Opinion issued October 20, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00355-CV

IN THE INTEREST OF A.F.R. AKA BABY BOY R

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Case No. 2018-04986J

MEMORANDUM OPINION

Appellants, A.Z.R. ("Mother") and D.R. ("Father"), appeal from the trial court's judgment that terminated their parental rights to their infant child, A.F.R. ("Alex").[1] In her sole issue, Mother argues that the trial court lost jurisdiction resulting in a void judgment. In five issues, Father argues that (1) the trial court

[1] For purposes of this Opinion, we will refer to the child and parties by pseudonyms. *See* TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8.

lost jurisdiction resulting in a void judgment; (2) the evidence is legally and factually insufficient to support termination under Texas Family Code section 161.001(b)(1)(E) and (O); (3) the evidence is legally and factually insufficient to support termination being in the best interest of the child; and (4) the evidence is legally and factually insufficient to support the appointment of the Department of Family and Protective Services ("DFPS") as the sole managing conservator of Alex.

We affirm.

Background

DFPS filed its original petition on October 16, 2018, after learning that Mother and Alex tested positive for cocaine upon his birth. On the same day, the trial court appointed DFPS as temporary sole managing conservator of Alex and that pursuant to section 263.401, October 21, 2019 was the statutory automatic dismissal date.[2] On September 23, 2019, the trial court signed an extension order, noting that (1) extraordinary circumstances exist to necessitate the child to remain in the temporary managing conservatorship of DFPS, (2) continuing appointment of DFPS as temporary managing conservator was in the child's best interests; and

[2] *See* TEX. FAM. CODE § 263.401.

(3) suit would be automatically dismissed if trial on the merits had not commenced by April 18, 2020.[3]

The trial on the merits commenced on February 12, 2020. Jasmin Green, a DFPS caseworker, testified that Alex was a little over a year old at the time of trial, and the referral to DFPS occurred because Mother and Alex tested positive for cocaine upon his birth. Although the trial court ordered her to take a drug test on April 30, 2019, Mother did not take the drug test on the scheduled date. Green recalled that she last spoke to Mother in December 2019 when Mother said she was moving to a longer-term treatment facility, but, because she did not give an address, Green was unable to verify the information that Mother had given her. Green testified that despite her service plan, Mother did not do any of the services. She also testified that Mother did not visit Alex during the pendency of the case.

Green testified that Mother committed terroristic threats on June 7, 2018, while pregnant with Alex, and on February 5, 2019, when Alex was four-months-old. Green also noted that Mother had a conviction for possession of cocaine and a 2013 conviction for attempted injury to a child. Green testified that Mother's criminal history shows a "pattern of instability. She has not been able to show that she can actually parent as it's evident and there are other children that are not in her care; and the fact that mom continued—even up until giving birth—to engage

[3] *See* TEX. FAM. CODE § 263.401(a), (b).

in criminal acts as well as illegal drug use. That kind of speaks to her inability to look out for the wellbeing of her child."

Regarding Father, Green testified that he was served on October 23, 2018. Green testified that Father was ordered to take a drug test on January 30 and April 30, 2019, but he failed to show. Green admitted that Father did not have any criminal history involving illegal substances, but she agreed that it would have been important for Father to drug test to "assuage some of the department's concerns." Green testified that despite Father receiving a service plan, he "has not completed any [of the services] that were ordered by this Court." Green also testified to calling Father on multiple occasions and leaving contact information, but Father never returned her calls. When asked if Father had contacted DFPS to visit Alex, Green answered "[j]ust recently within the last two weeks." Green also recalled that Father had visited Alex one time, in February 2019. Other than the one visit, Father has not seen Alex.

In discussing Father's criminal history, Green agreed that Father was sentenced to five years for aggravated robbery in 2007. She also testified that Father had been convicted of an assault in 2017 and another assault on June 24, 2018 against Mother, who was pregnant with Alex at the time of the assault. Green testified that Father's criminal history was a concern to DFPS regarding endangering conduct toward the child. The trial court also admitted documentary

evidence reflecting Father's aggravated robbery conviction in 2007 and the two assaults. A report from Child Advocates also showed Father's lengthy criminal history, including offenses in addition to those testified to by Green.

