Opinion issued March 31, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00802-CV

IN THE INTEREST OF W.J.B., A CHILD

and

NO. 01-15-00803-CV

IN THE INTEREST OF A.L.F., D.P.F.-A., E.E.F., B.E.H., JR., AND R.F.B., CHILDREN

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Case Nos. 2014-18450 & 2014-01773J

MEMORANDUM OPINION

These appeals arise from a proceeding[1] in which the trial court terminated the parental rights of the mother to her six children, and the rights of three fathers to five of those children.[2] One of the three fathers filed no appeal. Another father, B.J.B., and the mother, T.B.F., have *Anders* briefs filed on their behalf. Only the third father, B.E.H., whose parental rights were terminated after a bench trial that preceded the jury trial, filed a brief arguing for reversal.

We affirm the trial court's judgments and grant the *Anders* motions to withdraw.

Removal of the Children

On April 1, 2014, the Department of Family and Protective Services filed an original petition for protection and termination of parental rights and sought the emergency removal of six children, C.F., A.L.F., D.P.F.-A., E.E.F., B.E.H., Jr., and R.F.B., from the home they shared with their mother, T.B.F., and her husband, B.J.B. In the accompanying affidavit, a caseworker averred that the Department had received a report that T.B.F. and B.J.B. were abusing and neglecting J.B., who is the

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[1] Trial court case number 2014-18450 is the case involving the youngest child, and the appeal from this case is 01-15-00802-CV. Trial court case number 2014-01773J is the case involving the remaining five children, and the appeal from this case is 01-15-00803-CV.

[2] The Department of Family and Protective Services did not seek termination of the parental rights of a fourth man, G.A., who was the biological father of D.P.F.-A.

five-year-old biological son of B.J.B., but not the biological son of T.B.F. The caseworker averred that J.B. was found in a closet in the home by then 16-year-old C.F., and that J.B. was malnourished and had bruises on his forehead, cheeks, mouth, and the side of his head. C.F. confronted B.J.B. about his treatment of J.B., and the police were called after an ensuing altercation between C.F. and B.J.B.

The caseworker further averred that T.B.F. left the home with J.B. and the younger children before police officers arrived to prevent J.B. from being "seen or interviewed." T.B.F. and B.J.B. refused police requests to let them see J.B. However, officers were able to locate the family at a nearby motel by tracking T.B.F. and B.J.B.'s cell phones. J.B. was immediately transported to the hospital, where doctors determined that he had been subjected to chronic malnutrition and starvation as well as "non-accidental trauma" by B.J.B. and T.B.F.

Documentary evidence admitted at the bench trial of B.E.H. detailed J.B.'s condition. A March 31, 2014 report prepared by Memorial Hermann Hospital indicated that J.B. was extremely malnourished and had bruises on his head and body. The attending physician described his appearance as "very remarkable/startling," and stated that he had "complete loss/absence of subcutaneous fat, his scapula and ribs are protuberant." J.B.'s laboratory test results were "consistent with chronic malnutrition." According to the report, J.B. told doctors that he was made to sleep in a "very dark closet that is in the living room under the

stairs" and that he did not feel safe living in the home because "they're mean to me" and "I get in trouble a lot and I don't get to eat." The report indicated that J.B. was so weak that he needed assistance with standing.[3]

Parentage

The case was called to trial on August 25, 2015. The trial court first adjudicated the status of the then-existing parent-child relationships of the six children who were the subjects of the suit.[4] The trial court determined the following:

- T.B.F. is the biological mother of all of the children.
- K.F. is the biological father of A.L.F. and signed a voluntary relinquishment of his parental rights.[5]
- G.A. is the biological father of D.P.F.-A.[6]
- B.E.H. is the biological father of E.E.F and B.E.H., Jr.
- B.J.B. is the biological father of R.F.B. and W.J.B. and the purported adoptive father of E.E.F.

