Opinion issued October 3, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00283-CV

IN THE INTEREST OF C.J.L., A CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2016-02236J

MEMORANDUM OPINION

In this accelerated appeal, appellant, J.W.L. ("Father"), challenges the trial court's decree terminating his parental rights to his minor child, C.J.L ("the Child"). In four issues, Father argues that the evidence was legally and factually insufficient to support (1) the termination of his rights under Texas Family Code section 161.001(1)(E); (2) the termination of his rights under Texas Family Code section

161.001(1)(O); (3) the finding that termination of Father's parental rights was in the best interest of the Child under Texas Family Code section 161.001(2); and (4) the appointment of the Department of Family and Protective Services ("the Department) as managing conservator. *See* TEX. FAM. CODE ANN. §§ 161.001(1)(E), 161.001(1)(O), 161.001(2), 153.131(a) (West 2014). We affirm.

BACKGROUND

Mother's History with the Department

Even before the Child's birth in 2015, Mother had a history with the Department. In 2008, the Department received a referral regarding Mother's oldest daughter ("the Daughter").[1] The referral alleged drug use and domestic violence. Because the Department was unable to obtain a valid drug test from Mother, the case was disposed of as "Unable to Determine."

In May 2014, the Department received another referral when Mother's second child, also a daughter, died. This child died while strapped in a car seat as Mother showered. Mother tested positive for methamphetamine at the time. The autopsy showed no abuse or neglect, so this referral was also disposed of as "Unable to Determine." Nevertheless, the Department offered Mother the opportunity to participate in Family Based Safety Services, and Mother accepted. Just as the

[1] The Daughter was 13 years old at the time of the present trial and was living with the Grandmother and the Child. The Daughter had lived with the Grandmother her entire life.

Department was ready to close the case, it learned in January 2015 that Mother was pregnant and had given birth to the Child.[2]

The Department's Involvement after the Child's Birth

Because of Mother's history of drug abuse, the Department and Mother and Father agreed to a Parental Child Safety Placement Agreement ("PCSPA") shortly after the Child's birth. Both Mother and Father signed the PCSPA, agreeing to have the Child and the Daughter placed with Mother's mother ("the Grandmother"). Mother and Father also signed a Child Safety Evaluation and Plan ("CSEP"), in which both parents agreed that they would have no unsupervised visits with the Child, that they would undergo drug testing, and that they would complete all services offered by the Department.

Mother attempted substance abuse counseling with Hands of Healing two times, but was discharged both times for lack of success. She failed several drug tests.

The Department attempted to offer services to Father, but he refused. He also refused all requests to take drugs tests, arguing that he did not need to participate in

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[2] The Department became aware of Mother's pregnancy when the hospital, where Mother had been admitted for pregnancy complications, contacted the Department because Mother had a positive drug screen for amphetamine, barbiturate, and benzodiazepine.

services because "he should not be part of the case[,]" even though he had signed the PCSPA and CSEP.

In April 2016, Mother removed the Child from his daycare and refused to return him to Grandmother. Grandmother told a Department representative that Mother was residing with Father at his mother's house at the time. Grandmother went to the house where Mother and Father were living to retrieve the child. When Grandmother saw Mother, Mother "had a black eye and bruises on her." Grandmother told a Department representative that she was concerned about the environment at Father's home; Father had recently been in jail and he was wearing an ankle monitor when the Child was taken from Grandmother's custody.

The Department Sues for Conservatorship

After the Child was removed from Grandmother's custody, the Department filed its Original Petition in April 2016, seeking temporary managing conservatorship of the Child. The same day, the trial court signed emergency orders giving the Department temporary managing conservatorship of the Child. On April 26, 2016, after an adversary hearing, the trial court signed an order giving temporary sole managing conservatorship of the child to the Department. The April 26 order also required Father to "comply with each requirement set out in the Department's original or any amended service plan during the pendency of this suit." The trial court once again placed the Child and the Daughter in Grandmother's custody.

Father's Family Service Plan

Father's service plan, dated May 25, 2016, identified the following two goals:

> [Father] will demonstrate the willingness and ability to protect the child from harm.
>
> [Father] will demonstrate a willingness and ability to protect their [sic] child from people who may inflict serious harm.