Green testified that Alex is currently living in a foster home where he has been living since his discharge from the hospital. The foster home is willing to adopt Alex, who is developmentally on target and well loved and cared for. Green also testified that the foster parents are meeting Alex's basic medical needs, and she has no concerns that the foster parents would continue to meet Alex's needs if he is permanently placed in their home. Green further testified that the foster parents have a biological child, between the ages of seven and eight, who has a relationship with Alex, the family is well bonded to Alex, and it would be in Alex's best interest to remain in the current home and for parental rights to be terminated. Green explained that since being discharged from the hospital, Alex has only been in this placement, the family has taken the child in and loved him as their own, he is very bonded, and she did not think Alex could have been placed in a better home. The foster family has even facilitated contact between Alex and his biological family, including his maternal aunt, uncle, and grandmother.

On cross-examination, Green admitted that she did not have a positive drug test for Father and that Father's 2007 robbery conviction occurred 11 years ago when Father was 17. Green testified that she was informed that Father has been

working and that he has an apartment. Green was also aware that Father claimed to have completed his service plan, but she noted that he did not finish the service plan that DFPS offered. When asked what he has not completed, Green testified Father did not complete the following requirements: (1) parenting education classes, (2) a psychological assessment, (3) a substance-abuse assessment, (4) stable housing, (5) income, (6) remain crime-free, and (7) individual counseling. Green said Father has not provided proof that he completed any of those services. Green also testified that she was informed by someone other than Father that he had registered for a parenting class. Green supervised Father's first visit with Alex, and when asked if it was an appropriate visit, Green answered "for the most part, somewhat."

During questioning by Angela Phea, guardian ad litem for Alex, Green agreed that the services that DFPS gives to the parents needs to be completed and the parents must provide proof. Green agreed that a missed drug test is considered a positive drug screen according to DFPS's policy. Green agreed that Alex deserves stability and permanency, which he already has in the current placement.

On its redirect examination, DFPS asked Green to clarify what she meant when she said that Father's visit with Alex was "somewhat appropriate." Green clarified that Father did not really know how to hold Alex and "[h]e brought a female friend and she took over the visit in a way that I felt was not really

appropriate, especially if this is the first time this Father[] [was] meeting his son." Green testified that Father said the woman was his girlfriend, that he had not been around small children, and that he did not "know how."

Joy Redding, a coordinator from Child Advocates, testified that she believed that termination of the parents' rights and adoption by the current foster family would be in Alex's best interest. She explained her position because "the child deserves to be in a safe and stable environment, one that is free of violence, even if the child is not—even if violence is not directed at the child. The current foster parents are taking care of all of his needs, and they're providing that stable, safe environment above and beyond a normal amount. They're absolutely fantastic and he is bonded with them. They are bonded with him. He's a great, happy child."

On cross-examination, Redding testified that Father showed her the lease for his home two weeks before the trial, but that she has not been able to physically examine his house. She said that he also showed her letters from Catholic Charities.

Father testified that he was there to have his child returned to him and that he has been providing for his son, taking care of him, and sending him clothes and papers that they asked for, from day one. Father explained that he moved to Colorado to find work because the crime he committed when he was seventeen was holding him back. He "opened up two Hobby Lobby stores" in Colorado, but

he is now living in Houston as a self-employed barber. He wants to see Alex, he set up a beautiful room for Alex, and that if Alex is returned, he will get food for him and have someone to babysit. When asked if the babysitter's name was Isabel Mata, Father stated, "she's not really a babysitter. That's just the woman that's staying in my house right now, and I just brought these[4] to court just to show I'm not living with a maniac." Father testified that he participated in seven to eight parenting classes at Catholic Charities, he was ready to have the child placed in his home today, and he was willing to have cameras installed in his home for a period of six months.

