Opinion issued November 30, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00503-CV

IN THE INTEREST OF E.R., A CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2016-02731J

MEMORANDUM OPINION

Following a bench trial, the trial court signed a judgment terminating the parent-child relationship between C.P. ("Mother") and her four-year-old daughter, E.R. The trial court also appointed the Department of Family and Protective Services ("the Department") as E.R.'s sole managing conservator. In five issues, Mother contends that the evidence was not legally or factually sufficient to support

termination of her parental rights or to support appointment of the Department as E.R.'s sole managing conservator.

We affirm.

Background

In July 2015, Mother believed that E.R.'s father ("Father") was sexually abusing E.R. Mother limited Father's contact with E.R. Then, in September 2015, Mother formed the belief that E.R.'s step-grandfather was sexually abusing E.R. Mother took E.R. to the hospital where she saw a forensic nurse, who ruled out sexual assault but also noted that E.R. had impacted stool, which could possibly be caused by anal penetration or by the diet of fast food that Mother admitted to feeding E.R.

Not believing the hospital's assessment, Mother contacted CPS. Based on the allegations of sexual abuse, Mother and E.R. were admitted into a domestic abuse shelter. Two days later, the Department was notified that Mother was behaving in a paranoid manner at the shelter. Mother admitted that she had hit another shelter resident because she believed that the resident had sexually assaulted E.R. As a result of Mother's behavior, Mother and E.R. were required to leave the shelter.

Mother then took E.R. to a CPS medical clinic. After doctors there determined that the child had not been molested, Mother insisted that a CPS staff

member at the clinic had sexually abused E.R. Based on her behavior, CPS told Mother that she needed a psychiatric evaluation.

The doctor who performed the psychiatric evaluation certified under oath that there was a reasonable medical probability that Mother suffered from psychosis. Citing Mother's claims that several different people had sexually abused E.R. and Mother's assault on the resident at the shelter, the doctor further attested that Mother presented "a substantial risk of serious harm to others." An application was filed for Mother's involuntary commitment in which it was asserted that Mother should be "immediately restrained" based on her assault of the shelter resident and her accusations of sexual abuse of E.R. against several people. The application stated that Mother had "paranoid delusions of cameras filming [E.R.] and people molesting [E.R.]."

A judge signed commitment papers involuntarily admitting Mother to the Harris County Psychiatric Center ("the Psychiatric Center") for 12 days. The Psychiatric Center's medical records indicate that Mother was involuntarily admitted "due to reported acute psychosis with agitation, paranoid delusions, and aggressive behavior." Mother was "clearly paranoid and psychotic with evidence of hypervigilance and prominent paranoid and persecutory delusions." The records indicate that Mother was admitted after CPS had become "concerned about [Mother's] repeated claims that her 3 year old daughter was being 'sexually

molested' by several different individuals over the prior week including the patient's stepfather, a resident at a domestic abuse shelter, and then the staff at the Children's Protective Services office." The medical records noted that E.R. had been "examined by medical staff after each allegation but there was reportedly no evidence supporting [Mother's] claims." Mother "continued to assert that her daughter was being abused, despite evidence to the contrary." Mother "admitted that she had attacked her roommate at the shelter but felt that her actions were justified" because she believed that the roommate had molested E.R.

The medical records note that Mother's brother was contacted by medical staff. The brother stated that Mother had "experienced paranoia since childhood" and that Mother's paranoia had been more severe in the previous four or five months.

The brother said that Mother had a history of getting into fights and that she had spent time in jail. The brother also stated that Mother drank, smoked marijuana, and possibly used cocaine.

The brother reported that, after she "took [E.R.] to doctor to check for abuse," Mother went to Dallas to "start a new life"; however, once there, Mother called her brother, saying she was being followed "by a number of cars." She told him that people were "out to get her" and that "someone in Houston had paid the people in [the] cars to follow her." When he and another sister suggested that

Mother seek professional help for her paranoia, Mother "blew up," indicating that she does not believe that she is paranoid.

During her stay at the Psychiatric Center, Mother was prescribed an antipsychotic medication, which had an "effective response." When the involuntary commitment ended, Mother refused to remain voluntarily hospitalized and was discharged. At that time, Mother's "psychotic symptoms did show some improvement"; however, Mother "continued to have persistent delusional thoughts and also was largely devoid of insight concerning her mental illness and/or need for treatment including medication."