In addition, Father's service plan included the following tasks and services:

> • [Father] will maintain a stable and child friendly home for his child. The housing is to be safe, clean and free of hazards to ensure the child's safety and well-being. All of the utilities in the home such as electricity, water, and gas must be operational and he must apply basic homemaking skill in his daily chores such as sweeping, dusting, mopping, washing dishes, and doing laundry. [Father] will also notify the caseworker of any changes in his housing situation.
>
> • [Father] will be available by reasonable request and allow the Caseworker or agency representative to conduct both random and CPS scheduled home visits. This person must be allowed access to all areas of the home environment in an effort to assess safety and before the goal of reunification can be considered.
>
> • [Father] will participate in an agency approved parenting class in person and not via the internet. The parent will be responsible for choosing a class that lasts at least 8 weeks long and must provide the Caseworker with documentation of completion once this task has been completed. The parent will be responsible for any fees associated with this task.
>
> • [Father] will gain an acceptance and understanding of the role that he plays in the current situation and how his lack of age appropriate parenting skills and drug usage may be affecting the care of his child.
>
> • [Father] will acquire and maintain a legal form of employment or income and provide documentation in the form of payroll stubs and/or

income verification documents to the caseworker. Employment must be maintained and stable for more than 6 months.

• [Father] will participate in parenting classes. Classes must be at least 6–8 weeks in length. [Father] will be provided with a list of parenting classes by [the Department] caseworker. [Father] will be responsible for enrolling in classes and for any fees associated with the parenting classes. Upon completion of the parenting classes, [Father] will attend all visits with his child, court dates, and conference meetings and maintain contact with the agency. [Father] will be responsible for [his] own transportation to all appointments. [Father] will maintain contact with his caseworker at 3 Northpoint Drive, Houston, TX 77080 or by telephone[.]

• [Father] will sign any release of information forms the agency considers necessary to protect the best interest of the child. [Father] will also complete the health social educational genetic information form to insure that the child's individual needs maybe met by the agency. Both forms are to be completed and returned to the Caseworker within 2 weeks after the status hearing has occurred.

• [Father] will participate fully in a Psychosocial Evaluation to address his emotional and mental needs. The person administering this evaluation will be Harris County Children's Crisis Center at 2525 Murworth Drive, Houston, TX. [Father] will be contacted by the services provider to schedule the appointment. It is the responsibility of the parent to make sure that the caseworker has correct contact information. If after 2 weeks from the status hearing date, the provider has not contacted the parent then the parent should contact the provider to schedule the appointment. The fee associated with this service will be paid for by the agency. [Father] will follow all recommendations from the evaluation that may include individual therapy, family therapy, and/or group therapy.

• [Father] will provide the caseworker and/or service provider with an updated means of contact such as telephone numbers and address information in an effort to ensure timely contact for services. If [Father] has a change in his means of contact [he] needs to contact the caseworker within 48 hours to notify the caseworker of such changes.

• [Father] will submit to random drug screen[s] which may include hair follicle, oral swabs, or urinalysis as requested by the supervising caseworker and the Texas Department of Family and Protective Services. [Father] will be contacted the morning the drug screen is to be taken. [Father] will have 24 hours from the time he is contacted by the Department to submit to the drug testing. Failing to submit will be entered as a positive drug test. This service is funded by CPS.

• [Father] will complete a drug/alcohol assessment. [Father] will be referred to Hands of Healing at 2609 Market St., Baytown, TX 77520 to complete this service. This service will be funded by the Department of Family and Protective Services, however, if [Father] fails to report to three scheduled appointments with the provider, the cost of the service will become his responsibility. [Father] will follow any and all recommendations made by the service provider which may include, but are not limited to, supportive, intensive, or basic substance abuse counseling, inpatient treatment, and/or NA/AA meetings.

• [Father] will comply with all visitation orders. Until paternity is established this father may only contact the children through the Caseworker. Once paternity is established a visitation schedule will be arranged by the Caseworker and provided to all parties.

