Opinion issued August 27, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00159-CV

IN THE INTEREST OF G.M.M., A CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2019-00022J

MEMORANDUM OPINION

In this accelerated appeal,[1] appellant, mother, challenges the trial court's order, entered after a bench trial, terminating her parental rights to her minor child, G.M.M.[2] In four issues, mother contends the evidence is legally and factually

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1 *See* TEX. FAM. CODE ANN. § 263.405(a); TEX. R. APP. P. 28.4.

2 The trial court also terminated the parental rights of the child's father. He is not a party to this appeal.

insufficient to support the trial court's findings that she engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being;[3] she constructively abandoned G.M.M., who had been placed in the permanent or temporary managing conservatorship of the Department of Family and Protective Services ("DFPS") for not less than six months;[4] she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M.;[5] and termination of her parental rights was in the best interest of G.M.M.[6]

We affirm in part and reverse in part.

Background

On January 4, 2019, DFPS filed a petition seeking termination of mother's parental rights to G.M.M. and managing conservatorship of G.M.M. The petition alleges that G.M.M. was born on February 27, 2018 and that mother was seventeen years old at the time of G.M.M.'s birth.

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3 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

4 *See id.* § 161.001(b)(1)(N).

5 *See id.* § 161.001(b)(1)(O).

6 *See id.* § 161.001(b)(2).

Mother

At trial, mother testified that she, a teenager, was living with G.M.M.'s father at the time of G.M.M.'s birth.[7] DFPS removed G.M.M. from mother's care in July 2018, after hot soup fell on G.M.M. (the "soup-spilling incident") when the child was about three or four months old. Mother explained that she had prepared hot soup for herself in a friend's kitchen because G.M.M.'s father would "not give [her] food." As mother was packaging the soup in a plastic container to take home, the plastic container failed to withstand the heat of the soup and either "blew up or melted." The soup spilled on G.M.M., and G.M.M. was burned on multiple areas of her body. Mother stated that this incident was not intentional, that she immediately sought medical care for G.M.M. at the nearest hospital, and that G.M.M. was transferred by ambulance to a children's hospital for treatment. Mother stayed with G.M.M. at the hospital.

Mother further testified that, after the soup-spilling incident, DFPS placed G.M.M. in the care of G.M.M.'s maternal grandfather for about eight months. Mother admitted that she did not have a good relationship with the maternal grandfather, but she visited G.M.M. sometimes while G.M.M. lived in his home. Mother did not have a permanent place to live at the time and moved "from one place to another." At some point during the pendency of this case, mother met her

[7] Mother stated that she was eighteen years old at the time of trial.

current partner and became pregnant with her second child.[8] Mother moved with her partner, who is her second child's father, to Louisiana and did not visit G.M.M. for two months.[9]

When she returned to Texas, she started visiting G.M.M. again. G.M.M. has met mother's second child. Although mother initially lived with a friend, later, in November 2019, she leased an apartment in her own name. When asked whether DFPS had "been out to [her] apartment" to see it, mother responded, "Yes." At the time of trial, mother lived in the apartment with her partner and her second child. Mother stated that her partner was not abusive and was willing to help parent G.M.M. Although mother's partner paid their living expenses, mother believed she could support herself and both of her children if her partner ended the relationship. Mother secured a job in January 2020, twelve days before trial, and brought her first paycheck stub to trial.[10] Mother stated that she worked six to eight hours a day. She intended to work at night so that her partner would be home to care for the children

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8 DFPS is not involved with mother's second child.

9 Mother stated that she visited G.M.M. "up until [she] went to Louisiana."

10 The record indicates that mother had a job for an unspecified time after the birth of her second child in May 2019, though there are no precise dates for that employment. Mother's testimony suggests various reasons why she no longer had that job, including that she did not like the job, she was unable to align her work schedule with childcare, and she left work when her second child was dropped by a childcare provider.

in her absence. Mother also believed that the maternal grandfather would support G.M.M. upon reunification.

Mother acknowledged that DFPS gave her a Family Services Plan ("FSP") and that she needed to complete the requirements in the FSP in order to be reunited with G.M.M. She testified that she completed a psychological evaluation before giving birth to her second child by Cesarean section ("C-section") in May 2019. According to mother, the complications in the delivery of her second child derailed her ability to meet the requirements of the FSP, and she did not reengage with services until late November 2019.[11] Then, she completed a second psychological evaluation, restarted visitation with G.M.M., attended two of "six or eight" required parenting classes and two domestic-violence classes, and began participating in individual counseling. The results of her narcotics-use testing have been negative during the pendency of this case.

Regarding the domestic violence in her relationship with G.M.M.'s father, mother stated that G.M.M.'s father abused her "a few times" by hitting her, throwing her clothes outside, and refusing to provide her with food. Mother did not immediately end her relationship with G.M.M.'s father because she lacked alternative housing and would "wind up living again with him." Mother did not

[11] Mother stated that she notified the DFPS caseworker that she was unable to complete the requirements of her FSP at that particular time due to her C-section complications.

report the abuse to law enforcement. Mother acknowledged that, as recently as the day before trial, G.M.M.'s father had threatened her at her home by stating that he refused to help her with G.M.M. if mother would not continue a relationship with him. This time, mother called law enforcement to report the incident, and she stated that she would call law enforcement again if G.M.M.'s father made additional threats in the future. Mother stated that G.M.M.'s father did not "mistreat" G.M.M. Mother's current partner and G.M.M.'s father had never had any altercations.

With respect to the needs of her two children, mother agreed that G.M.M. limps, uses leg braces, requires physical therapy, and has delayed speech. Mother attributed these special needs partially to the injuries G.M.M. sustained in the soup-spilling incident and partially to mother's lack of prenatal care, stating that G.M.M. had "very little calcium because [she] was unable to eat during [her] pregnancy" or take prenatal vitamins. Mother testified that on one occasion she took her second child to the hospital because the child had something in her eye and a fever. Mother learned at the hospital that the child was dehydrated but stated that she had "no idea" how the child had developed that condition. Mother noted that she had provided G.M.M. with clothes, diapers, toys, and food on certain visits.

DFPS Caseworker Marilyn Scott

DFPS caseworker Marilyn Scott testified that G.M.M. and mother initially were a part of the Family Based Safety Services ("FBSS") program.[12] But DFPS sought to be appointed as G.M.M.'s temporary managing conservator because mother was "not completing her [required] services" or "doing what [DFPS] asked" related to the FBSS program. Once DFPS became G.M.M.'s temporary managing conservator and petitioned to terminate mother's parental rights, mother received an FSP, but she did not complete it. Scott opined that, though a permanent placement had not been located for G.M.M., termination of mother's parental rights would establish permanency for G.M.M.