After Mother's discharge, the Department offered Mother Family Based Safety Services, which included developing a "safety plan" for E.R. Under the safety plan, Mother agreed that E.R. would live with her maternal grandmother, and Mother and Father were not permitted to have unsupervised visits with E.R. However, Mother and Father violated the safety plan on May 4, 2016. On that day, Mother was stopped by the police while she was driving. Father was in the passenger seat, and four-year-old E.R. was sitting unrestrained in the backseat.

During the stop, the police officer determined that Mother and Father each had an outstanding arrest warrant. The officer also found methamphetamines in the car near Father and a syringe in a backpack in the backseat where E.R. was sitting. Both Mother and Father were arrested at the scene. Mother called CPS

and informed a caseworker that she was being arrested. At the direction of the caseworker, the police brought E.R. to the Children's Assessment Center. The Department tried to contact E.R.'s grandmother to care for E.R., but she did not respond. Mother was unable to provide the name of any other suitable caretaker.

The next day, the Department filed suit, requesting temporary managing conservatorship and seeking emergency orders. Based on the request, the trial court appointed the Department as E.R.'s temporary managing conservator. In its petition, the Department also sought to terminate Mother's and Father's parental rights and to obtain sole managing conservatorship of E.R. if family reunification could not be achieved.

The Department prepared a family service plan for Mother and for Father. Mother's service plan provided that the Department had the following concerns: "[Mother] is unable to meet [E.R.'s] immediate needs, due to [Mother's] untreated mental health [issues]." "[Mother] is diagnosed as bipolar and also displays paranoid, out-of-control behavior at times. [Mother] has refused treatment for her mental health, and has been arrested for assault." "[Mother] is hostile, at times to DFPS, her attorney and other parties involved, due to her untreated mental health. [Mother] denies the severity of her mental health, denies diagnoses and denies that she has been prescribed medication."

The family service plan also indicated that the Department was concerned because Mother does "not have stable housing and has a history of criminal involvement." The Department noted that Mother and Father were arrested with E.R. in the car and that methamphetamines were found in the vehicle.

The service plan set out several tasks and services for Mother to complete before reunification with E.R. could occur, including the following: (1) participate in a psychosocial evaluation and follow all recommendations resulting from the evaluation; (2) participate in a psychiatric evaluation and follow all recommendations resulting from the evaluation; (3) complete parenting classes; (4) participate in a drug and alcohol assessment and follow all recommendations resulting from the assessment; (5) provide urine samples for random drug testing and not test positive for illegal drugs; (6) maintain suitable housing and employment; (7) refrain from engaging in any illegal and criminal activities; and (8) attend all court hearings.

While the case was pending, in June 2016, Mother assaulted a woman exiting a bank by tackling the woman from behind, grabbing her hair, and hitting her in the face with a closed fist. Mother pleaded guilty to the assault offense and was sentenced to 45 days in jail. However, this was not the first time that Mother was convicted of assault. In 2006, she had pleaded guilty to assault and was sentenced to 75 days in jail.

In November 2016, Mother committed the third-degree felony offense of evading arrest with a motor vehicle. She pleaded guilty and was placed on deferred adjudication community supervision for three years in January 2017. As a term of her community supervision, Mother was prohibited from using, possessing, or consuming illegal drugs. However, in February 2017, Mother tested positive for cocaine.

The case was tried to the bench beginning in April 2017 and continuing in May 2017. The Department sought to terminate the parent-child relationship between Mother and E.R., asserting that Mother had engaged in conduct that endangered E.R. and that she had failed to comply with the family service plan. Among the documentary evidence offered by the Department was Mother's family service plan, her medical records from her involuntary psychiatric stay at the Psychiatric Center, the 2006 and June 2016 judgments of conviction for assault, the January 2017 order for deferred adjudication for evading arrest, and Mother's positive drug test from February 2017.

In conjunction with the documentary evidence, the Department offered the testimony of the police officer who stopped Mother's car in May 2016. The police officer testified that, during the stop, she discovered methamphetamines and a syringe in the car, belonging to Father. The officer also discovered that both

Mother and Father had outstanding arrest warrants. Mother and Father were arrested, and E.R. was transported to the Children's Assessment Center.

The Department also presented the testimony of the assigned caseworker, L. Carroll, who testified that CPS first became involved with the family when it received a report that E.R. had been sexually abused by her father and step-grandfather. Carroll stated that Mother then took E.R. to a domestic abuse shelter where Mother had a physical altercation with another resident, who Mother accused of sexually assaulting E.R. The Department developed a safety plan, and E.R. was placed with her grandmother. Under the safety plan, Mother and Father were not to have unsupervised visits with E.R. However, the parents violated the safety plan at the time Mother and Father were arrested in conjunction with the traffic stop in May 2016.