• [Father] will need to complete paternity testing as directed by the court in an effort to establish paternity. Once identified as the father, he will be responsible for completing all tasks outlined in the amended family service plan which will be completed by the Caseworker and submitted to the court after an assessment of needs is conducted.

Father Failed to Complete his Family Service Plan

Father testified at trial that he had completed a psychosocial assessment, a drug and alcohol assessment, and was currently attending counseling. The Department provided evidence that Father had not completed his individual counseling or his substance abuse therapy.

Father testified that he had completed his parenting classes, but the Department had not received any proof of such completion as required by the Family Service Plan.

Father claimed to have a job and that he was able to support the Child, but he did not provide any proof of such employment, such as pay stubs or income verification documents.

Father testified that he had cooperated with the Department during the case. The Department caseworker testified that she had trouble contacting Father and that her calls always went to voice mail, to which Father would not respond for several days.

Father testified that he went to all court hearings, as required by the Family Service Plan. However, he admitted that he was in jail for "a significant portion of this case," during which time he could not attend hearings.

Father argued that his failure to complete the Family Service Plan was because he was incarcerated for a bond violation from April to July of 2016.

Father visited the child for the first time a few days before trial; he testified that the visit went well.

Father's Drug Use in the Four Months Before Trial

In September 2016, Father's hair tested positive for marihuana. The State's expert at trial stated that the amount present was very low and could have come from

environmental exposure. Father claimed that he had been exposed to other inmates smoking marihuana while he was incarcerated from April to July.

On November 28, 2016, Father tested positive for methamphetamine. The State's expert indicated that the amount of methamphetamine indicated that Father "[u]sed more than one time . . . [n]ot every day but more than one time."

On December 8, 2016, Father tested positive for amphetamine and methamphetamine. The State's expert explained that the amphetamine level could have been therapeutic if appellant had a prescription; no such prescription was introduced into evidence. Regarding the methamphetamine, the expert explained that the level of methamphetamine again indicated that Father had used the substance "[m]ore than one time."

Father, himself, admitted to using methamphetamine during the pendency of the case, although he claimed that it was "one day," not multiples times, despite the multiple positive drug tests.

Father lived with Mother, but claimed that he did not know that she had a drug problem. The record showed that Mother failed 11 drug screenings over a period of two years.

Father's Criminal Record

Father had five DWI convictions, four convictions for driving with a suspended license, and one conviction for assault.

Father's final DWI occurred four months before the Child was born, and Father did not get out of jail until one day after the Child was born. Father returned to jail on a "bond violation" from April to July 2016, where he remained until he pleaded guilty to his final DWI. Father was on 10 years' probation at the time of trial, and admitted that his drug use in the months before trial was a violation of the terms of his probation and could lead to his re-incarceration.

Termination of Parental Rights

Following a bench trial, the court terminated Mother's[3] and Father's parental rights. As for Father, the only subject of this appeal, the court's order specified the following grounds:

> 9. Termination of [Father's] Parental Rights
>
> > 9.1. The Court finds by clear and convincing evidence that termination of the parent-child relationship between [Father], and [Child], is in the best interest of the child.
> >
> > 9.2. Further, the Court finds by clear and convincing evidence, that [Father] has:
> >
> > > 9.2.1 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, pursuant to § 161.001(1)(E), Texas Family Code;
> > >
> > > 9.2.2 failed to comply with the provisions of a court order that specifically established the actions necessary for the father to obtain the return of the child who has been in the permanent or

[3] Mother voluntarily relinquished her parental rights pursuant to TEX. FAM. CODE ANN. § 161.001(1)(K) (West 2014).

> 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, pursuant to § 161.001(l)(O), Texas Family Code[.]

Father timely brought this appeal.

SUFFICIENCY OF THE EVIDENCE

In issues one through four, Father challenges the sufficiency of the evidence to support (1) termination under Family Code section 161.001(1)(E) (endangerment), (2) termination under Family Code section 161.001(1)(O) (failure to complete service plan), and (3) termination under Family Code section 161.001(2) (finding that termination of Father's parental rights was in child's best interest); and (4) a finding that appointment of the Department as managing conservator was in the child's best interest.