Scott further testified that, in her view, mother had not taken responsibility for the injuries G.M.M. sustained from the soup-spilling incident and mother did not understand the full extent of the care G.M.M. required as a result of those injuries. Scott attributed her view, at least in part, to inconsistent accounts from mother of how G.M.M. sustained the injuries. Mother first indicated that another child—mother's two-year-old sister—had spilled the soup on G.M.M. Next, mother stated that the soup simply had spilled. And a couple of weeks before trial, mother stated

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[12] *See In re D.C.*, No. 05-19-01217-CV, 2020 WL 1042692, at *1 (Tex. App.—Dallas Mar. 4, 2020, pet. denied) (mem. op.) ("Family based safety services is a [Child Protective Services] program that works with parents to try to keep children in the home.").

that G.M.M. was injured when the take-home container "exploded." Scott indicated that these differing accounts of the soup-spilling incident were taken from the report, another investigator, and from mother's own statement to Scott.

As to the injuries G.M.M. sustained from the soup-spilling incident, Scott explained that the skin grafts used to treat G.M.M.'s burns had healed. One foot, however, did not heal properly. This initially prevented G.M.M. from walking, but G.M.M. used leg braces to build her strength. G.M.M. also participated in occupational and physical therapies and required assistance learning to speak and eat properly. In describing the progress made by G.M.M. while in the care of DFPS, Scott noted that G.M.M. is now "full of energy" and can walk, run, and jump; feed herself; and speak a few words. G.M.M. still uses the leg braces occasionally.

Scott also explained that the severity of the burns from the soup-spilling incident compromised G.M.M.'s immune system. When G.M.M. was removed from her initial placement with her maternal grandfather and placed into a foster home, she had severe skin, respiratory, and ear infections. The ear and respiratory infections are recurring, and G.M.M. has become immune or allergic to certain antibiotics used to treat the infections. Scott opined that mother would be unable to meet G.M.M.'s ongoing medical and therapeutic needs.

Although DFPS is not involved with mother's second child, Scott expressed concern for that child. Mother initially did not disclose her second pregnancy to

DFPS and acknowledged a lack of prenatal care in that pregnancy. In addition, the hospital physician who treated mother's second child for dehydration observed that mother needed parenting classes. Mother, however, waited until two weeks before trial to start those classes despite the classes being included in both the requirements for the FBSS program and in her FSP.

Scott also expressed doubt about mother's stability. Scott acknowledged that mother had participated in the requirements of her FSP and established an appropriate apartment in the two months before trial. When Scott visited the apartment, mother had food, some furnishings, electricity, and running water. Scott also noted that mother had a job and had started participating in parenting classes and individual counseling. Mother had visited G.M.M. in the recent months before trial. Before then, however, mother was inconsistent with visitation and the requirements of her FSP, moved at least six times, and resided out of state for three months. And Scott was not able to meet mother's partner because he was absent from the apartment when Scott visited. Scott opined that mother had not demonstrated stability with respect to her housing or employment and that "everything about [mother] is just not safe for [G.M.M.]." When asked whether it was possible mother would "get it" if she completed the FSP, Scott indicated it was possible but declined to speculate whether that would occur.[13]

[13] Scott did acknowledge that mother had shown some progress.

Medical Records

The trial court admitted into evidence certain medical records. Included in those records are ones that predate G.M.M.'s injuries from the soup-spilling incident. In April 2018, mother took G.M.M. to the emergency room because G.M.M. was "crying and not feeding well." The chart entry for this visit stated: "7 week old F born FT NSVD here for crying episodes at home for the past 3 days that are intermittent. Has otherwise been healthy and well . . . discussed that this is likely colic. Also went over feeding regiment with mother . . . mother understands." The chart entry also noted that G.M.M. was taking formula and breast milk and was "active," "alert," and up to date on vaccinations. In June 2018, mother took G.M.M. to the emergency room because G.M.M. had a cough and "felt warm." The medical care provider detected "no problems/health issues" and attributed G.M.M.'s symptoms to a virus.

Other medical records detailed the injuries sustained by G.M.M. in July 2018 from the soup-spilling incident. A report from the emergency department of the hospital from which G.M.M. initially received treatment noted that burns covered G.M.M.'s complete left leg and foot, partial right leg, and most of her right arm. The report stated:

> 4 mo girl here with burns to her right arm, including elbow, right leg, including knee, left leg including knee and ankle. Mom states that she was sitting on a chair at the table with a pot of hot soup on top of a table cloth [sic]. [G.M.M.] was in the car seat on the floor. Mom is unsure

how she pulled the table cloth [sic] and the pot of soup fell off of the table. The hot soup landed on mom and [G.M.M.].

Mother's FSP

The trial court admitted into evidence mother's FSP, which is unsigned by mother, as well as the trial court's March 26, 2019 status hearing order incorporating the FSP by reference.[14] The FSP states that DFPS initially became involved with mother in March 2018 after receiving a report of neglect. The report alleged that mother, who was a minor when DFPS received the report and was not in school or employed, had moved out of the maternal grandfather's house while pregnant with G.M.M. because "she felt like it." According to the FSP, mother was unable to provide food or shelter for G.M.M. The FSP also notes that mother had not provided DFPS with a valid address, was out of the state on different occasions, and had not completed any of the requirements of her FSP. Under the categories of family and community supports, the FSP states that mother has the support of G.M.M.'s maternal grandfather and mother's eligibility at the age of eighteen for food stamps and public assistance. The FSP references the soup-spilling incident and more than three instances of domestic violence between mother and G.M.M.'s father.

[14] The March 26, 2019 status hearing order states that mother had reviewed her FSP and understood the it and that the trial court "f[ound] that [mother] ha[d] signed the plan."

The FSP identifies a number of goals for reducing the future risk to G.M.M., including, among other things, mother being able to demonstrate an ability to parent and protect G.M.M., an ability to provide basic necessities such as food, clothing, shelter, medical care, and supervision for G.M.M., an ability to provide a "safe, stable, and nurturing environment" for G.M.M., and ability to understand the "serious nature of the situation that placed [G.M.M.] in harm's way," and an ability to protect G.M.M from future abuse or neglect. To aid in the achievement of these goals, the FSP identifies certain requirements to be completed by mother:

- Maintenance of a positive support system and contact with the DFPS caseworker on a monthly basis;
- Participation in and completion of a psychological evaluation and all recommendations made as a result of that evaluation;
- Participation in and completion of domestic-violence counseling and all recommendations made as a result of that counseling;
- Participation in and completion of at least six weeks of parenting classes;
- Participation in individual counseling and completion of all recommendations made as a result of that counseling;
- Proof of any and all sources of income for herself and her child on a monthly basis;
- Maintenance of safe and stable housing for six consecutive months and "throughout the duration of the case"; and
- Provision of a release of information for all service providers.