Carroll testified that the Department had concerns about Mother's mental health. She stated that Mother was diagnosed by the Harris County Psychiatric Center with schizoaffective disorder. She described Mother's behavior as "delusional" and "erratic" during the case. Carroll stated that Mother was calm during most of her visits with E.R. at CPS's office "but there were a few times that she was upset and would have delusions and just act very erratic and we would have to end the visit." Carroll described one visit as follows:

> [W]e were in the bathroom with the child and the mom was alone with the child for . . . not even a full minute, and [Mother] began yelling that the child had been sexually assaulted by the foster parents. . . . I was unable to calm her down. She started trying to call the foster parents on the phone, and then she was holding the child and would not give the child back to me. We were asking her to give the child to us so that we could sit down and talk about it and the mom refused to. Then, eventually, she just kind of pushed the child at me and she was still yelling and very upset and erratic; so, we ended up calling security, and she would not leave the building so we had to call [the Houston Police Department].

As a result of the psychosocial assessment required by the family service plan, Mother was referred to individual counseling. Mother completed the counseling, but Carroll testified that Mother had not completed the counselor's recommendations. Because the she had concerns about Mother's mental health, the counselor referred Mother to the Mental Health and Mental Retardation Authority (MHMRA). Carroll testified that Mother went to MHMRA but, because Mother denied any mental health issues, MHMRA was "not able to provide her with services."

In addition to individual counseling, Carroll acknowledged that Mother had engaged in a number of the services required by the family service plan, such as completing psychosocial and psychiatric evaluations. Carroll answered affirmatively when asked whether Mother had maintained suitable housing but then indicated that Mother had failed to arrange a time for Carroll to visit her home and had failed to timely notify Carroll when she moved.

Mother completed a drug and alcohol assessment, but Carroll pointed out that Mother had to redo the assessment after she tested positive for cocaine three months before trial. Carroll also testified that Mother had failed to timely submit to all of the required drug tests. And Carroll testified that Mother had not shown that she had maintained stable employment or completed her parenting classes.

Carroll also testified that Mother had engaged in criminal activity while the case was pending, resulting in her arrest and conviction for assault and evading arrest. Carroll confirmed that Mother had spent time in jail during the pendency of the case.

Carroll also testified about E.R. Carroll stated that four-year-old E.R. is a happy and healthy child, who is developmentally on track with no special needs. Carroll testified that E.R. needs "a very supportive, nurturing home with other children, animals, and . . . a big family, extended family." Carroll stated that, after a careful selection process, the Department had identified a family that met this criteria. She said that the family will provide a long-term home for E.R. Carroll indicated that the plan was for E.R. to begin transitional visits with the family.

On cross-examination by E.R.'s attorney ad litem, Carroll also testified about a visit that E.R. had with Mother attended by the ad litem. During the visit, E.R. had backed away from Mother and had refused to stand by her. After the visit, E.R. was shaking, crying, and clinging to the ad litem.

Carroll also testified about Father. She indicated that Father had tested positive for illegal drug use throughout the case. Father had also not completed the services in his family service plan. Carroll indicated that Father had been in jail while the case was pending for possession of methamphetamines. She also testified that she had observed the last visit between Father and E.R. seven months earlier. During the visit, E.R. "was very afraid" of Father and "refused to stay in the room with him."

The Department also presented the testimony of M. Hernandez, the Child Advocate Coordinator assigned to the case. Hernandez had also attended the visit with Mother and E.R. at which the ad litem was present. Hernandez confirmed that she had witnessed E.R. being "very frightened" of Mother during the visit.

Hernandez also testified that Mother had committed assault and evading arrest while the case was pending. Hernandez averred that she believed Mother's and Father's parental rights should be terminated because they "have failed their family plan of service as well as continue to engage in activities that led to the removal of the child." Based on observations made during family visits, Hernandez believed that E.R. felt "confused and frightened" around Mother and Father. She stated that it was in E.R.'s best interest to be "in a situation where she feels safe, secure, and loved." Hernandez stated that neither parent could provide that to E.R.

Mother was also called to testify. She testified that she had completed her parenting classes and offered the certificate of completion into evidence. Mother also testified that she was employed at a company that sold produce. She stated that she had a lease for a one-bedroom apartment and could move to a two-bedroom if E.R. came to live with her. With regard to her mental health, Mother was asked if she was ever diagnosed "with anything" during the evaluations required under the family service plan. She responded in the negative but then recognized that she had been admitted to the hospital for an evaluation.