Applicable Law and Standard of Review

A parent's rights to the "companionship, care, custody, and management" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397 (1982); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Therefore, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). However, "the rights of natural parents are not absolute" and "[t]he rights of parenthood are

accorded only to those fit to accept the accompanying responsibilities." *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). Recognizing that a parent may forfeit his or her parental rights by their acts or omissions, the primary focus of a termination suit is protection of the child's best interests. *Id.*

In a case to terminate parental rights by the Department under § 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, that (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (West 2008). 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." *A.V.*, 113 S.W.3d at 362.

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. *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 conducting a factual-sufficiency review in a parental-rights-termination case, we must determine whether, considering the entire record, including evidence both supporting and contradicting the finding, a factfinder reasonably could have formed a firm conviction or belief about the truth of the matter on which the Department bore the burden of proof. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). We should consider whether the disputed evidence is such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266–67. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Sufficiency of the evidence under section 161.001(1)(E)–Endangerment

Subsection (E) allows termination when the parent has endangered the child. Specificically, it provides that the court may order termination upon a finding, by clear and convincing evidence, that a parent:

> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child[.]

TEX. FAM. CODE ANN. § 161.001(1)(E).

Endangerment means to expose to loss or injury, to jeopardize. *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003); *see also In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996). Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child's physical well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *See J.T.G.*, 121 S.W.3d at 125; *see also* TEX. FAM. CODE ANN. § 161.001(1)(E). Additionally, termination under subsection (E) must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *J.T.G.*, 121 S.W.3d at 125; *see* TEX. FAM. CODE ANN. § 161.001(1)(E). It is not necessary, however, that the parent's conduct be directed at the child or that the child actually suffer injury. *Boyd*, 727 S.W.2d at 533; *J.T.G.*, 121 S.W.3d at 125. The specific danger to the child's well-being may be inferred

from parental misconduct standing alone. *Boyd*, 727 S.W.2d at 533; *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied).

"[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct." *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). Illegal drug use may support termination under section 161.001(1)(E) because "it exposes the child to the possibility that the parent may be impaired or imprisoned." *Walker*, 312 S.W.3d at 617. Because it significantly harms the parenting relationship, drug activity can constitute endangerment even if it transpires outside the child's presence. *See Boyd*, 727 S.W.2d at 533; *J.O.A.*, 283 S.W.3d at 345; *Walker*, 312 S.W.3d at 617. "[A] parent's decision to engage in illegal drug use during the pendency of a termination suit, when the parent is at risk of losing a child, may support a finding that the parent engaged in conduct that endangered the child's physical or emotional well-being." *In re K.C.F.*, No. 01–13–01078–CV, 2014 WL 2538624, at *9–10 (Tex. App.—Houston [1 Dist.] 2014, no pet.) (mem. op.).

Here, Father tested positive on several occasions during the four-month period before trial. On September 8, 2016, he had trace amounts of marihuana in his hair, which he claimed was due to exposure to other inmates who were smoking marihuana while he was incarcerated.

On November 28, 2016, Father tested positive for methamphetamine. The State's expert indicated that the amount of methamphetamine indicated that Father

"[u]sed more than one time . . . [n]ot every day but more than one time." Again, on December 8, 2016, Father tested positive for amphetamine and methamphetamine. The State's expert explained that the amphetamine level could have been therapeutic if appellant had a prescription; no such prescription was introduced into evidence. Regarding the methamphetamine, the expert explained that the level of methamphetamine again indicated that Father had used the substance "[m]ore than one time." Father, himself, admitted to using methamphetamine during the pendency of the case, although he claimed that it was "one day," not multiples times, despite the multiple positive drug tests. Father also admitted that he was on probation for 10 years for his most recent DWI and that his admitted use of methamphetamine could result in his incarceration because it is a violation of his parole.

Because the evidence showed that Father engaged in illegal drug use during the pendency of the termination suit, when he knew he was at risk for losing his child, we hold that the evidence was legally sufficient to support a finding of endangerment. *See In re A.M.*, 495 S.W.2d 573, 580 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also J.F.C.*, 96 S.W.3d at 266; *Walker*, 312 S.W.3d at 617; *J.O.A.*, 283 S.W.3d at 345.