During cross-examination, Father admitted that he was not present for the birth of his son because his relationship with Mother was "rocky from the start." Father knew Mother was pregnant and he took care of her for nine months. Father said that he was around Mother because he wanted his son to be healthy. When asked if he failed to show up for a January 30, 2019 court-ordered drug test, Father agreed, explaining that he was in Colorado. When asked if the court ordered a drug test on April 30, 2019, Father said he did not know. When asked if he would argue with DFPS that evidence has already been admitted that shows that he did not show up for an April 30, 2019 drug test, Father answered, "I want to say

[4] Although not in the record, Father was apparently referring to some type of certificate.

there's evidence to show that I did take a test because Ms. Jasmin said our last court date there was crack cocaine found in my system, so, I'm going to say yes." Father admitted that he did not show up for court-ordered testing because, "when I first came to court and I was in the living room with the dude who was doing the hair, he was kind of being sarcastic with me. He was being sarcastic about my hair and I'm zero tolerance about my hair. He said he was going to, like, yank my hair out to do this test and that kind of upset me so I kind of left it alone and left the building." Father admitted that he did not give a sample of his hair because he did not want it to affect his hairstyle.

Father agreed that, at the January 30, 2019 hearing, the trial court ordered him to do specific things and follow recommendations, including services to address domestic violence. Father testified that he did not complete it because he did not know about it. Father admitted that he knew it was important to complete his family plan of service and he completed it. When asked what he did, Father responded, "Everything. Evidence you see right here in front of you, going to parental classes at the Catholic Charity church, providing . . . a roof over my son's head, . . . and several other little things that I just did on my own, you know, as far as like . . . making sure his room is in a perfect environment for a one-year-old." He clarified that he "actually completed courses of parental classes. I actually completed having a stable place to stay. I actually completed—what else I

completed—completed on looking for these jobs that y'all wanted me to look for, even though it took out much time from my personal business." When asked if he visited his son during the pendency of the case, Father answered "Yes."

Father agreed that he was convicted of aggravated robbery back in 2007 and sentenced to five years in the penitentiary. Father said he learned his lesson and paid his debt to society. DFPS then asked if he was convicted of assault in 2017, to which Father responded that he had gotten into a fistfight. Father disagreed that on June 24, 2018, he committed assault on Mother, who was pregnant at the time. Father agreed that he pled guilty because he was told that it was the only way to be released that day. Father disagreed that he had a desire to beat up pregnant women.

On re-direct examination, counsel attempted to show that Father had pay stubs. Instead, Father testified that working in the past has nothing to do with him taking care of his son right now. Father also testified that he and "this lady" make a total of $600 a month.

Mother testified that she wanted to continue to work on her services, and since she was incarcerated, she wanted her son placed "at home with his family, with his brothers and sisters, hopefully with me."

On April 10, 2020, the trial court terminated Mother's parental rights to Alex based on the predicate acts in subsections (E) (endangering conduct), (N)

(constructive abandonment), (O) (failure to comply with court order).[5] The trial court also terminated Father's parental rights based on the predicate acts in subsections (E) (endangering conduct) and (O) (failure to comply with court order).[6] The trial court also found that termination of their parental rights was in the child's best interest under Family Code section 161.001(b)(2). Mother and Father timely appealed.

Dismissal Deadline

In their first issue, Mother and Father both argue that the trial court lost jurisdiction on October 21, 2019 because it did not dispose of the case within one year of appointing DFPS as the temporary managing conservator.

A. Standard of Review and Applicable Law

Whether a court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *In re T.B.*, 497 S.W.3d 640, 644 (Tex. App.—Fort Worth 2016, pet. denied). When a trial court's void judgment is appealed, we lack jurisdiction to address the merits of the appeal and have jurisdiction only to declare the judgment void and dismiss the underlying case. *In re G.X.H.*, 584 S.W.3d 543, 556 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Freedom Commc'ns, Inc. v. Coronado*,

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5 *See* TEX. FAM. CODE § 161.001(b)(1)(E), (N), (O).

6 *See id.* § 161.001(b)(1)(E), (O).