When asked why she thought it would be in E.R.'s best interest to be placed with her, Mother said, "Because I want . . . her to be with me. I miss my child, I do; . . . I completed my classes. I know, like, it was a mistake, you know, what happened, it was, you know, but I can take care of her." Mother testified that she could provide E.R. a safe and stable environment. When asked what she believed a safe and stable environment meant, Mother testified, "Well, you know, for her to have a home. I can take care of her, like, you know, she has everything like, food, just taking care of her, like she has everything."

On June 7, 2017, the trial court signed a judgment terminating Mother's and Father's parental rights, finding that termination was in E.R.'s best interest. The trial court also found that Mother had engaged in conduct described in Subsections D and E (both concerning endangerment of a child) and O (failing to comply with

a court-ordered service plan) of Family Code Section 161.001(b)(1). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O) (West Supp. 2016). The trial court found that Father had engaged in the same conduct plus constructive abandonment described in Subsection N. *Id.* § 161.001(b)(1)(N). In conjunction with the termination of parental rights, the trial court appointed the Department as E.R.'s sole managing conservator.

Mother now appeals the trial court's judgment. Father has not appealed. Raising five issues, Mother challenges the termination of her parental rights and the appointment of the Department as E.R.'s sole managing conservator.

Termination of Parent-Child Relationship

Mother's first three issues address the legal and factual sufficiency of the evidence to support the trial court's findings regarding the predicate acts listed in Family Code Subsections 161.001(b)(1)(D), (E), and (O). In her fourth issue, Mother asserts that the evidence was not legally or factually sufficient to support the trial court's finding that termination of the parent-child relationship was in E.R.'s best interest.

A. Standard of Review

Termination of parental rights requires proof by clear and convincing evidence. *See* TEX. FAM. CODE ANN. § 161.001(b). This heightened standard of review is mandated not only by the Family Code but also by the Due Process

Clause of the United States Constitution. *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *see also Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 1394–95 (1982) (recognizing fundamental liberty interest parent has in his or her child and concluding that state must provide parent with fundamentally fair procedures, including clear-and-convincing evidentiary standard, when seeking to terminate parental rights). The Family Code defines clear and convincing evidence as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (Vernon 2014); *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

Section 161.001(b) of the Family Code provides the method by which a court may involuntarily terminate the parent-child relationship. *See* TEX. FAM. CODE. ANN. § 161.001(b). Under this section, a court may order the termination of the parent-child relationship if the court finds, by clear and convincing evidence, that (1) one or more of the acts enumerated in section 161.001(b)(1) was committed and (2) termination is in the best interest of the child. *Id.* Although termination may not be based solely on the best interest of the child as determined by the trier of fact, *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987), "[o]nly 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). Thus, if multiple predicate grounds are found by the trial court, we will affirm on any one ground because only one is necessary for termination of parental rights. *In re G.A.A.*, No. 01–12–01052–CV, 2013 WL 1790230, at *7 (Tex. App.—Houston [1st Dist.] Apr. 25, 2013, no pet.) (mem. op.). Here, the Department was required to establish, by clear and convincing evidence, that Mother's actions satisfied one of the predicate grounds listed in Family Code section 161.001(b)(1) and that termination was in E.R.'s best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)–(2).

When determining legal sufficiency, we review all the evidence in the light most favorable to the trial court's finding "to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d at 266. To give appropriate deference to the fact finder's conclusions, we must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. *Id.* We disregard all evidence that a reasonable fact finder could have disbelieved or found to have been not credible. *Id.* This does not mean that we must disregard all evidence that does not support the finding. *Id.* The disregard of undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.* Therefore, in conducting a legal-sufficiency review in a parental-termination

case, we must consider all of the evidence, not only that which favors the verdict. *See City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005).

In determining a factual-sufficiency point, the higher burden of proof in termination cases also alters the appellate standard of review. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). "[A] finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance." *Id.* at 25. In considering whether evidence rises to the level of being clear and convincing, we must consider whether the evidence is sufficient to reasonably form in the mind of the fact finder a firm belief or conviction as to the truth of the allegation sought to be established. *Id.* We 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.*

We give due deference to the fact finder's findings, and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109.

B. Predicate Finding under Subsection 161.001(b)(1)(E)

The termination of Mother's parental rights to E.R. was predicated on, among others, a violation of Family Code Subsection 161.001(b)(1)(E). In her second issue, Mother asserts that the evidence was legally and factually insufficient to support that predicate finding.