Termination of B.E.H.'s Parental Rights

B.E.H.'s lawyer appeared on his behalf at trial, but B.E.H., although notified, did not appear. B.E.H.'s lawyer had filed a motion for continuance based on

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[3] T.B.F. was pregnant at the time of removal, and the baby, W.J.B., was removed after he was born.

[4] Parental rights to J.B. were not adjudicated in this suit. At the time of trial, he had been returned to his biological mother in Alabama, and B.J.B.'s parental rights to J.B. were adjudicated in Alabama. In addition, because C.F. had turned 18 by the time of trial, he was no longer subject to the suit.

[5] K.F. has not appealed.

[6] The Department did not seek termination of G.A.'s parental rights.

B.E.H.'s representation that his father had recently died, along with a motion to sever for separate trial, and a motion to withdraw because B.E.H. had complained about the lawyer's representation of him. B.E.H.'s lawyer told the trial court that he had asked his client for some confirmation regarding his father's death to present to the court, but received nothing. The trial court denied the motions and commenced a bench trial solely on the Department's request for termination of B.E.H.'s parental rights.

At the bench trial, Lisa McCartney, a child abuse consultant who had worked with the Department in these cases, testified as a fact witness and an expert about the circumstances surrounding the removal of B.E.H.'s children, E.E.F. and B.E.H., Jr. B.E.H. was incarcerated when E.E.F. and B.E.H., Jr. were removed from T.B.F.'s home along with their siblings. McCartney testified that although B.E.H. was incarcerated at the time his children were removed, he "knew [B.J.B.] was living in the home and there [were] issues with violence" because he had lived in the home with T.B.F. and B.J.B. at one time. While B.E.H. and T.B.F. were living together, T.B.F. began a relationship with B.J.B. and B.J.B. moved into the home T.B.F. was sharing with B.E.H. and the children. McCartney testified that as a result, B.E.H. knew that the home environment was not healthy and possibly dangerous to the children's physical and emotional well-being. B.E.H. eventually moved out of the

home after a violent confrontation between him and B.J.B.[7] Although B.E.H. was aware of the issues with violence, he "offered no protection for the children" when he left. McCartney admitted that because B.E.H. was incarcerated, he was not the one who was "allegedly neglecting the children, keeping them in the closet, not feeding them, et cetera" at the time of removal, but testified that he could have made arrangements for a more appropriate caregiver to care for the children, and should have, because of the known problems in the home.

McCartney testified that B.E.H. was convicted in 2008 for injury to a child, C.F., in connection with an incident that occurred on June 11, 2008. Two Harris County Constable incident reports admitted during the bench trial describe the June 11, 2008 assault of T.B.F. and then nine-year-old C.F. C.F. told the officer that B.E.H. was yelling at T.B.F. and C.F. started crying. B.E.H. cursed at him and called him a crybaby, and when C.F. said he wasn't a crybaby, B.E.H. punched C.F. and slammed him into a wall multiple times. C.F. told the officer that T.B.F. was holding one-year-old E.E.F. and tried to stop B.E.H., but B.E.H. slammed her into the wall and the table while she was holding the baby. T.B.F. took C.F. to the pediatrician because he was in pain and had bruises on his arm and back, and the doctor diagnosed him with a contusion on his left arm, a sore neck and shoulder from a

[7] The documentary evidence showed that B.E.H. pleaded guilty to assaulting B.J.B. with a deadly weapon in February 2012.

sudden jolt, and a sore neck from a sharp blow. B.E.H. was charged with and pleaded guilty to the felony offense of injury to a child, and was placed on deferred adjudication for two years.