372 S.W.3d 621, 623 (Tex. 2012)). We must analyze the jurisdictional question because subject-matter jurisdiction is a power that exists only by operation of law and may not be conferred by agreement or waiver. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

The Family Code sets out a statutory framework for ensuring that termination proceedings are handled in an expedited manner. *See, e.g.*, *Tex. Dep't of Fam. & Protective Servs. v. Dickensheets*, 274 S.W.3d 150, 158–59 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Section 263.041 provides,

> (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court's jurisdiction over the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child is terminated and the suit is automatically dismissed without a court order. Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date.
>
> (b) Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a). If the court retains the suit on the

> court's docket, the court shall render an order in which the court:
>
> (1) schedules the new date on which the suit will be automatically dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a);
>
> (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
>
> (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).

TEX. FAM. CODE § 263.401(a), (b).

Thus, the Family Code requires that the court commence the trial on the merits or grant an extension by the first Monday after the first anniversary of the date the court rendered a temporary order appointing DFPS as temporary managing conservator. TEX. FAM. CODE § 263.401(a). If the trial court fails to commence the trial on time, "the court's jurisdiction over the suit . . . is terminated and the suit is automatically dismissed without a court order." *Id.*; *In re G.X.H.*, 584 S.W.3d at 546 ("[T]he trial court in a parental termination case automatically loses jurisdiction if the trial on the merits does not begin by the deadline imposed by section 263.401(a) of the Texas Family Code.").

The trial court may grant an extension of up to 180 days if it finds that extraordinary circumstances necessitate that the child remain in the temporary

managing conservatorship of DFPS and that continuing the appointment of DFPS as temporary managing conservator is in the child's best interest. *See* TEX. FAM. CODE § 263.401(b).

We strictly construe statutes concerning involuntary termination of parental rights in favor of parents. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Our primary objective in construing a statute, however, is to determine and give effect to the legislature's intent. *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). In determining the legislature's intent, we look first to the statute's plain and common meaning and presume that the legislature intended the plain meaning of its words. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 282 (Tex. 1999). We also presume that the legislature chose its words carefully, recognizing that every word in a statute was included for some purpose and that every word excluded was omitted for a purpose. *In re M.J.M.L.*, 31 S.W.3d 347, 354 (Tex. App.—San Antonio 2000, pet. denied); *Renaissance Park v. Davila*, 27 S.W.3d 252, 257 (Tex. App.—Austin 2000, no pet.).

B. Analysis

On October 18, 2018, the trial court issued a temporary order appointing DFPS as temporary sole managing conservator of Alex. Thus, the trial court had to commence trial by the automatic dismissal date of October 21, 2019 or grant an extension. *See* TEX. FAM. CODE § 263.401(a). If neither of those acts occurred, the

trial court may not retain the suit on the court's docket after October 21, 2019. *See id*.

Instead of commencing trial by October 21, 2019, the record shows that on September 23, 2019, the trial court signed an order finding extraordinary circumstances that necessitated Alex to remain in the temporary managing conservatorship of DFPS and that continuing the appointment of DFPS as temporary managing conservator was in Alex's best interests. The order provided a new automatic dismissal date of April 18, 2020, unless a trial on the merits had commenced or if the child was placed in or removed from a monitored placement. Ultimately, the trial court commenced the trial on the merits on February 12, 2020. We conclude that the trial court's September 23, 2019 order finding extraordinary circumstances complies with section 263.401 of the Texas Family Code.

Without citing any authority, Father argues that the trial court's decree of termination is void because the record does not indicate that the trial court held a hearing before issuing the September 23 order retaining the suit on the court's docket. Although we agree that the record does not contain a transcript of any hearing conducted in relation to the trial court's finding of extraordinary circumstances, we note that the plain language of the statute does not require the trial court to conduct a hearing before granting an extension. *See* TEX. FAM. CODE § 263.401(a), (b); *In re T.T.F.*, 331 S.W.3d 461, 475 (Tex. App.—Fort Worth

2010, no pet.) (noting that plain language of section 263.401 does not require trial court to conduct hearing before extension). Because no hearing requirement appears in the statute, we presume that the legislature did not intend to require a hearing before the trial court retains a case on its docket pursuant to section 263.401. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (emphasizing that courts presume legislature chooses its words with care, including words it intends to include and omitting words it intends to omit).