Permanency Report

The trial court also admitted into evidence DFPS's November 2019 permanency report. The permanency report describes G.M.M. as healthy and notes that G.M.M. should continue to wear "[b]races on both legs and boot alternated." The report also notes DFPS's recommendation that G.M.M. continue with speech, occupational, and physical therapies on a weekly basis. And with regard to mother's progress, the permanency report states that mother had signed releases of information for all service providers but did not "maintain contact with the DFPS caseworker at least once a month in person, by phone call or text" or initiate "evaluations or any therapy courses." The permanency report further notes that mother had not "attended parent/child visits twice a month."

Standard of Review

A parent's right to "the companionship, care, custody, and management" of her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (internal quotations omitted). The United States Supreme Court has emphasized that "the interest of [a] parent[] in the care, custody, and control of [her] child[] . . . is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Likewise, the Texas Supreme Court has concluded that "[t]his natural parental right" is "essential," "a basic civil right of man," and "far more

precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (internal quotations omitted). Consequently, "[w]e strictly construe involuntary termination statutes in favor of the parent." *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012).

Because termination of parental rights is "complete, final, irrevocable and divests for all time that natural right . . . , the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent's rights." *Holick*, 685 S.W.2d at 20. 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." TEX. FAM. CODE ANN. § 101.007; *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Because the standard of proof is "clear and convincing evidence," the Texas Supreme Court has held that the traditional sufficiency standards of review are inadequate. *In re J.F.C.*, 96 S.W.3d at 264–68.

In conducting a legal-sufficiency review in a termination-of-parental-rights case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the factfinder could reasonably have formed a firm belief or conviction about the truth of the matter on which DFPS bore the burden of proof. *Id.* at 266. In viewing the evidence in the light most favorable to the finding, we "must assume that the factfinder resolved disputed facts in favor of its finding if a

reasonable factfinder could do so," and we "should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (internal quotations omitted). But this does not mean we must disregard all evidence that does not support the finding. *In re J.F.C.*, 96 S.W.3d at 266. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id.* If we determine that no reasonable trier of fact could form a firm belief or conviction that the matter that must be proven is true, we must hold the evidence is legally insufficient and render judgment for the parent. *Id.*

In conducting a factual-sufficiency review in a termination-of-parental-rights 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 DFPS bore the burden of proof. *In re C.H.*, 89 S.W.3d 17, 25–26 (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. "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) (internal quotations omitted).

Sufficiency of Evidence

In her first, third, and fourth issues, mother argues that the trial court erred in terminating her parental rights to G.M.M. because the evidence is legally and factually insufficient to support the trial court's findings that she engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being, she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M., and termination of her parental rights was in G.M.M.'s best interest. *See* TEX. FAM. CODE ANN. §§ 161.001(b)(1)(E), (O), (b)(2).

In order to terminate the parent-child relationship, DFPS must establish, by clear and convincing evidence, one or more of the acts or omissions enumerated in Texas Family Code section 161.001(b)(1) and that termination of parental rights is in the best interest of the child. *See id.* § 161.001(b). Both elements must be established, and termination may not be based solely on the best interest of the child as determined by the trier of fact. *Id.*; *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). "Only one predicate finding under section 161.001[(b)](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).

A. Family Services Plan

In a portion of her third issue, mother argues the evidence is legally insufficient[15] to support the termination of her parental rights for failing to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M. because the evidence shows that mother "did what she could on her [FSP]." Mother also asserts that the trial court's order was not sufficiently specific as to the actions necessary for her to obtain G.M.M.'s return.

Parental rights may be terminated under Texas Family Code section 161.001(b)(1)(O) if clear and convincing evidence supports that the parent

> failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of [DFPS] 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.

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15 When a party presents multiple grounds for reversal, an appellate court should first address those issues that would afford the party the greatest relief. *See Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999); *In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *7 n.4 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.). Because legally insufficient evidence requires a rendition of judgment in favor of the party raising the challenge, we must address a legal-sufficiency challenge first. *See In re A.A.H.*, 2020 WL 1056941, at *7 n.4; *In re L.N.C.*, 573 S.W.3d 309, 315 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

TEX. FAM. CODE ANN. § 161.001(b)(1)(O). Essentially, to terminate parental rights under this subsection, the parent must have failed to comply with the provisions of a court order that specifically establish the actions necessary for the parent to regain custody of her child from DFPS, which serves as the permanent or temporary conservator of the child. *In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019). But a court "may not order termination under [s]ubsection (b)(1)(O) based on the failure by the parent to comply with a specific provision of a court order if a parent proves by a preponderance of the evidence that: (1) the parent was unable to comply with specific provisions of the court order; and (2) the parent made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent." TEX. FAM. CODE ANN. § 161.001(d).

Mother does not dispute that at the time of trial G.M.M. had been in the temporary managing conservatorship of DFPS for not less than nine months as a result of her removal for abuse or neglect. Mother also does not dispute that the trial court signed the March 26, 2019 status hearing order in which the trial court ordered mother to comply with each of the requirements in her FSP prepared by DFPS one month earlier.[16] Mother's FSP therefore was a "court order that specifically

[16] The March 26, 2019 status hearing order states that mother had reviewed her FSP and understood it and that the trial court "f[ound] that [mother] ha[d] signed the plan."

established the actions necessary" for mother to obtain the return of G.M.M. *See id.* § 161.001(b)(1)(O).

DFPS caseworker Scott testified that mother failed to comply with the requirements of the FSP, and mother concedes in her briefing that she did not complete her FSP "to the satisfaction of [DFPS]." Mother testified that she started the FSP and "then stopped" because she had her second child and complications arose in the delivery of her second trial by C-section. In the two months before trial, mother made progress with the requirements of the FSP by obtaining housing and employment and participating in two parenting classes, two domestic-violence classes, individual counseling, and a psychological evaluation. But the evidence establishes that mother did not comply with the requirements that she maintain safe and stable housing for six consecutive months, stay in regular contact with DFPS, actually complete individual counseling and the DFPS-approved courses in parenting and domestic violence, and follow all recommendations made as part of the psychological evaluation, domestic-violence classes, and individual counseling. Thus, while mother completed some of the requirements of her FSP and took some steps to regain custody of G.M.M. before trial, she ultimately failed to complete all of the requirements in the court-ordered plan. And substantial compliance with an FSP is not sufficient to avoid a termination finding under Texas Family Code section 161.001(b)(1)(O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *In re A.L.J.*, No.

01-19-00251-CV, 2019 WL 4615826, at *5 (Tex. App.—Houston [1st Dist.] Sept. 24, 2019, no pet.) (mem. op.); *In re M.C.G.*, 329 S.W.3d 674, 676 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Mother asserts that her youth excuses her failure to complete her FSP. But the record reflects that mother, though still a teenager, had reached the age of majority when the trial court ordered her to comply with the FSP. And no evidence substantiates mother's claim that, at the age of eighteen, she was too young to access or complete the requirements set out in the FSP.