McCartney testified that when B.E.H. was arrested for the assault of C.F., the Department developed a safety plan that prohibited B.E.H. from having contact with T.B.F.'s children. However, when B.E.H. was released from jail, he moved back into the home with T.B.F. and her children. McCartney testified that this was concerning because, at the time B.E.H. injured C.F., "there was a lot of chaos, and emotional abuse, and bad things going on at the time in the home. And then [B.E.H.] returned to the home with the same victim that he had been convicted of hurting." An incident report from three years after the assault of C.F. showed that B.E.H. was living in the home and that T.B.F. permitted him to supervise the children. In that December 2011 report, T.B.F. reported that C.F. had run away after she became angry at him for drinking vodka. C.F. had been left in the care of B.E.H. at the time.

There was also evidence of B.E.H.'s drug use. McCartney testified that B.E.H. has a "drug issue and drug problems," specifically, with cocaine. She testified that he was being drug-tested by his probation officer, but there was a warrant out for his arrest because he had not kept up with the terms of his probation.

At the time of the bench trial, B.E.H. had not had any involvement with his children for at least six months, although McCartney acknowledged that he may

have been prohibited from seeing them. However, B.E.H. had also not paid any child support for at least six months, although he had been out of jail for at least the six months preceding trial. He was provided with a court-ordered family service plan but had failed to complete it. McCartney testified that she expressed to B.E.H. "the importance of him following through with his [service plan] tasks and listening to his attorney." She testified that she attempted to guide him to do the things he needed to do to be reunited with his children and told him that he needed to work closely with his appointed attorney and his caseworker. McCartney testified that B.E.H. had a clear understanding of what he needed to do and had an adequate opportunity to start working on services after he was released from prison, but failed to do so.

Progress reports filed by the Department showed that B.E.H. did not comply with his service plan. The reports from both May 2015 and August 2015 (the month of the bench trial) indicated that B.E.H. had not completed any of the requirements of his service plan. The August report noted that B.E.H.'s last contact with the Department was in March 2015, and that he had not provided the Department with a working phone number or current address.

McCartney testified that E.E.F. and B.E.H., Jr. are doing very well with their foster family and that the family plans to adopt them. E.E.F. and B.E.H., Jr. refer to the foster parents in their placement as "mommy" and "daddy." E.E.F. and B.E.H.,

Jr. have improved since being removed from T.B.F.'s home and being placed with that family.

Documentary evidence showed that both of B.E.H.'s children suffered psychological damage because of their home environment. A psychological evaluation of E.E.F., performed shortly after removal, reported that, according to E.E.F., when B.E.H. lived in the home, "he was nice sometimes, but sometimes he was not." She told the evaluator that she was never hurt or harmed and had adequate food, "but I don't know about [J.B.]" When talking about B.J.B. and J.B., E.E.F. would "regress into baby talk." She told the evaluator that B.J.B. treated J.B. "differently than the rest of us and he was mean to him . . . but I don't want to explain." When asked to describe her father (B.E.H.), she said "I don't know who he is . . . I don't know when I saw him last." The evaluation concluded that E.E.F. "needs a nurturing environment that provides a sense of safety and belonging."

A second psychological evaluation of E.E.F., conducted several months after removal, noted that E.E.F. told the evaluator that B.J.B. made J.B. sleep in a closet and that he was sometimes kept in the closet at other times, and that T.B.F. was aware of this treatment. E.E.F. told the evaluator that J.B. was fed only bread and water. E.E.F. stated that B.J.B. "started to do that to them, but that her mom would not let him do that to any of the rest of us." E.E.F.'s foster mother told the evaluator

that E.E.F. had significant sleep problems. E.E.F. told the evaluator that she wants to continue to live with her foster mother.

A psychological evaluation of B.E.H., Jr., conducted several months after removal, was also admitted. The evaluation indicated that B.E.H., Jr. understood that he was removed from T.B.F.'s home because B.J.B. "puts [J.B.] under the stairs in the closet" and that J.B. did not get food. B.E.H., Jr.'s foster mother reported to the evaluator that B.E.H., Jr. wet the bed every night, had nightmares several times a week, had a hard time falling asleep, and told her that he was afraid that B.J.B. will get a ladder and break into his bedroom and hurt him. The evaluator concluded that B.E.H., Jr. was suffering from post-traumatic stress disorder. The evaluator further concluded that B.E.H., Jr. was doing well in his foster placement and liked living with his foster mother.