1. Applicable Legal Principles

Subsection E of section 161.001(1)(b) permits termination when clear and convincing evidence shows that the parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child. TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Within the context of Subsection E, endangerment encompasses "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Boyd*, 727 S.W.2d at 533. Instead, "endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *Id.*; *see also In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996).

It is not necessary to establish that a parent intended to endanger a child in order to support termination of the parent-child relationship under subsection (E). *See M.C.*, 917 S.W.2d at 270. However, termination under subsection 161.001(b)(1)(E) requires "more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required." *In re*

J.T.G., 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). 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). "As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child." *R.W.*, 129 S.W.3d at 739.

The statute does not require that conduct be directed at a child or cause actual harm; rather, it is sufficient if the parent's course of conduct endangers the well-being of the child. *See Walker v. Tex. Dep't of Family & Protective Servs*., 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Furthermore, the conduct does not have to occur in the presence of the child. *Id.* The conduct may occur before the child's birth and both before and after the child has been removed by the Department. *Id.* A parent's past endangering conduct may create an inference that the parent's past conduct may recur and further jeopardize a child's present or future physical or emotional well-being. *See In re D.M.*, 58 S.W.3d 801, 812 (Tex. App.—Fort Worth 2001, no pet.).

2. Analysis

In her brief, Mother acknowledges that "[t]he evidence supporting the subsection (E) finding consists primarily of [her] mental health issues, her criminal behaviors resulting in her incarceration during the [pending] case, and her illegal

drug usage." However, Mother characterizes the evidence as "scant." We disagree that the evidence supporting the Subsection E endangerment finding was scant.

a. Mental Health Issues

The evidence at trial showed that Mother struggles with issues of mental illness. "Mental illness or incompetence of a parent alone are not grounds for terminating the parent-child relationship; however, if a parent's mental state causes her to engage in conduct that endangers the physical or emotional well-being of a child, that conduct can support a termination ruling under subsection E." *In re T.G.R.–M.*, 404 S.W.3d 7, 14 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *Jordan v. Dossey*, 325 S.W.3d 700, 723–24 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)); *see In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (considering parent's persistent and untreated mental illness as evidence of endangerment).

Evidence was presented that Mother had a history of schizoaffective and bipolar disorder. Mother's medical records from her involuntary commitment to the Psychiatric Center show that she has suffered from paranoia since childhood. When she was admitted to the Psychiatric Center, Mother was "clearly paranoid and psychotic with evidence of hypervigilance and prominent paranoid and persecutory delusions." The records indicated that Child Protective Services had become "concerned about [Mother's] repeated claims that her 3 year old daughter

was being 'sexually molested' by several different individuals over the prior week including the patient's stepfather, a resident at a domestic abuse shelter, and then the staff at the Children's Protective Services office." The medical records noted that E.R. had been "examined by medical staff after each allegation but there was reportedly no evidence supporting [Mother's] claims." Mother "continued to assert that her daughter was being abused, despite evidence to the contrary." Mother admitted that she had physically attacked another resident at the domestic abuse shelter, where Mother and E.R. had gone to live after Mother accused Father and the E.R.'s grandfather of sexually abused E.R. Mother said that she had attacked the other resident because the resident had sexually assaulted E.R.

The medical records indicate that Mother was prescribed psychiatric medication during her hospitalization, which had an "effective response." However, Mother was "selectively compliant" with taking her medication. During her hospitalization, Mother's "psychotic symptoms did show some improvement . . . with less isolation and less frequent episodes of agitation, but she continued to have persistent delusional thoughts and also was largely devoid of insight concerning her mental illness and/or need for treatment including medication." The medical records indicate that Mother refused to voluntarily remain hospitalized at the end of her involuntary commitment.

Carroll also stated that the therapist, to whom Mother had been referred for individual therapy, had concerns about Mother's mental health. The therapist referred Mother to MHMRA; however, because Mother denied any mental health issues, MHMRA was not able to provide services to her.