Mother also argues that the FSP was not sufficiently specific because it required her to maintain a "positive support system" and "follow all recommendations" without defining those terms. A court order establishing the actions necessary for a mother to obtain the return of her child is sufficiently specific if it sets forth the terms for compliance with certainty so that the mother knows what duties and obligations it imposes. *See In re D.K.J.J.*, No. 01-18-01081-CV, 2019 WL 2455623, at *14 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. denied) (mem. op.). The FSP in this case did that. The FSP provided context for its requirement that mother maintain a "positive support system" by stating that the "positive support system" must be "safe, crime-free, drug/alcohol free, and . . . not inflict abuse or neglect of her child." And the phrase "follow all recommendations," though itself undefined, is incorporated three times in the context of specific

requirements of mother. For example, the FSP required mother to "actively participate in and complete" individual counseling and "follow all recommendations which may include further services," and the FSP specifically identified the service provider who could recommend the additional services, i.e., the "Wellness Counseling Center, 2626 S Loop W, Houston, TX." Likewise, the requirements that mother "follow all recommendations" resulting from her participation in a psychological evaluation and domestic-violence classes also are attached to a specific service and service provider. The undefined term is thus not devoid of context which informed mother of the requirements for reunification with G.M.M. The FSP therefore was sufficiently specific that mother's failure to comply with its requirements warranted termination under Texas Family Code section 161.001(b)(1)(O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *In re D.K.J.J.*, 2019 WL 2455623, at *14–16.

Viewing the evidence in the light most favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O). Accordingly, we hold that the evidence is legally sufficient to support the trial court's finding that mother failed to comply with the provisions of

a court order that specifically established the actions necessary for her to obtain the return of G.M.M. *See id.*

We overrule this portion of mother's third issue.

Due to our disposition below, we need not address the portion of mother's third issue in which she asserts that the evidence is factually insufficient to support the trial court's finding that she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M. This is because, even were we to sustain the factual-sufficiency challenge raised in that portion of mother's third issue, mother would not be granted any more relief than we have afforded her below. *See In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *18 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.); *see also* TEX. R. APP. P. 47.1.

B. Endangering Conduct

In a portion of her first issue, mother argues that the evidence is legally insufficient to support the termination of her parental rights for engaging, or knowingly placing G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being because the soup-spilling incident was not intentional, the evidence of domestic violence between mother and G.M.M.'s father "does not rise to the level of clear and convincing support" for the termination

of mother's parental rights, and there is no evidence that mother engaged in a pattern of criminal conduct or abused narcotics or alcohol.

A trial court may terminate the parent-child relationship if it finds by clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endanger[ed] the physical or emotional well-being of the child." TEX. FAM. CODE ANN. § 161.001(b)(1)(E). To "endanger" means to expose the child to loss or injury or to jeopardize her emotional or physical health. *Boyd*, 727 S.W.2d at 533; *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 616 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). 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. But it is not necessary that the endangering conduct be directed at the child or that the child actually suffer injury. *Id.* The specific danger to the child's well-being may be inferred from parental misconduct standing alone. *Id.*; *In re K.P.*, 498 S.W.3d 157, 171 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

The relevant inquiry under Texas Family Code section 161.001(b)(1)(E) is whether evidence exists that the endangerment of the child's physical and emotional well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. *In re K.P.*, 498 S.W.3d at 171. We must look at a parent's conduct

standing alone, including her actions or omissions. *In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). It is not necessary to establish that a parent intended to endanger the child. *See In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996). But termination of parental rights based on endangering conduct requires "more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent." *In re K.P.*, 498 S.W.3d at 171; *see also In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.); *In re J.W.*, 152 S.W.3d at 205.

There is no evidence that mother endangered G.M.M. by engaging in criminal conduct or abusing narcotics or alcohol. Nor is the soup-spilling incident, standing alone, evidence of a voluntary, deliberate, and conscious course of conduct that endangered G.M.M. Mother's testimony about how the incident occurred and the other varying accounts recalled by Scott indicate the incident was not intentional. And the medical records admitted into evidence establish that mother sought immediate medical attention for G.M.M.'s injuries and had previously sought medical care for G.M.M. when appropriate, such as when G.M.M. was "crying and not feeding" and when G.M.M. had a cough and "felt warm." Medical records for both hospital visits state that G.M.M.'s vaccinations were "up to date." Mother also sought medical attention for her second child when that child was ill. That said, there is some evidence that mother engaged in a course of conduct that subjected

G.M.M. to instability by refusing to access resources that might have assisted her with caring for G.M.M.

"As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of the child." *In re I.V.H.*, No. 01-19-00281-CV, 2019 WL 4677363, at *6 (Tex. App.—Houston [1st Dist.] Sept. 26, 2019, pet. denied) (mem. op.); *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied). A parent's consistent failure to take advantage of many forms of assistance made available to help her establish safe and stable living conditions for her child may warrant termination of parental rights. *See* TEX. FAM. CODE ANN. § 261.001(4)(c); *see also Smith v. Tex. Dep't of Family & Protective Servs.*, Nos. 01-09-00173-CV, 01-09-00390-CV, 2009 WL 4359267, at *7 (Tex. App.—Houston [1st Dist.] Dec. 3, 2009, no pet.) (mem. op); *Phillips v. Tex. Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 348, 352–54 (Tex. App.—Austin 2000, no pet.) (parent's lack of progress toward stabilizing home and becoming better parent was evidence of endangering conduct under subsection (E)).

Mother's FSP states that DFPS received a report that mother was unable to provide food or shelter for herself and G.M.M. The FSP further states that mother moved out of G.M.M.'s maternal grandfather's home when she was pregnant with G.M.M., did not seek the maternal grandfather's help, and lived between homes with friends or G.M.M.'s father. Mother could not access food stamps because she was

a minor at the time, and she reported that food banks would not help her. The FSP also notes there were incidents of domestic violence in mother's relationship with G.M.M.'s father.

Further, mother testified that she decided to leave the maternal grandfather's house when she was pregnant with G.M.M. But she clarified that the maternal grandfather was willing to help support her two children even though she and he do not have a good relationship. Mother explained that G.M.M. sustained injuries from the soup-spilling incident because she was preparing food in a friend's kitchen as there was no food in the home that she shared with G.M.M.'s father. Mother stated that G.M.M.'s father would "not give [her] food." But she also testified that G.M.M. was not eating solid food at the time, and medical records indicate G.M.M. was bottle-fed formula and, at one point, was also breastfed by mother. Mother agreed that G.M.M. requires "a lot" of physical therapy on her legs as a result of her injuries from the soup-spilling incident, and mother acknowledged that she "was unable to eat" during her pregnancy with G.M.M. and unable to take prenatal vitamins which may have contributed to the obstacles G.M.M. faces related to her physical development. *See Smith*, 2009 WL 4359267, at *8 (mother's failure to receive prenatal care was evidence of endangerment).