McCartney testified that she believed termination of B.E.H.'s parental rights was in the children's best interest because B.E.H. had "demonstrated a continuing course of conduct that is not conducive to raising children nor in their best interest," he had "abused children," "not acted responsibly," there had been "violent allegations against him," and he had fought with B.J.B. She testified that the children had "been exposed to so much dysfunction, violence, and chaos in their lives that they need stability, structure, and they need permanency." She testified that she believed termination was in the children's best interest because B.E.H. had

"failed to support or protect his children from the environments that they were living in, and he was aware that it was not a safe environment." McCartney testified that she did not think B.E.H. would be a suitable parent if given the opportunity "[b]ecause of his continuing course of conduct," his "pattern of behavior of not following the law, endangering children, leaving them in dangerous places," and the fact that "he keeps going back to jail even though he's been provided services through probations such as drug treatment." McCartney testified that offering supervised visitation instead of terminating B.E.H.'s rights would be detrimental to the children because they "need permanency" and "need to be able to move on, and grow and thrive," and B.E.H.'s behavior was not "conducive to the children having the stability that they need now and in the future." If B.E.H.'s rights were not terminated, the children "would be permanent CPS foster kids," which is "not healthy for any child" because they "need to have stability, structure, and the best chance of growing up to be productive adults."

At the close of the bench trial, the trial court orally rendered judgment terminating B.E.H.'s parental rights under Family Code section 161.001(1)(D), (E), (N), (O), and (L).

Termination of T.B.F.'s and B.J.B.'s Parental Rights

After the bench trial, the Department's request for termination of T.B.F. and B.J.B.'s parental rights was tried to a jury. The jury found that T.B.F.'s and B.J.B.'s

parental rights should be terminated. The trial court subsequently signed final judgments terminating the parental rights of T.B.F., B.J.B., B.E.H., and K.F.

B.E.H's Appeal

In three issues, B.E.H. complains that (1) he was not permitted to try his case before a jury and (2) the evidence adduced during the bench trial was insufficient to support termination.

A. Jury Trial

In his first issue, B.E.H. argues that the trial court abused its discretion by denying B.E.H. a jury trial.

1. Standard of Review and Applicable Law

The Family Code provides that a party may demand a jury trial in a parental-rights termination proceeding. *See* TEX. FAM. CODE § 105.002(a). However, in a termination case, the right to a jury arises only when a party has demanded a jury trial and paid the applicable fee. *See In re J.N.F.*, 116 S.W.3d 426, 431 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also* TEX. R. CIV. P. 216 (no jury trial shall be had in a civil suit unless a written request is filed and jury fee is paid).

Under Texas Rule of Civil Procedure 220, a party may rely on another party's jury demand, and the case may not be tried to the bench over objection once the demand has been properly made. TEX. R. CIV. P. 220; *see Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996); *see also Bank of Houston v.*

White, 737 S.W.2d 387, 388 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding) (case will not be removed from jury docket if any party adversely affected objects to removal). However, a party waives his right to a jury if he does not object to proceeding without a jury when the case is called for trial. *See In re W.G.O, III*, No. 02-12-00059-CV, 2013 WL 105661, at *2 (Tex. App.—Fort Worth Jan. 10, 2013, pet. denied) (parent waived right to jury by failing to object to proceeding without a jury when case was called for trial); *Walker v. Walker*, 619 S.W.2d 196, 198 (Tex. App.—Tyler 1981, writ ref'd n.r.e.) (party waives right to jury when fails to object to proceeding without a jury when the case is called to trial); *cf. In re W.B.W., Jr.*, 2 S.W.3d 421, 422 (Tex. App.—San Antonio 1999, no pet.) ("Because [appellant's] lawyer timely appeared for trial and objected to the nonjury setting, [appellant] did not waive her right to trial by jury.").