Accordingly we overrule issue one.

Sufficiency of the evidence under section 161.001(1)(O)—Failure to Comply with Plan

Subsection (O) allows termination when the parent has failed to satisfy conditions of a service plan. Specifically, it provides that the trial court can order termination upon a finding, by clear and convincing evidence, that a parent:

> (O) 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). Texas courts generally take a strict approach to subsection (O)'s application. *In re D.N.*, 405 S.W.3d 863, 877 (Tex. App.—Amarillo 2013, no pet.). The burden of complying with the court order is on the parent. *Id*. at 878. Courts do not measure the "quantity of failure" or "degree of compliance." *Id.* at 877. Rather, courts only look for a parent's failure to comply. *See In re J.S.*, 291 S.W.3d 60, 67 (Tex. App.—Eastland 2009, no pet.) (holding subsection (O) does not intend an evaluation of a parent's partial achievement of plan requirements); *see also In re A.W.*, No. 01–15–01030–CV, 2016 WL 3022824, at *7 (Tex. App.—Houston [1st Dist.] May 26, 2016, no. pet.) (mem. op.) (holding substantial compliance with a court-ordered service plan may be insufficient to avoid termination).

Despite this strict approach, the Department must present evidence that the plan established specific actions the parent must take for the return of the child. *In re D.N.*, 405 S.W.3d at 877–78. In *In re D.N.*, the mother challenging termination of her parental rights under subsection (O) had been directed by DFPS to simply "find whatever she could" regarding programs and services; the court-ordered plan did not outline any specific actions she needed to take to be in compliance. *In re D.N.*, 405 S.W.3d at 878. The court of appeals held that her rights could not be terminated under subsection (O) because the "do-as-best-as-you-can directive" was not specific enough and gave little way to measure the mother's compliance. *Id.*

The Department contends that Father did not complete individual counseling or substance abuse therapy. And, while Father testified that he had completed parenting classes, the Department representative testified that Father never provided proof of such completion, as required by the Family Service Plan. Father also testified that he was employed, but again, he provided no pay stubs to the Department as required by the Family Service Plan.

Father contends that his failure to complete the plan should be excused because for much of the time the plan was in place, he "was incarcerated and unable to perform any services while he was incarcerated because the jail would not permit such actions." However, the Family Code has no provisions regarding partial compliance or excuses for noncompliance. *In re C.M.*, No. 01-15-00830-CV, 2016

WL 1054589, at *7 (Tex. App.—Houston [1st Dist.] Mar. 17, 2016, no pet.). The burden of complying with a court order is on the parent, even if the parent is incarcerated. *Thompson v, Tex. Dept. of Fam. & Protective Servs.*, 176 S.W.3d 121, 127 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), overruled on other grounds by, *Cervantes-Peterson v. Tex. Dept. of Fam. & Protective Servs.*, 221 S.W.3d 244 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also In re B.L.D.–O.*, No. 13–16–00641–CV, 2017 WL 929486, at *4 (Tex. App.—Corpus Christi Mar. 9, 2017, no pet.) (mem. op.); *In re M.R.*, No. 11–13–00029–CV, 2013 WL 3878584, at *6 (Tex. App.—Eastland July 25, 2013, no pet.) (mem. op.). Incarceration, therefore, is not a legal excuse or defense to a parent's failure to comply with a service plan order. *K.D. v. Tex. Dept. of Fam. & Protective Servs.*, No. 01-17-00184-CV, 2017 WL 3585255 (Tex. App.—Austin Aug. 17, 2017, no pet.).

Because there was legally and factually sufficient evidence to show that Father failed to comply with all the terms of his family service program, and Father does not even argue that he complied, we overrule issue two.

Sufficiency of the Evidence Regarding Best Interest of the Child

In issue three, Father contends there is legally and factually insufficient evidence that termination of his parental rights was in the best interest of the Child. As a matter of public policy, "the best interest of a child is usually served by maintaining the parent-child relationship." *J.F.C.*, 96 S.W.3d at 294. Despite this

important relationship, the Texas Supreme Court has held that "protection of the child is paramount" and "the rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." *A.V.*, 113 S.W.3d at 361.