Father, relying on *In re Department of Family & Protective Services*, 273 S.W.3d 637, 643 (Tex. 2009) (orig. proceeding), also argues that the trial court's decree of termination is void because the September 23 order does not contain its factual bases for finding extraordinary circumstances. In *In re Department of Family & Protective Services*, the trial court terminated Mother's parental rights within its dismissal deadline, but then granted a new trial outside the dismissal deadline and without an order extending the time for which the case was to be retained on its docket. 273 S.W.3d at 640. In discussing former section 263.401(a), the supreme court stated, "The court cannot just enter an extension order, though. In order for the suit to remain on the court's docket beyond the one-year dismissal date, the court must make specific findings to support the extension order . . . as set out in the statute." *Id*. at 643.

Contrary to Father's interpretation of *In re Department of Family & Protective Services*, the supreme court's opinion requires the trial court to provide only the specific findings, as "set out in [section 263.401]"—a finding that extraordinary circumstances exist and that continuing DFPS as the temporary managing conservator is in the best interests of the child. *See* TEX. FAM. CODE § 263.401(b). We thus decline to interpret section 263.401(b) or *In re Department of Family & Protective Services* to require the trial court to find anything more than what is required in the statute. *See In re J.G.K.*, No. 02-10-00188-CV, 2011 WL 2518800, at *35 (Tex. App.—Fort Worth June 23, 2011, no pet.) (mem. op.) (stating that section 263.401 does not require trial court to explain in extension order what extraordinary circumstances necessitated extension); *In re A.T.S.*, No. 12-07-00196-CV, 2008 WL 2930392, at *18 (Tex. App.—Tyler July 31, 2008, no pet.) (mem. op.) (same).

Mother relies on *In the Interest of G.X.H.* to support her argument that the trial court lacked jurisdiction. In *G.X.H.*, the trial on the merits commenced after the dismissal deadline and it was undisputed that the trial court did not grant an extension under section 263.401(b) or (b)(1). *See G.X.H.*, 584 S.W.3d 543, 546 (Tex. App.—Houston [14th Dist.] 2019, pet. pending). Our sister court thus held that the trial court's jurisdiction terminated, and the suit was automatically dismissed. *Id.* G.*X.H.* provides no support for Mother's argument because the

record in this appeal shows that the trial court granted an extension on September 23, 2019, before the statutorily mandated dismissal deadline of October 23, 2019.

Because the trial court granted an extension that complied with section 263.401, we conclude that the trial court did not lose its jurisdiction.

We overrule Mother's and Father's first issues on appeal.

Sufficiency of the Evidence

In his second and third issues on appeal, Father argues that the evidence is legally and factually insufficient to support the trial court's finding that he committed the predicate acts under subsections 161.001(b)(1)(E) and (O). *See* TEX. FAM. CODE § 161.001(b)(1)(E), (O).

A. Standard of Review and Applicable Law

Protection of the best interest of the child is the primary focus of the termination proceeding in the trial court and our appellate review. *See In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). A parent's rights to the "companionship, care, custody, and management" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Accordingly, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

In a case to terminate parental rights under Texas Family Code section 161.001, DFPS must establish, by clear and convincing evidence, that (1) the parent committed one or more of the enumerated acts or omissions justifying termination and (2) termination is in the best interest of the child. TEX. FAM. CODE § 161.001(b). Clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Only one predicate finding under section 161.001(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 at 362.

When reviewing the legal sufficiency of the evidence in a case involving termination of parental rights, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that there existed grounds for termination under section 161.001(b)(1) and that termination was in the best interest of the child. *See* TEX. FAM. CODE § 161.001(b)(1), (2); *In re J.F.C.*, 96 S.W.3d at 266. In doing so, we examine all the evidence in the light most favorable to the finding, assuming the "factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *Id.* We must also

disregard all evidence that the factfinder could have reasonably disbelieved or found to be incredible. *Id*.