2. Analysis

We conclude that B.E.H. waived his right to a jury because he did not object when his case was called to trial and tried to the bench. T.B.F. filed a jury demand, upon which B.E.H. was entitled to rely. *See Rhyne*, 925 S.W.2d at 666. However, in order to preserve his right to a jury trial, B.E.H. was required to object to proceeding to a nonjury trial. *See In re W.G.O, III*, 2013 WL 105661, at *2 (parent who had timely filed written jury demand and paid fee waived right to jury by not objecting to proceeding to nonjury trial); *cf. In re W.B.W., Jr.*, 2 S.W.3d at 422

(parent who had timely filed written jury demand and paid fee preserved right to jury trial by timely objecting to proceeding with nonjury trial). Here, B.E.H.'s lawyer made no objection to proceeding to a bench trial. Accordingly, we hold that this issue is not preserved for our review. *See In re W.G.O, III*, 2013 WL 105661, at *2; *In re W.B.W., Jr.*, 2 S.W.3d at 422.

We overrule B.E.H.'s first issue.

B. Sufficiency of the Evidence

In his second and third issues, B.E.H. contends that the evidence supporting the trial court's termination of his parental rights is legally and factually insufficient.

1. Standard of Review and Applicable Law

In a case to terminate parental rights by the Department under section 161.001 of the Family Code, the Department must establish, by clear and convincing evidence, that (1) the parent committed one or more of the enumerated acts or omissions justifying termination and (2) termination is in the best interest of the child. TEX. FAM. CODE § 161.001. Clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). "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).

In a legal sufficiency review in a parental-rights-termination case, the appellate court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d at 266. We assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, disregarding all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* If, after conducting a legal sufficiency review of the record, we determine that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude that the evidence is legally insufficient. *Id.*

In a factual sufficiency review, the appellate standard for reviewing termination findings is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). By focusing on whether a reasonable factfinder could form a firm conviction or belief, the appellate court maintains the required deference for the factfinder's role. *Id.* at 26. "An appellate court's review must not be so rigorous that the only factfindings that could withstand review are those established beyond a reasonable doubt." *Id.* We 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 a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

2. Termination under section 161.001(1)

In his second issue, B.E.H. argues that the evidence is legally and factually insufficient to support termination of his parental rights under section 161.001(1)(D), (E), (L), (N), and (O). Because we conclude that sufficient evidence supports the trial court's finding under section 161.001(1)(L), and this is dispositive of B.E.H.'s second issue, we address this finding first.

In relevant part, Section 161.001(1)(L) provides that the trial court may order termination of the parent-child relationship if it finds by clear and convincing evidence that the parent has:

> been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code:
>
> . . .
>
> (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual)[.]

TEX. FAM. CODE § 161.001(1)(L)(ix). The Family Code does not define "serious injury," and accordingly, we give it its ordinary meaning. *See In re A.L.*, 389 S.W.3d 896, 900–01 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *C.H. v. Dep't of Family and Protective Servs.*, Nos. 01-11-00385-CV, 01-11-00454-CV, 01-11-00455-CV, 2012 WL 586972, at *4–5 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)). "Serious" means "having important or dangerous possible consequences," while "injury" means "hurt, damage, or loss sustained." *See id.* "Serious injury" under section 161.001(1)(L) does not require bodily injury. *See id.*; *see also In re L.S.R.*, 92 S.W.3d 529, 530 (Tex. 2002) ("serious injury" may be implied from certain types of convictions, even those that do not involve bodily injury; disavowing appellate court's suggestion that molestation or indecency with a child do not necessarily cause "serious injury" to the victim).

The evidence adduced in the bench trial conclusively demonstrated that B.E.H. had been placed on deferred adjudication community supervision for injury to a child under section 22.04 in connection with the June 11, 2008 assault of C.F. The record includes a certified copy of B.E.H.'s indictment for injury to a child and a protective order entered in connection with that charge. It also contains a certified copy of the 2008 order of deferred adjudication showing that B.E.H. was placed on deferred adjudication community supervision for two years after he pleaded guilty to injury to a child, C.F.

