order for conservatorship of R.W., E.W., and B.W.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Massengale.