Carroll testified that she had concerns about Mother's mental health while the case was pending. Carroll stated that Mother was calm during most of her visits with E.R. but at times would "have delusions and just act very erratic and we would have to end the visit." Carroll described one such visit at the CPS office. Mother was in the bathroom with E.R. for less than one minute when Mother began yelling that the foster parents had sexually assaulted E.R. Mother would not calm down and had refused to give E.R. back to Carroll. Mother then "pushed" E.R. at Carroll, continuing to yell and act erratically. Because Mother refused to leave the building, even after security was called, Carroll had to call the police. Carroll indicated that Mother's behavior had upset and frightened E.R. Carroll confirmed that Mother's behavior did not change while the case was pending.

b. Illegal Conduct, Imprisonment, and Drug Use

The evidence also showed that Mother has, both before and during the case, engaged in illegal conduct, including assaultive behavior and involvement with illegal drugs. The evidence further showed that Mother has been incarcerated both before and during the case. "Abusive, violent, or criminal conduct by a parent also

can produce an environment that endangers the well-being of a child." *In re A.D.M.*, No. 01–16–00550–CV, 2016 WL 7368075, at *6 (Tex. App.—Houston [1st Dist.] Dec. 20, 2016, pet. denied) (mem. op.) (citing *T.G.R.–M.*, 404 S.W.3d at 14). Evidence of criminal conduct, convictions, and imprisonment and their effect on a parent's life and ability to parent may establish an endangering course of conduct. *In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—Fort Worth 2003, no pet.). "Imprisonment alone does not constitute an endangering course of conduct but it is a fact properly considered on the endangerment issue." *In re J.L.B.*, No. 04–17–00364–CV, 2017 WL 4942855, at *3 (Tex. App.—San Antonio Nov. 1, 2017, no pet. h.) (mem. op.). However, routinely subjecting a child to the probability that she will be left alone because her parent is in jail endangers the child's physical and emotional well-being. *In re S.M.*, 389 S.W.3d 483, 491–92 (Tex. App.—El Paso 2012, no pet.). Similarly, because a parent's illegal drug use exposes her child to the possibility the parent may be impaired or imprisoned, evidence of illegal drug use supports a finding that the parent engaged in a course of conduct that endangered the child's physical or emotional well-being. *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009); *In re A.M.*, 495 S.W.3d 573, 579–80 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also In re A.H.*, No. 02–06–064–CV, 2006 WL 2773701, at *3 (Tex. App.—Fort Worth Sept. 28, 2006, no pet.) (mem. op.) (noting that stability and permanence are paramount in upbringing

of children, that endangering environment can be created by parent's involvement with illegal drugs, and that factfinder may infer from past conduct endangering children's well-being that similar conduct will recur if children are returned to parent).

The evidence showed that Mother had a conviction for assault in 2006, resulting in her incarceration for 75 days in jail. Although it does not show that Mother was charged with assault for striking the woman at the domestic abuse shelter, the record does show that Mother assaulted a woman at a bank after E.R. was removed from her care and while this case was pending. Mother pleaded guilty to allegations that she had tackled a woman from behind who was exiting a bank, grabbing the woman's hair, and hitting her in the face with a closed fist. Mother was sentenced to 45 days in jail for the assault, and both Carroll and Mother testified that Mother served time in jail while the case was pending.

Mother also committed the third-degree felony of evading arrest with a motor vehicle while the case was pending. She pleaded guilty and was placed on deferred adjudication community supervision for three years in November 2016. As a term of her community supervision, Mother was prohibited from using, possessing, or consuming illegal drugs. In February 2017, Mother tested positive for cocaine, leaving her susceptible to revocation of her community supervision and imprisonment.

Carroll also testified that drug use was a concern for Mother. Evidence was presented that methamphetamines belonging to Father were found in a car driven by Mother during a traffic stop. E.R. was in the car, unrestrained in the backseat. The police discovered that Mother and Father had outstanding arrest warrants and were taken into custody. As a result, E.R. came into the care of the Department, and the case was initiated. And, in addition to the positive cocaine test, Mother failed to timely submit to all of required drug tests. Mother's family service plan provided that failure to provide "a specimen [for testing] or [providing an] insufficient specimen will count as a positive result."

In sum, given the evidence, the trial court could have reasonably inferred that Mother pursued a course of conduct that, based on her unresolved mental health issues, criminal conduct, imprisonment, and involvement with drugs, exposed E.R. to injury and placed her in jeopardy, that is, endangered E.R.'s physical and emotional well-being. The trial court could have further reasoned that Mother will continue to pursue this course of conduct if E.R. was placed in her care and that E.R.'s physical and emotional welfare would be at risk, given Mother's past conduct. *See Jordan*, 325 S.W.3d at 724 ("Conduct that subjects a child to life of uncertainty and instability endangers the child's physical and emotional well-being.").