When conducting a factual sufficiency review, we consider and weigh all the evidence including disputed or conflicting evidence. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). "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*. (quoting *In re J.F.C.*, 96 S.W.3d at 266). We give due deference to the factfinder's findings, and we cannot substitute our own judgment for that of the factfinder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Subsection 161.001(b)(1)(E) requires the trial court to find by clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child[.]" *Id*. § 161.001(b)(1)(E). Subsection (E) requires that the cause of the endangerment be the parent's conduct alone, as evidenced by either the parent's actions or omissions. *Id*. § 161.001(b)(1)(E).

As used in section 161.001, "'endanger' means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex.

1987). In this context, endanger means to expose a child to loss or injury or to jeopardize a child's emotional or physical well-being. *Id.*; *see In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996).

The Department does not need to establish that a parent intended to endanger a child to support termination based on endangerment. *See In re M.C.*, 917 S.W.2d at 270. Nor is it necessary to establish that the parent's conduct was directed at the child or caused actual harm; rather, it is sufficient if the parent's conduct endangers the child's well-being. *See Boyd*, 727 S.W.2d at 534; *Walker v. Tex. Dep't of Fam. & Protective Servs.*, 312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Danger to a child's well-being may be inferred from parental misconduct. *Boyd*, 727 S.W.2d at 533. "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." *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied). A parent's past endangering conduct may support an inference that past conduct may recur and further jeopardize the child's present or future physical or emotional well-being. *See id*.

The court's endangerment analysis also includes consideration of a parent's criminal record and how repeated criminal activity adds instability to the child's life with repeated parental incarceration and separation. *See Boyd*, 727 S.W.2d at 533 (stating that "imprisonment is certainly a factor to be considered by the trial

court on the issue of endangerment"). While "mere imprisonment will not, standing alone, constitute engaging in conduct which endangers the emotional or physical well-being of a child," "if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding [under Subsection] (E) is supportable." *Id*. at 533–34; *see In re V.V.*, 349 S.W.3d 548, 555 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (en banc) (affirming termination of father's parental rights for endangering conduct, noting his "extensive criminal history," repeated "criminal conduct leading to incarceration before and after the child's birth," "life of crime" that included four felonies as well as "assault and other crimes against the person," "no effort to care for his daughter when not incarcerated," and "irresponsible choices that deprived this child of a parent").

B. Analysis

The evidence shows that Father was convicted of aggravated robbery in 2007 and sentenced to imprisonment for five years; convicted of assault in 2017 and sentenced to 28 days in jail; and convicted of assault of a family member in September 2018 and sentenced to 100 days in jail. Additional evidence in the record from Child Advocates shows that Father has the following criminal history: (1) criminal trespassing in 2016; confined for 15 days; (2) resisting arrest in 2016; confined for 30 days; (3) criminal mischief in 2017; confined for six days;

(4) criminal trespassing of habitation in 2017; confined for 150 days; and (5) criminal mischief in 2017; confined for 100 days.

Father argues that his criminal convictions and incarcerations occurred before Alex was born. However, courts may look to evidence of parental conduct both before and after a child's birth and before and after a child's removal from the home to determine whether termination is appropriate. *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) (citing *In re M.N.G.*, 147 S.W.3d 521, 536 (Tex. App.—Fort Worth 2004, pet. denied)); *Walker v. Tex. Dep't of Fam. and Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (explaining that relevant conduct may occur either before or after child's removal from home).