There was also sufficient evidence from which the trial court could conclude that the acts for which B.E.H. was convicted caused serious injury to C.F. The incident reports that gave rise to the charges for the June 11, 2008 incident showed that B.E.H. punched C.F. so hard that he fell to the ground and that B.E.H. slammed C.F. into a wall multiple times, causing him to cry. C.F. watched B.E.H. slam his mother into a table and a wall while his mother was holding C.F.'s sister. The officer noted that C.F.'s arm was red and swollen. Following the incident, C.F. had bruises on his arm and back and scratches on his back and was in so much pain that T.B.F. took him to the pediatrician, where he was diagnosed with a contusion on his left arm, a sore neck and shoulder from a sudden jolt, and a sore neck from a sharp blow. *See C.H.*, 2012 WL 586972, at *6 (child was seriously injured when child had bruising on body, swollen eye, and difficulty walking). C.F. told the officer that B.E.H. hurt him, his mother, and his sister and he did not want B.E.H. back in the house.

B.E.H. contends that the evidence supporting the trial court's finding under subsection (L) is insufficient, but he ignores the documentary evidence admitted at the outset of the bench trial and focuses only on McCartney's oral testimony, which did not touch on the details of the June 11, 2008 incident. Considering all the evidence in the light most favorable to the trial court's finding under subsection (L)(ix), we conclude that a reasonable trier of fact could have formed a firm belief

or conviction that B.E.H. had been placed on deferred adjudication community supervision for being criminally responsible for injury to a child that had caused serious injury to the child, C.F. *See In re J.F.C.*, 96 S.W.3d at 266; *see, e.g.*, *C.H.*, 2012 WL 586972, at *6 (evidence sufficient to support finding that parent caused serious injury to child when evidence showed parent beat child with belt and child had bruising on body, swollen eye, and difficulty walking); *see also In re L.S.R.*, 92 S.W.3d at 530 (psychological or emotional injury is relevant consideration when determining whether child has sustained serious injury). We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the subsection (L)(ix) finding or was not so significant that the factfinder could not reasonably have formed a firm belief or conviction that section 161.001(L)(ix) was satisfied. *See In re C.H.*, 89 S.W.3d at 28. Accordingly, we hold that legally and factually sufficient evidence supports the trial court's finding under section 161.001(1)(L).

Because sufficient evidence of only one predicate finding is necessary to support termination, we need not address the remainder of B.E.H.'s second issue, in which he challenges the predicate findings for termination under subsections (D), (E), (N), and (O). *See In re A.V.*, 113 S.W.3d at 362.

We overrule B.E.H.'s second issue.

3. Best Interest of the Children

In his third issue, B.E.H. argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights was in the children's best interest.

a. Applicable Law

A strong presumption exists that a child's best interest is served by maintaining the parent-child relationship. *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), the Texas Supreme Court provided a nonexclusive list of factors that the factfinder in a termination case may use in determining the best interest of the child. *Id.* at 371–72. These factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* These factors are not exhaustive, and the Department need not 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.).

"[T]he prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." TEX. FAM. CODE § 263.307(a). Evidence establishing one of the predicate acts under section 161.001(1) also may be relevant to determining the best interest of the child. *See In re C.H.*, 89 S.W.3d at 28.

b. Analysis

Reviewing these factors, we first consider evidence of E.E.F.'s and B.E.H., Jr.'s desires. The evidence shows that E.E.F. and B.E.H., Jr. refer to their foster parents as "mommy" and "daddy." B.E.H., Jr. reported that he liked living with his foster mother and E.E.F. told her psychological evaluator that she wanted to stay with her foster mother. Accordingly, this factor weighs in favor of termination.