Appellate courts examine the entire record to decide what is in the best interest of the child. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). There is a strong presumption that the best interest of a child is served by preserving the parent-child relationship. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). In assessing whether termination is in a child's best interest, the courts are guided by the non-exclusive list of factors set forth in *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). 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 proper, and (9) any excuse for the acts or omissions of the parent. *Id.* "[T]he State need not prove all of the factors as a condition precedent to parental termination, 'particularly if the evidence was undisputed that the parental relationship endangered the safety of the child.'" *In re C.T.E.*, 95 S.W.3d 462, 466

(Tex. App.—Houston [1st Dist.] 2002, pet. denied) (quoting *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002)).

The Texas Family Code also provides a list of relevant considerations:

> § 263.307 Factors in Determining Best Interest of Child
>
> (a) In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.
>
> (b) The following factors should be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment:
>
> (1) the child's age and physical and mental vulnerabilities;
>
> (2) the frequency and nature of out-of-home placements;
>
> (3) the magnitude, frequency, and circumstances of the harm to the child;
>
> (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;
>
> (5) whether the child is fearful of living in or returning to the child's home;
>
> (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
>
> (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
>
> (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.

. . . .

TEX. FAM. CODE ANN. § 263.307 (West Supp. 2015).

Applying the factors relevant in this case to determining if termination of Father's parental rights in is in the child's best interest, we conclude that the trial court's finding is supported by legally and factually sufficient evidence.

The desires of the child.

The Child is too young to express an opinion about termination. However, the record shows that he had very limited involvement with Father. Father had one supervised visit with the Child during the pendency of the appeal. The record also shows that the Child spent some undetermined amount of time with Father when the Mother removed him from his daycare without permission to do so. Other than few instances, the record shows that the Child had lived with Grandmother and his sister from the time he was born. This factor is neutral at best.

Emotional and physical needs now and in the future.

The record shows that the Child's Grandmother was his primary caregiver and that she had been so since the time of the Child's birth. Appellant's only sibling also lived with Grandmother, and she too was thriving in Grandmother's home. Father had agreed earlier to placing the Child with Grandmother, thus recognizing that Grandmother was able to fulfill the child's emotional and physical needs.

Further, there was evidence that Father might not be present to fulfill the Child's future emotional and physical needs because he could be incarcerated, given that he violated the terms of his parole by repeatedly using drugs. Because the

Child's current emotional and physical needs were being met by Grandmother, and because Father's ability to meet those same needs in the future was uncertain, this factor weighs in favor of termination.

Stability of the home.

For the same reasons cited in the last category, this factor also weighs in favor of termination.

Emotional and physical danger to the child now and in the future.

As for physical danger, Father admitted to using drugs, and he left the Child with Mother, who was also using drugs. While he claimed to not know about Mother's drug use, the trial court could have found Father's assertion that he did not know Mother, with whom Father lived, used drugs to not be credible. And, depending on the circumstances, Father's current or continued drug use could potentially put the Child at physical risk. Additionally, there was evidence that Father had been physically abusive to Mother. Based on the evidence of abuse toward Mother, the Court could have concluded that Father also posed a threat of physical danger to the Child. Thus, this factor weighs in favor of termination of Father's parental rights.

Plans for the child by parent and person seeking custody.

Father had no plans to provide a home for the Child. Instead, he wanted the child placed with his sister, who was willing to adopt him. While Father's sister

may have been able to provide a stable home for the Child, there was no need to remove him from Grandmother, whose home was the only one he had ever known. The Department planned to leave the Child in his Grandmother's care, where he had done very well and thrived. Grandmother was also willing to adopt the Child, but she and Department had decided that it was better for the Child not to be adopted because to do so would reduce the financial benefits available to the Child. Also, leaving the child with Grandmother would allow him to live in the home with his only sibling. This factor weighs in favor of termination of Father's parental rights.

Parental abilities of person seeking custody.