We conclude that the evidence, viewed in the light most favorable to a finding of endangerment, was sufficiently clear and convincing that a reasonable factfinder could have formed a firm belief or conviction that Mother engaged in conduct that endangered E.R.'s physical or emotional well-being. We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the trial court's endangerment determination or was not so significant that the trial court could not reasonably have formed a firm belief or conviction that Mother engaged in conduct that endangered E.R.'s physical or emotional well-being. Accordingly, we hold that the evidence was legally and factually sufficient to support the Subsection E endangerment finding. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

We overrule Mother's second issue.[1]

B. Best-Interest Finding

In her fourth issue, Mother challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination of the parent-child

[1] Because there is sufficient evidence of Subsection (E) endangerment, we need not address Mother's first or third issues, challenging the sufficiency of the evidence to support the trial court's findings that Mother committed the predicate acts listed in Subsections 161.001(b)(1)(D) and (O). *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) ("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.").

relationship was in E.R.'s best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2).

1. Legal Principles

A strong presumption exists that a child's best interests are served by maintaining the parent-child relationship. *See In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016). The Department has the burden to prove by clear and convincing evidence that termination is in a child's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2).

In *Holley v. Adams*, the Supreme Court of Texas identified factors that courts may consider when determining the best interest of the child, including: (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 individual seeking custody; (5) the programs available to assist the individuals to promote the best interest of the child; (6) the plans for the child by the 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. 544 S.W.2d 367, 371–72

(Tex. 1976). This is not an exhaustive list, and a court need not have evidence on every element listed in order to make a valid finding as to the child's best interest. *In re C.H.*, 89 S.W.3d at 27. While no one factor is controlling, analysis of a single factor may be adequate in a particular factual situation to support a finding that termination is in the best interest of the child. *In re A.P.*, 184 S.W.3d 410, 414 (Tex. App.—Dallas 2006, no pet.).

The evidence supporting the statutory predicate grounds for termination may also be used to support a finding that the best interest of the child warrants termination of the parent–child relationship. *C.H.*, 89 S.W.3d at 28; *In re H.D.*, No. 01–12–00007–CV, 2013 WL 1928799, at *13 (Tex. App.—Houston [1st Dist.] May 9, 2013, no pet.) (mem. op.). Furthermore, in conducting the best-interest analysis, a court may consider not only direct evidence but also may consider circumstantial evidence, subjective factors, and the totality of the evidence. *In re H.D.*, 2013 WL 1928799, at *13.

*1. **Analysis***

Applying the *Holley* factors, we first observe that, because she was four years old at the time of trial, E.R. was too young to testify about her desires; however, the evidence supports an inference that E.R. is not bonded with Mother. Evidence was presented showing that, during a parental visitation, E.R. had appeared frightened of Mother. E.R. had backed away from Mother and had

refused to stand by her. After the visit, E.R. was shaking, crying, and clinging to the ad litem, who had attended the visit. Child advocate Hernandez confirmed that she had witnessed E.R. being "very frightened" of Mother during the visit and believed that E.R. was "frightened and confused" when around her parents. This evidence tips the first *Holley* factor in favor of the trial court's best-interest finding.

The second through fourth and sixth factors also weigh in favor of the trial court's best-interest finding. Carroll testified that E.R. is a "happy and healthy child," who needs to live "in a situation where she feels safe, secure, and loved." Carroll stated that E.R. needs "a very supportive, nurturing home with other children, animals, and . . . a big family, extended family." Carroll indicated that, through a careful selection process, the Department had recently identified a family that met this criteria with whom to place E.R. Carroll also stated that the family planned to provide a long-term home for E.R. Carroll indicated the plan was for E.R. to soon begin transitional visits with the family. In contrast, as discussed with regard to the endangerment finding, Mother's (1) unresolved mental health issues, which cause her to suffer delusions and act erratically, (2) her violent, assaultive conduct, (3) her criminal convictions, (4) her history of incarceration, and (5) her history of illegal drug involvement, including using cocaine, is evidence that Mother is not capable of providing for E.R.'s emotional and physical needs now

and in the future and that she presents an emotional and physical danger to E.R. now and in the future.

Mother's stated future plans for E.R. also lacked insight. When asked what providing a safe and stable environment for E.R. meant, Mother testified, "Well, you know, for her to have a home. I can take care of her, like, you know, she has everything like, food, just taking care of her, like she has everything." In short, the evidence shows that Mother is not capable of parenting E.R. *See In re T.G.R.–M.*, 404 S.W.3d at 14.