In addition, it is undisputed that domestic violence occurred in mother's relationship with G.M.M.'s father. *See In re P.M.B.*, No. 01-17-00621-CV, 2017

WL 6459554, at *9 (Tex. App.—Houston [1st Dist.] Dec. 19, 2017, pet. denied) (mem. op.) ("[E]xposing one's child to risk of domestic violence from others may also constitute endangering conduct."). Mother acknowledged that G.M.M.'s father hit her and denied her food. Mother testified that she tried to end the relationship with G.M.M.'s father, but she "did not have a place to live so [she] would wind up living with him again." Mother did not contact law enforcement or report the domestic violence. Although mother denied that G.M.M.'s father mistreated G.M.M., "domestic violence may constitute endangerment, even if the violence is not directed at the child." *D.N. v. Tex. Dep't of Family & Protective Servs.*, No. 03-15-00658-CV, 2016 WL 1407808, at *2 (Tex. App.—Austin Apr. 8, 2016, no pet.) (mem. op.); *see also In re A.V.M.*, No. 13-12-00684-CV, 2013 WL 1932887, at *5 (Tex. App.—Corpus Christi–Edinburg May 9, 2013, pet. denied) (mem. op.) ("It is self[-]evident that parents perpetuating violence toward certain [other] members of the family threaten the emotional development and well-being of any child.").

This domestic violence was identified in mother's FSP as a reason for DFPS's involvement with G.M.M., and the FSP specifies a service provider for domestic-violence counseling and education. Yet she did not access any domestic-violence classes until shortly before trial. *Cf. In re J.J.S.*, 272 S.W.3d 74, 79 (Tex. App.—Waco 2008, pet. struck) (concluding fact that mother "conducted

herself in a manner, namely her abusive relationships, which exposed her children to a home where physical violence was present" was evidence of endangerment under subsection (E)); *In re M.R.*, 243 S.W.3d 807, 819 (Tex. App.—Fort Worth 2007, no pet.) (considering fact that mother "exposed her children to domestic violence" as evidence of endangerment under subsection (E)).

The record also reflects that DFPS offered mother various types of assistance in addition to the domestic-violence counseling, first, without requesting conservatorship of G.M.M., and, again, after moving to terminate mother's parental rights. Mother did not accept this assistance and continued to engage in similar conduct for more than one and half years after DFPS became involved with G.M.M. Even after DFPS petitioned to terminate her parental rights, mother moved frequently and visited G.M.M. "whenever she felt like it" or, during a two-or three-month period in which she lived out of state, not at all. DFPS's November 2019 permanency report confirmed that, between July 2018 and November 2019, mother consistently failed to take advantage of any form of assistance made available to help her establish safe and stable living conditions for G.M.M. *See Smith*, 2009 WL 4359267, at *7.

Mother does not dispute that she failed to access available assistance programs and to make progress toward stabilizing a home and becoming a better parent for more than one and half years after G.M.M. was removed from her care. Mother

explained that her second pregnancy and resulting C-section complications interfered with her ability to comply with the requirements of her FSP but that she let her caseworker know. Mother also attributes her instability in that time to her status as a teenage parent, and she asserts that the trial court's finding of endangering conduct is undermined by the evidence of her emergent maturity in the two months before trial, when she obtained housing and employment and began parenting and domestic-violence classes and individual counseling. We agree. But evidence of improved conduct, especially of short duration, does not preclude the factfinder from reasonably forming a firm belief that mother's acts or omissions supported termination of mother's parental rights under Texas Family Code section 161.001(b)(1)(E). *See In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009) (evidence of improved conduct, short in duration, does not conclusively negate probative value of long history of irresponsible choices). A parent's past endangering conduct may support an inference that the past conduct may recur and further jeopardize the child's present or future physical or emotional well-being. *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.).

Viewing the evidence of instability, mother's refusal for a prolonged period of time to take advantage of available assistance, and the exposure of G.M.M. to domestic violence in the home mother shared with G.M.M.'s father in the light most

favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that mother engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). We hold that the evidence is legally sufficient to support the trial court's finding that mother engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being. *See id.*

We overrule this portion of mother's first issue.

Due to our disposition below,[17] we need not address the portion of mother's first issue in which she asserts that the evidence is factually insufficient to support the trial court's finding that she engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional

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[17] Because we will reverse and remand the case after concluding the evidence is factually insufficient to support the trial court's best-interest finding, *see infra*, we need not consider whether the evidence is factually insufficient to support the trial court's finding that mother engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being. *See In re M.A.J.*, No. 01-19-00685-CV, slip op. at 16 n.16 (Tex. App.—Houston [1st Dist.] June 25, 2020, no pet. h.), *available at* http://www.search.txcourts.gov/Case.aspx?cn=01-19-00685-CV&coa=coa01; *In re D.T.*, Nos. 07-19-00071-CV, 07-19-00072-CV, 2019 WL 3210601, at *5 n.6 (Tex. App.—Amarillo July 16, 2019, no pet.) (mem. op.); *see also* TEX. FAM. CODE ANN. § 161.001(1)(b)(E); *In re N.G.*, 577 S.W.3d at 237, 239 (explaining that *only* when appellate court "*affirms the termination*" of parental rights under section 161.001(b)(1)(D) or (E) must it address both legal and factual sufficiency of evidence "to support [a] section 161.001(b)(1)(D) and (E) finding[] as grounds for termination" (emphasis added)).

well-being. *See id.* This is because, even were we to sustain the factual-sufficiency challenge raised in that portion of mother's first issue, mother would not be granted any more relief than we have afforded her below.[18] *See In re A.A.H.*, 2020 WL 1056941, at *18; *see also* TEX. R. APP. P. 47.1.

C. Best Interest of Child

In her fourth issue, mother argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights is in G.M.M.'s best interest because G.M.M. was not in an adoptive placement at the time of trial, mother's initial failure to fully access the available assistance programs designed to improve her parenting skills should be excused, and mother demonstrated an "emergent maturity" and willingness to parent G.M.M. by reengaging in support services, establishing an appropriate home, and obtaining employment before trial.

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[18] For this same reason and also because we have determined that there is legally sufficient evidence to support the trial court's findings that mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of G.M.M. and that mother engaged, or knowingly placed G.M.M. with persons who engaged, in conduct that endangered G.M.M.'s physical and emotional well-being, we need not address mother's second issue challenging the legal- and factual-sufficiency of the evidence supporting the trial court's finding that she constructively abandoned G.M.M., who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N); *see also* TEX. R. APP. P. 47.1; *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (only one predicate finding under Texas Family Code section 161.001(b)(1) is required to support judgment of termination).