While there is evidence that Father acted appropriately in his only visit with the Child, there is no other evidence of his parental abilities. He testified that he had one other daughter, but he did not know if she lived in North Dakota or North Carolina. Although Father claims to have taken a parenting class, he provided no such proof to the Department, as required by his Family Service Plan. Father has multiple criminal convictions, and he has been in jail many times. He is currently at risk for returning to jail because he violated his parole by using drugs. If reincarcerated, Father would be unable to parent the Child. This factor weighs in favor of termination of Father's parental rights.

Parent's acts or omissions indicating that the existing parent-child relationship is not a proper one, and any excuse for acts or omissions.

There is evidence that Father lived with Mother, and that, if he did not know that Mother had a significant drug problem, he should have. The factfinder was entitled to discredit his testimony that he did not know of Mother's drug use. While Father claims that he wants to parent the Child, he has not made any plans to do so. Instead, he wants the Child to live with, and possibly be adopted by, his sister. In addition, he has put himself at risk for re-incarceration by using methamphetamine, which would leave the Child at risk of having his sole remaining parent incarcerated. From this, the trial court could conclude that Father has not taken actions consistent to establish a "proper" relationship with the Child. This factor weighs in favor of the termination of Father's parental rights.

Based on application of the above factors, we conclude that the trial court's determination that termination of Father's parental rights was in the Child's best interests is supported by legally and factually sufficient evidence. *See City of Keller v. Wilson*, 168 S.W.3d 801, 817 (Tex. 2005) (regarding legal sufficiency) and *J.F.C.*, 96 S.W.3d at 266 (regarding factual sufficiency).

Accordingly, we overrule overrule Father's third issue.

Sufficiency of the Evidence Regarding Managing Conservatorship

In his fourth issue on appeal, Father argues that the trial court erred in naming the Department as managing conservator of the Child. The Family Code creates a rebuttable presumption that a parent will be named a child's managing conservator

unless the court finds that such appointment would not be in the child's best interest "because the appointment would significantly impair the child's physical health or emotional development. TEX. FAM. CODE ANN. § 153.131(a) (West 2014). Father contends that there is legally and factually insufficient evidence that the Child's physical health or emotional development would be impaired by naming him as Managing Conservator.

However, the Family Code also provides: "If the court terminates the parent child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child. TEX. FAM. CODE ANN. § 161.207(a) (West 2014). In this case, the Department was appointed as sole managing conservator of the Child once the parental rights of both parents were terminated.

The Fourteenth Court of Appeals considered, and rejected, the argument that a parent could be appointed as managing conservator after a termination of parental rights, stating:

> Having made termination findings on the predicate grounds and best interest, the trial court was required to appoint the Department, or another permissible adult or agency, as managing conservator pursuant to Family Code section 161.207. *See In re C.N.S.*, No. 14–14–00301–CV, 2014 WL 3887722, at *13 (Tex. App.—Houston [14th Dist.] Aug. 7, 2014, no pet.) (mem. op.). We previously have stated the appointment may be considered a "consequence of the termination." *In*

> *re J.R.W.*, No. 14–12–00850–CV, 2013 WL 507325, at *12 (Tex. App.—Houston [14th Dist.] Feb. 12, 2013, pet. denied) (mem. op.).
>
> We have reviewed the evidence supporting the trial court's termination findings and found the evidence to be legally and factually sufficient. Mother provides no authority for the proposition that she is a "suitable, competent adult" as contemplated by section 161.207(a) or that the presumption in section 153.131(a) applies to a parent whose parental rights have been terminated under Chapter 161. *See In re A.W.B.*, No. 14–11–00926–CV, 2012 WL 1048640, at *7 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012, no pet.) (mem. op.). Accordingly, Mother's challenge to the trial court's appointment of the Department as sole managing conservator, rather than Mother, is without merit.

In re A.A.Z., No. 14-17-00276-CV, 2017 WL 3612259, at *13 (Tex. App.—Houston [14th Dist. Aug. 22, 2017, no pet.). We agree with our sister court that the presumption found in 153.131(a) does not apply in favor of a parent whose parental rights have been terminated.

Accordingly, we overrule Father's fourth issue.

CONCLUSION

We affirm the trial court's decree terminating Father's parental rights and naming the Department as managing conservator.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.