In her brief, Mother contends that the evidence is not sufficient to support the trial court's best-interest finding because the Department had only recently located a long-term placement for E.R. and had not yet started the transitional visits between E.R. and the family. However, Carroll indicated that the Department had used a careful selection process to find the right family for E.R. And, pertinent to this point, the Supreme Court of Texas has stated that "[e]vidence about placement plans and adoption are, of course, relevant to best interest," however, the court made clear that "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located." *C.H.*, 89 S.W.3d at 28. "Instead, the inquiry is whether, on the entire record, a factfinder could reasonably

form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's future home environment." *Id.*

Mother also intimates that evidence was insufficient to support the court's best-interest finding because there was no evidence that a suitable relative placement could not be located with whom to place E.R.; however, Mother also acknowledges that the evidence indicated that "[t]here are no potential relative caregivers or kinship alternatives" for placement.

The evidence showing that Mother has untreated mental health issues, violent tendencies, and a history of criminal convictions, imprisonment, and involvement with illegal drugs also weigh in favor of a finding for the Department regarding the seventh and eighth factors, that is, the stability of the home, and the parent's acts or omissions that indicate the existing parent-child relationship is not a proper one. *See Holley*, 544 S.W.2d at 371–72. Also relevant to these factors was Carroll's testimony that Mother had not shown stable employment and had not facilitated Carroll's visit to evaluate the suitability of Mother's home. Mother offered her own testimony that conflicted with Carroll's testimony on these points; however, the trial court, as the sole arbiter of witnesses' credibility, was free to believe Carroll and disbelieve Mother. *See In re H.R.M.*, 209 S.W.3d at 109. In short, the evidence supported an inference that Mother could not provide a stable

home for E.R. *See Quiroz v. Dep't of Family & Protective Servs*., No. 01–08–00548–CV, 2009 WL 961935, at *10 (Tex. App.—Houston [1st Dist.] April 9, 2009, no pet.) (mem. op.) (recognizing that stability of home has been found "to be of paramount importance in a child's emotional and physical well-being").

Relevant to factor five regarding the programs available to assist the parent, the evidence did show that Mother had engaged in and completed a number of the services required in her family service plan. However, evidence cannot be read in isolation; it must be read in the context of the entire record. *See In re K.C.F.*, No. 01–13–01078–CV, 2014 WL 2538624, at *16 (Tex. App.—Houston [1st Dist.] June 5, 2014, no pet.) (mem. op.). Here, the balance of the record shows that Mother is unable to provide E.R. a safe and stable home.

After viewing all of the evidence in the light most favorable to the best-interest finding, we conclude that the evidence was sufficiently clear and convincing that a reasonable factfinder could have formed a firm belief or conviction that termination of the parent-child relationship between Mother and E.R. was in the child's best interest. We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the trial court's finding that termination of the parent-child relationship between Mother and E.R. was in E.R.'s best interest or was not so significant that the trial court could not reasonably have formed a firm belief or conviction that termination

was in the E.R.'s best interest. Therefore, after considering the relevant factors under the appropriate standards of review, we hold the evidence is legally and factually sufficient to support the trial court's finding that termination of the parent-child relationship was in E.R.'s best interest.

We overrule Mother's fourth issue.

Conservatorship of E.R.

Mother's fifth issue challenges the appointment of the Department as E.R.'s sole managing conservator. Conservatorship determinations are reviewed for an abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). Therefore, we reverse the trial court's appointment of a managing conservator only if we determine it was arbitrary and unreasonable. *Id.*

Mother asserts that she should have been appointed managing conservator of E.R. based on Section 153.131(a) of the Family Code. Section 153.131 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 or finds that there is a history of family violence involving the parents. TEX. FAM. CODE ANN. § 153.131(a)–(b) (West 2014). Section 153.131 applies when the parents' rights have not been terminated. *See In re S.N., Jr.*, No. 05–16–01010–CV, 2017 WL 2334241, at *5 (Tex. App.—Dallas

May 30, 2017, no pet.) (mem. op. nunc pro tunc); *see also In re J.A.J.*, 243 S.W.3d at 614–15. However, when the parents' rights are terminated, as here, Section 161.207 controls the appointment of a managing conservator. In that situation, the trial court appoints "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 Supp. 2016).

On appeal, Mother argues only that she should have been appointed E.R.'s managing conservator pursuant to the rebuttable presumption under Section 153.131(a). Because Section 161.207—not Section 151.131—applies here, Mother has failed to show that the trial court abused its discretion by appointing the Department as E.R.'s sole managing conservator. *See id.*

We overrule Mother's fifth issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

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