Next, under the second and fourth *Holley* factors, we consider the evidence of E.E.F.'s and B.E.H., Jr.'s present and future emotional and physical needs, and the evidence regarding B.E.H.'s ability to parent and provide for their needs. The psychological evaluations of both children indicated that they have had significant sleeping problems and that B.E.H., Jr. suffers from post-traumatic stress disorder. The evidence at trial indicated that B.E.H. left his children in the home in 2012 after having a violent altercation with B.J.B. and that he was in jail part of the time the

case was pending. Although B.E.H. was in jail when the children were removed, McCartney testified that he had been out of jail for at least the last six months preceding trial, but made no contact with his children and did not contact the Department after March 2015, which was five months before trial. McCartney testified that B.E.H. had had no involvement with his children between removal and trial and had not paid any child support for the children. McCartney further testified that B.E.H. was aware of the violence and dysfunction in the home with T.B.F. and B.J.B., but had done nothing to find more appropriate caregivers for his children. He did not complete any requirement of his court-ordered family service plan and did not have a working telephone number or current address at the time of trial. Also, at the time of trial, there was an outstanding warrant for B.E.H.'s arrest because he had failed to comply with the terms of his probation. Thus, the evidence regarding these factors weighs in favor of a finding that termination was in the children's best interest.

With respect to the third *Holley* factor, evidence of the emotional and physical danger to E.E.F. and B.E.H., Jr. now and in the future, we are mindful that evidence of past misconduct or neglect can be used to measure a parent's future conduct. *See In re A.M.*, 385 S.W.3d 74, 82 (Tex. App.—Waco 2012, pet. denied). B.E.H. has been convicted of injury to a child, in an altercation where he hit the children's older brother, C.F., repeatedly, and also hit and pushed T.B.F. while she was holding one-

year-old E.E.F. McCartney testified that B.E.H. has issues with cocaine, and he was also convicted of aggravated assault of B.J.B., a violent crime. Thus, the evidence related to this factor weights in favor of the trial court's best interest finding.

With respect to the fifth *Holley* factor, programs available to assist B.E.H. in promoting the best interest of his children, the evidence conclusively showed that B.E.H. had not completed any of the programs required by his court-ordered family service plan, including a drug and alcohol assessment, a psychological assessment, and parenting classes. McCartney testified that she had worked with B.E.H. on behalf of the Department to make sure that he understood what he needed to do to be reunited with his children, and that although B.E.H. had a clear understanding of what he needed to do, he did not comply with his court-ordered family service plan. Thus, this factor weights in favor of the trial court's best interest finding. *See In re J.I.T.P.*, 99 S.W.3d at 847 (evidence of mother's failure to follow therapy plan as recommended by psychological evaluation pursuant to court-ordered family service plan weighed in favor of best interest finding).

Concerning factors six and seven, in which we examine the plans for the child by the individual and by the agency seeking custody and the stability of the home or proposed placement, the record reflects that E.E.F. and B.E.H., Jr. are doing well in their placement. The family with whom they are placed plans to adopt them and the

children's emotional and mental health has improved since being in the placement. Accordingly, this factor weighs in favor of the trial court's best interest finding.

With respect to the eighth *Holley* factor, evidence of acts or omissions that indicate that the existing parent-child relationship between B.E.H. and E.E.F. and B.E.H., Jr. is not a proper one, the evidence suggests that B.E.H. had a limited relationship with his children, particularly after he left the home in 2012 after the altercation with B.J.B. E.E.F. told the psychological evaluator that she had not seen B.E.H. for a long time, and that when he lived with them he sometimes was nice, and sometimes was not nice. The evidence also shows that B.E.H. physically assaulted T.B.F. while she was holding one-year-old E.E.F. On balance, this factor weighs in favor of the trial court's best interest finding.

We note also that B.E.H. failed to appear at the trial. According to his lawyer, this failure to appear may have been due to the death of B.E.H.'s father, but his lawyer was unable to confirm this claim. We also note that there was no evidence regarding the ninth *Holley* factor, any excuses for the acts or omissions of B.E.H.