It is presumed that the prompt and permanent placement of the child in a safe environment is in the child's best interest. *See* TEX. FAM. CODE ANN. § 263.307(a); *In re D.S.*, 333 S.W.3d 379, 383 (Tex. App.—Amarillo 2011, no pet.). There is also a strong presumption that the child's best interest is served by maintaining the parent-child relationship. *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Thus, we strictly scrutinize termination proceedings in favor of the parent. *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.).

"[T]he best interest standard does not permit termination merely because a child might be better off living elsewhere." *In re J.G.S.*, 574 S.W.3d 101, 122 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (internal quotations omitted); *see also In re W.C.*, 98 S.W.3d 753, 758 (Tex. App.—Fort Worth 2003, no pet.). Termination of parental rights should not be used as a mechanism to merely reallocate children to better and more prosperous parents. *In re J.G.S.*, 574 S.W.3d at 122; *In re W.C.*, 98 S.W.3d at 758; *see also In re E.N.C.*, 384 S.W.3d at 809; *In re C.R.*, 263 S.W.3d 368, 375 (Tex. App.—Dallas 2008, no pet.). And "[t]ermination of the parent-child relationship is not justified when the evidence shows that a parent's failure to provide a more desirable degree of care or support of the child is due solely to misfortune or the lack of intelligence or training, and not to indifference or malice." *In re E.C.A.*, No. 01-17-00623-CV, 2017 WL 6759198, at *10 (Tex. App.—Houston [1st Dist.]

Dec. 28, 2017, pet. denied) (mem. op.). DFPS's burden is not simply to prove that a parent should not have custody of her child; DFPS must meet the heightened burden to prove, by clear and convincing evidence, that the parent should no longer have any relationship with her child whatsoever. *See In re K.N.J.*, 583 S.W.3d 813, 827 (Tex. App.—San Antonio 2019, no pet.); *see also In re J.A.J.*, 243 S.W.3d 611, 616–17 (Tex. 2007) (distinguishing conservatorship from termination).

In determining whether the termination of mother's parental rights is in the best interest of her child, we may consider several factors, including: (1) the child's desires; (2) the current and future physical and emotional needs of the child; (3) the current and future emotional and physical danger to the child; (4) the parental abilities of the parties seeking custody; (5) whether programs are available to assist those parties; (6) plans for the child by the parties seeking custody; (7) the stability of the proposed placement; (8) the parent's acts or omissions that may indicate that the parent-child relationship is not proper; and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re L.M.*, 104 S.W.3d at 647. The focus of this non-exhaustive list of factors is on the best interest of the child, not of the parent. *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ).

Courts may consider any other factor relevant to the child's best interest, including evidence that establishes the predicate act under Texas Family Code

section 161.001(b)(1). *See In re C.L.C.*, 119 S.W.3d 382, 399 (Tex. App.—Tyler 2003, no pet.) ("[T]he best interest of the child does not require proof of any unique set of factors nor limit proof to any specific factors."); *see also In re C.H.*, 89 S.W.3d at 28 ("While it is true that proof of acts or omissions under section 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues."); *In re L.M.*, 104 S.W.3d at 647 ("[T]he same evidence of acts or omissions used to establish grounds for termination under section 161.001(1) may be probative in determining the best interests of the child."). The absence of evidence about some of the factors would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the children's best interest. *In re C.H.*, 89 S.W.3d at 27; *In re J.G.S.*, 574 S.W.3d at 122. Likewise, a lack of evidence on one factor cannot be used as if it were clear and convincing evidence supporting termination of parental rights. *In re E.N.C.*, 384 S.W.3d at 808; *In re J.G.S.*, 574 S.W.3d at 122.

1. Child's Desires

Because G.M.M. was less than two years old at the time of trial, there is no direct evidence of her desires. When a child is too young to express her desires, this factor is considered neutral. *See In re A.C.*, 394 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("The young age of the child render[s] consideration of the child's desires neutral."). The factfinder, however, may

consider that the child has bonded with her foster family, is well-cared for by them, and has spent minimal time with her parent. *In re N.J.H.*, 575 S.W.3d 822, 834 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *see also In re L.W.*, No. 01-18-01025-CV, 2019 WL 1523124, at *17–18 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, pet. denied) (mem. op.).

At the time of trial, G.M.M. had not lived in mother's care for about eighteen months. Mother initially visited G.M.M. only sporadically while G.M.M. was in the care of the maternal grandfather and by failing to visit G.M.M. at all when mother lived out of state for two or three months. The evidence was undisputed, however, that mother's visitation became more consistent before trial. Scott stated that mother attended all but one scheduled visit between November 2019 and January 2020. Neither mother nor Scott testified as to whether mother and G.M.M. had bonded in these visits, but mother brought G.M.M. diapers when she could and "clothes and something to eat[] or toys," and G.M.M. met mother's second child.

The evidence that G.M.M. has lived outside of mother's care for more than eighty percent of her life and of irregular visitation is evidence that mother has spent minimal time with G.M.M. But there is little evidence from which the trial court could form any firm belief or conviction about G.M.M.'s relationship with her foster family that might nudge this factor toward weighing in favor of the termination of mother's parental rights. The permanency report indicates that G.M.M. was placed

in her current foster placement ten months before trial. Although G.M.M.'s physical health and development improved in that time, there is no evidence that G.M.M. has bonded with her foster family. *Cf. In re L.W.*, 2019 WL 1523124, at *17–18 (factor weighed in favor of termination where children, although young, were "very close" to foster family and had "bonded" with and relied on foster parents for emotional support). And the foster family decided against adopting G.M.M., meaning that her placement there lacks permanence regardless of whether any bond has been formed. Accordingly, this factor remains neutral under the legal- and factual-sufficiency standards of review and neither weighs in favor of nor against termination.

2. Current and Future Physical and Emotional Needs

Like all children, G.M.M. needs a safe and stable home. *See* TEX. FAM. CODE ANN. § 263.307(a) (prompt and permanent placement of child in safe environment presumed to be in child's best interest); *In re G.M.G.*, 444 S.W.3d 46, 60 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (parent who lacks ability to provide child with safe and stable home is unable to provide for child's emotional and physical needs). The FSP and mother's testimony indicate that mother lacked food or housing security or both when DFPS first intervened and for much of the duration of this case. *In re K-A.B.M.*, 551 S.W.3d 275, 288 (Tex. App.—El Paso 2018, no pet.) (child's basic needs include food and shelter). Further, mother's housing insecurity contributed to mother staying in a home in which G.M.M.'s father committed

physical violence and other abuse against her. The FSP states that mother moved out of G.M.M.'s maternal grandfather's home when she was pregnant with G.M.M. and did not seek the maternal grandfather's help. Because she was a minor, mother could not access food stamps. And she reported that food banks would not help her.

According to Scott, mother moved "at least six times," including for three months out of state when mother failed to visit G.M.M. at all. *See In re A.A.A.*, 265 S.W.3d 507, 517–18 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (evidence parent moved frequently weighed against parent's ability to provide stable home). Mother testified that she lived out of state only for "some two months," but she did not dispute that she failed to maintain contact with G.M.M. during that time. Scott's testimony that mother often was between homes does not include any details as to the specific condition of any home that mother and G.M.M. lived in prior to G.M.M.'s removal. *See In re E.N.C.*, 384 S.W.3d at 808 ("A lack of evidence does not constitute clear and convincing evidence."). Mother was not asked any questions at trial about the condition of any home prior to G.M.M.'s removal, and mother only stated that she was preparing food in a friend's home when G.M.M. was injured because there was no food in the home she shared with G.M.M.'s father.

Scott opined that "everything about [mother] is just not safe for [G.M.M.]," but that opinion contradicts other undisputed evidence. For example, it is undisputed that mother had leased an apartment in her own name and obtained employment at

the time of trial. Scott visited mother's apartment and found that it was "appropriate," noting it was furnished and had food, running water, and electricity. And it is undisputed that mother's second child remains in the care of mother and her partner in that home without DFPS's intervention, supporting an inference that mother is able to meet at least a child's basic needs. Mother testified that her current partner is not abusive, is financially supportive, and is willing to co-parent G.M.M. Though mother's partner is financially supportive and was paying the bills for their shared apartment at the time of trial, mother testified that she would be able to support herself and both children if her partner ended the relationship and that she would also have the support of G.M.M.'s maternal grandfather upon reunification.

Additionally, under this factor, we must consider G.M.M.'s tender age and particular physical vulnerabilities. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *see also In re D.D.M.*, No. 01-18-01033-CV, 2019 WL 2939259, at *5 (Tex. App.—Houston [1st Dist.] July 9, 2019, no pet.) (mem. op.) ("Evidence of this factor generally demonstrates what the children's physical needs are, specifically any special physical needs, and whether the parent seeking custody [is] willing and able to meet those needs."). There is evidence that G.M.M. has an ongoing need for specialized medical care and therapies that may require more than a basic level of parental attentiveness and diligence. *See In re L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (considering, among other things,

child's particular needs and parent's lack of understanding and resolve to meet future medical needs in evaluating best interest). G.M.M.'s particular medical needs include the occasional use of leg braces; speech, occupational, and physical therapies on a weekly basis; and treatment of recurring ear and respiratory infections that have become antibiotic-resistant or involve medications to which G.M.M. has developed an allergy. Mother was aware of G.M.M.'s ongoing medical concerns resulting from the injuries she sustained in the soup-spilling incident, acknowledging that G.M.M. walks with a limp, wears leg braces, has delayed speech, and needs physical therapy to "loosen [her legs] up." And mother acknowledged that her own inability to eat or take prenatal vitamins during her pregnancy with G.M.M. may also have contributed to G.M.M.'s physical condition.

Despite mother's awareness of G.M.M.'s special medical needs, Scott expressed concern rooted in mother's history of moving frequently that mother did not fully understand the extent of care G.M.M. required. And DFPS asserts that mother's admission that she had "no idea" how her second child became dehydrated calls into doubt her ability to meet even G.M.M.'s most basic needs. But Scott's opinion about mother's ability to fully understand or meet G.M.M.'s specialized medical needs lacks the support of any evidence that mother failed in the past to seek or obtain necessary medical care for G.M.M. The medical records admitted into the evidence at trial reflect that mother sought medical care for both of her children at

appropriate times on more than one occasion, including when G.M.M. was injured and when one or the other child developed a fever. The chart entry for a hospital visit in April 2018—which was after DFPS's initial involvement with G.M.M.—notes that G.M.M. was taking formula and breast milk and was "active," "alert," and up to date on vaccinations.

As to the ability of DFPS to meet G.M.M.'s current and future physical and emotional needs, the record contains little evidence about G.M.M.'s current foster placement, except to confirm that it is not an adoptive placement, and that G.M.M. has progressed in recovering from her injuries. Scott testified that G.M.M.'s foster family takes her to medical appointments, and her testimony together with the permanency report indicates G.M.M. is healthy, full of energy, and participating in normal activities. *See In re J.S.*, No. 14-18-00709-CV, 2019 WL 438821, at *9 (Tex. App.—Houston [14th Dist.] Feb. 5, 2019, pet. denied) (mem. op.) (evidence child was thriving in foster placement weighed in favor of termination of parental rights); *In re T.A.S.*, No. 05-15-01101-CV, 2016 WL 279385, at *6 (Tex. App.—Dallas Jan. 22, 2016, no pet.) (mem. op.) (considering children's improvement in foster care); *In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (affirming termination as in best interest when child thriving in foster care).

Because the trial court could have disbelieved the testimony about the recent progress made by mother and because the evidence establishes that G.M.M.'s

physical health and development improved in DFPS's care, under a legal-sufficiency review, this factor weighs in favor of termination. *See In re C.H.*, 89 S.W.3d at 28 (father's past performance as parent could have impact on his fitness to provide for child); *In re J.D.*, 436 S.W.3d 105, 119 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (parent's failure to show stability for any prolonged period permits trial court to conclude pattern would likely continue); *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied) (trial court may measure parent's future conduct by past conduct). But viewing all of the evidence in a neutral light, including the evidence of mother's positive progress and history of obtaining medical care for her children when necessary, this factor does not weigh in favor of termination under a factual-sufficiency review.

3. Current and Future Physical and Emotional Danger

Beyond the initial food and housing insecurity already discussed, the record contains little evidence that mother posed a physical or emotional danger to G.M.M. Scott opined that mother had not taken responsibility for the soup-spilling incident, but DFPS did not present any evidence that the incident was intentional. There is also no evidence that mother engaged in criminal conduct or abused narcotics or alcohol. And there is no evidence that mother's interactions with G.M.M. in visitation were inappropriate or that G.M.M. was negatively affected by contact with mother. *See In re J.G.S.*, 574 S.W.3d at 125 (considering lack of evidence child was

negatively affected by contact with parent in overturning order terminating parental rights).

To be sure, it is undisputed that domestic violence occurred in mother's relationship with G.M.M.'s father. The FSP notes that mother was experiencing domestic violence when DFPS became involved with G.M.M., and mother admitted that G.M.M.'s father hit her and denied her food. *See* TEX. FAM. CODE ANN. § 263.307(b)(7) (in determining whether parent able to provide child with safe environment, considering history of abusive and assaultive conduct by child's family and others with access to child's home). But mother is no longer in a relationship with or living with G.M.M.'s father. No evidence contradicts mother's testimony that her current partner is not abusive. Although mother sought the help of G.M.M.'s father, who committed violence against her in the past, in support of her desire for reunification, mother demonstrated a greater ability to protect against any future danger posed by either G.M.M.'s father, specifically, or other domestic violence, generally, when she reported the pretrial threat from G.M.M.'s father to law enforcement and pledged that she would do so again if she is threatened in the future.