Considering all the evidence in the light most favorable to the trial court's best interest finding, we conclude that a reasonable trier of fact could have formed a firm belief or conviction that termination of B.E.H.'s parental rights was in the children's best interest. *See In re J.F.C.*, 96 S.W.3d at 266. And, considering the entire record, any disputed evidence was not so significant that the trial court could not have

reasonably formed a firm belief or conviction that termination was in the children's best interest. *See In re C.H.*, 89 S.W.3d at 28. Accordingly, we hold that legally and factually sufficient evidence supports the trial court's finding that termination of B.E.H.'s parental rights was in the children's best interest.

We overrule B.E.H.'s third issue.

Appeals by T.B.F. and B.J.B.—*Anders* Briefs

The procedures set forth in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), are applicable to an appeal from a trial court's order terminating parental rights when appellant's appointed appellate counsel concludes that there are no non-frivolous issues to assert on appeal. *See In re D.D.*, 279 S.W.3d 849, 849–50 (Tex. App.—Dallas 2009, pet. denied); *In re D.E.S.*, 135 S.W.3d 326, 329 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *In re K.D.*, 127 S.W.3d 66, 67 (Tex. App.—Houston [1st Dist.] 2003, no pet.). T.B.F.'s appointed counsel and B.J.B.'s appointed counsel have filed *Anders* briefs in which they conclude that, after a thorough review of the records, their respective client's appeals are frivolous and without merit.[8] *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400; *In re D.E.S.*, 135 S.W.3d at 327, 330; *In re K.D.*, 127 S.W.3d at 67.

[8] We grant B.J.B.'s Unopposed Motion to File Tardy Brief and Unopposed Motion to Exceed TRAP 9.4(i)(2)(B) Word Limit.

Counsels' briefs meet the minimum *Anders* requirements by presenting a professional evaluation of the records and stating why there are no arguable grounds for reversal on appeal. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400. Here, both T.B.F.'s counsel and B.J.B.'s counsel have certified that they delivered a copy of their motions to withdraw, *Anders* briefs, and copies of the records to their client and have informed them of their right to review the records and file pro se responses. *See In re K.D.*, 127 S.W.3d at 67; *see also Kelly v. State*, 436 S.W.3d 313, 322 (Tex. Crim. App. 2014). The Department filed a waiver of its rights to file responsive briefs. T.B.F. and B.J.B. have not filed pro se responses.

We have independently reviewed the entire record in each appeal, and we conclude that no reversible error exists in the records, that there are no arguable grounds for review, and that therefore T.B.F.'s and B.J.B.'s appeals are frivolous. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400 (emphasizing that reviewing court—and not counsel—determines, after full examination of proceedings, whether the appeal is wholly frivolous); *In re D.E.S.*, 135 S.W.3d at 330 (same); *In re K.D.*, 127 S.W.3d at 67 (same). We have reviewed counsels' *Anders* briefs and agree with counsels' assessments that the appeals are frivolous and without merit. Accordingly, we will affirm the trial court's judgment as to T.B.F. and B.J.B. and grant their respective counsels' motions to withdraw.

Conclusion

We affirm the judgments of the trial court and grant counsels' motions to withdraw in each appeal.[9] Attorneys Juliane Crow and William Thursland must immediately send the notice required by Texas Rule of Appellate Procedure 6.5(c) to their respective clients and file copies of the notices with the Clerk of this Court. *See* TEX. R. APP. P. 6.5(c).

Rebeca Huddle
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

[9] Appointed counsels still have a duty to inform their respective clients of the result of these appeals and notify them that they may, on their own, pursue petitions for review in the Supreme Court of Texas. *See In re K.D.*, 127 S.W.3d 66, 68 n.3 (Tex. App.—Houston [1st Dist.] 2003, no pet.).