Given the undisputed evidence of exposure to domestic violence, this factor weighs in favor of termination under a legal-sufficiency review. But viewing all of the evidence in a neutral light, as we must under a factual-sufficiency review, this factor does not weigh in favor of termination.

3. Parental Abilities, Plans for Child, Stability of Proposed Placement

The evidence already discussed regarding G.M.M.'s need for a safe and stable home is also relevant in the analysis of these related factors. *See In re I.L.G.*, 531 S.W.3d 346, 356 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). The same is true of the evidence that mother is currently raising her second child without DFPS's intervention. And we note again the lack of evidence that mother's relationship with G.M.M. is inappropriate or that G.M.M. is adversely affected by contact with mother during visitation. The scant evidence of the nature or quality of visitation between mother and G.M.M. suggests that mother has attempted to foster a parent-child relationship with G.M.M. by bringing food, clothes, diapers, and toys to visits with G.M.M. and introducing G.M.M. to her sibling.

Mother testified that she desired to be reunited with G.M.M. and about the positive progress she made toward stabilizing her home. Beyond her statement that she intended to work at night when her partner would be home to care for her children, however, there is no other evidence of mother's plans or goals for G.M.M. in the future. Yet the record reflects more than one source of concern for mother's parenting skills. Scott testified that mother needed parenting classes but had not participated in those classes until two weeks before trial. And Scott was not alone in her opinion that mother needed help learning to parent. Scott stated that the hospital physician who treated mother's second child for dehydration also

recommended that mother take parenting classes. At the time of trial, however, mother had completed two of "six or eight" parenting classes.

Also, as already discussed, this record contains little evidence about G.M.M.'s current foster placement. At the time of trial, G.M.M. had lived with the same foster family for ten months. The only evidence of the abilities of G.M.M.'s current foster family or the environment they have provided G.M.M. is G.M.M.'s positive physical improvement and development while in their care. This is evidence, at least, of the foster family's ability to plan for and follow through with accepting assistance to meet G.M.M.'s needs. But even though G.M.M. is doing well in her current foster placement, it is not an adoptive placement. DFPS's goal for G.M.M. remains unrelated adoption, and, at the time of trial, DFPS was looking for a permanent placement for G.M.M.

Given that the lack of evidence of an adoptive placement for G.M.M. is not dispositive of this analysis and the evidence of concern for the adequacy of mother's parenting skills, these factors weigh in favor of termination under a legal-sufficiency review. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013) (lack of evidence about definitive plans for permanent placement and adoption of the child is not dispositive of best-interest analysis); *see also In re C.H.*, 89 S.W.3d at 28. But viewing all of the evidence in a neutral light, including the evidence that mother is parenting her

second child without DFPS intervention, these factors do not weigh in favor of termination under a factual-sufficiency review.

4. Availability of Assistance and Excuse for Acts or Omissions

"In determining the best interest of the child in proceedings for termination of parental rights, the [factfinder] may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child." *In re I.L.G.*, 531 S.W.3d at 355; *see In re E.C.R.*, 402 S.W.3d at 249. Here, it is undisputed that mother did not fully complete the requirements of her FSP. Scott testified that mother failed to engage in the assistance offered by DFPS for more than one and half years after DFPS's initial intervention with G.M.M. Mother leased her apartment in November 2019, which was two months before trial and short of the six months of safe and stable housing required by the FSP. And although mother participated in psychological evaluations, individual counseling, parenting classes, and domestic-violence classes, the majority of her positive progress on these services also was made in the two months before trial. Mother testified that her progress on her FSP was delayed between May 2019, when her second child was born, and November 2019, when she returned to Texas from Louisiana. She explained that she experienced complications in her second pregnancy, delivered her second child by C-section in May 2019, and then had no choice but to move with her current partner, who is her second child's father, out of state because she lacked other

housing. According to mother, Scott was aware of the complications mother experienced in birth and of her resulting inability to complete the requirements of her FSP for a time. Beyond immaturity, however, mother did not offer any excuse for her failure to participate in available assistance programs before the birth of her second child. *See In re R.S.*, No. 13-09-00368-CV, 2010 WL 877567, at *5 (Tex. App.—Corpus Christi–Edinburg Mar. 11, 2010, no pet.) (mem. op.) (evidence mother failed to complete FSP weighed in favor of termination despite assertion of youth as excuse).

When viewing the evidence in the light most favorable to the trial court's best-interest finding, we must presume that the trial court disbelieved mother's testimony about why she was unable to meaningfully engage the assistance offered by DFPS until two months before trial. *See In re D.D.M.*, 2019 WL 2939259, at *5; *In re I.L.G.*, 531 S.W.3d at 356; *In re A.S.*, 261 S.W.3d 76, 87 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Accordingly, under a legal-sufficiency review, these factors weigh in favor of termination. Viewing all of the evidence in a neutral light, these factors also weigh in favor of termination under a factual-sufficiency review.

* * *

In sum, viewing the evidence in the light most favorable to the trial court's finding, all but one of the *Holley* factors weigh in favor in terminating mother's parental rights. We therefore conclude that the trial court could have formed a firm

belief or conviction that termination of mother's parental rights is in the best interest of G.M.M. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). We hold that the evidence is legally sufficient to support the trial court's finding that termination of mother's parental rights is in the best interest of G.M.M. *See id.*; *see also In re A.A.H.*, 2020 WL 1056941, at *7 n.4 (because legally insufficient evidence requires rendition of judgment in favor of party raising the challenge, we must address it); *In re L.N.C.*, 573 S.W.3d at 315.

We overrule this portion of mother's fourth issue.

Under a factual-sufficiency review, however, we must view the evidence in a neutral light. And viewing all of the evidence equally, the majority of the *Holley* factors do not weigh in favor of termination of mother's parental rights. We therefore conclude that a reasonable factfinder could not have formed a firm belief or conviction that termination of mother's parental rights is in the best interest of G.M.M. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Thus, we hold that the evidence is factually insufficient to support the trial court's finding that termination of mother's parental rights is in the best interest of G.M.M. *See id.*

We sustain this portion of mother's fourth issue.

Conclusion

We reverse the portion of the trial court's order terminating mother's parental rights and remand the case to the trial court for a new trial. *See* TEX. R. APP. P.

.28.4(c); *In re J.O.A.*, 283 S.W.3d at 347. Because mother did not challenge the trial court's appointment of DFPS as G.M.M.'s sole managing conservator, we affirm that portion of the trial court's order. *See In re J.A.J.*, 243 S.W.3d 611, 612–13 (Tex. 2007).

Julie Countiss
Justice

Panel consists of Justices Goodman, Hightower, and Countiss