In addition to the criminal history before Alex was born, Father pled guilty to assaulting Mother while she was pregnant with Alex. "Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment." *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Violence does not have to be directed toward the child or result in a final conviction—"Texas courts routinely consider evidence of parent-on-parent physical abuse in termination cases without specifically requiring evidence that the conduct resulted in a criminal conviction." *In re V.V.*, 349 S.W.3d at 556. "Domestic violence, want of self-control, and propensity for

violence may be considered as evidence of endangerment." *In re J.I.T.P.*, 99 S.W.3d at 845. Parents' criminal conduct that exposes them to the possibility of incarceration can negatively impact a child's living environment and emotional well-being. *In re S.M.L*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Viewing the evidence in the light most favorable to the trial court's finding, particularly Father's 2011 aggravated robbery conviction, two assault convictions, including one against Mother while pregnant with Alex, and his additional lengthy criminal history and repeated incarcerations, we conclude that the trial court could have formed a firm belief or conviction that Father had knowingly engaged in conduct that endangered Alex's physical or emotional well-being in violation of subsection 161.001(b)(1)(E). *See In re J.O.A.*, 283 S.W.3d at 344 (citing *In re J.F.C.*, 96 S.W.3d at 266). Although Father denied that he assaulted Alex's Mother and that he only pled guilty to the assault so that he could be released, the trial court was within its discretion to disbelieve Father's self-serving testimony. *See In the Interest of K.P.C.*, No. 14-17-00993-CV, 2018 WL 2106669, at *9 (Tex. App.—Houston [14th Dist.] May 8, 2018, pet. denied) (mem. op.) (stating that trial court entitled to disbelieve Father's self-serving testimony that panhandling was not endangering children's physical and emotional well-being). Thus, in view of the entire record, we conclude that the disputed evidence is not so significant as to

prevent the trial court from forming a firm belief or conviction that Father had knowingly engaged in conduct that endangered Alex's physical or emotional well-being in violation of subsection 161.001(b)(1)(E). *See In re J.O.A.*, 283 S.W.3d at 345 (citing *In re J.F.C.*, 96 S.W.3d at 266).

Because we conclude that the evidence is legally and factually sufficient to support the trial court's findings under section 161.001(b)(1)(E), we do not address Father's arguments that the evidence is legally and factually insufficient to support the trial court's findings under subsection (O). *See In re P.W.*, 579 S.W.3d 713, 728 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

We overrule Father's second and third issues.

Best Interest

In his fourth issue, Father argues that the evidence is legally and factually insufficient to support termination being in the best interest of the child.

A. Applicable Law

There is a strong presumption that the best interest of a child is served by keeping the child with a parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). 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 § 263.307(a).

Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best-interest finding: the desires of the child; the present and future physical and emotional needs of the child; the present and future emotional and physical danger to the child; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent which may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). This list of factors is not exhaustive, however, and evidence is not required on all the factors to support a finding that terminating a parent's rights is in the child's best interest. *Id.*; *In re D.R.A.*, 374 S.W.3d at 533.

In addition, the Texas Family Code sets out factors to be considered in evaluating the parent's willingness and ability to provide the child with a safe environment, including: the child's age and physical and mental vulnerabilities; whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; the

willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; whether the child's family demonstrates adequate parenting skills, including providing the child with minimally adequate health and nutritional care, a safe physical home environment, and an understanding of the child's needs and capabilities; and whether an adequate social support system consisting of an extended family and friends is available to the child. TEX. FAM. CODE § 263.307(b); *In re R.R.*, 209 S.W.3d at 116.

Courts may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence when conducting the best-interest analysis. *See In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). Evidence supporting termination under one of the predicate grounds listed in section 161.001(b)(1) can also be considered in support of a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (holding same evidence may be probative of both section 161.001(b)(1) grounds and best interest). A parent's past conduct is probative of his future conduct when evaluating the child's best interest. *See In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.); *see also Jordan v. Dossey*, 325 S.W.3d 700, 724 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). A factfinder may also infer that past conduct endangering the well-being

of a child may recur in the future if the child is returned to the parent when assessing the best interest of the child. *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.) (citing *In re B.K.D.*, 131 S.W.3d 10, 17 (Tex. App.—Fort Worth 2003, pet. denied)).

B. Analysis

Regarding the child's desires, Alex, an infant at the time of trial, was too young to express his desires. However, he had been placed in a foster home, in which he was doing well, and his needs were being met. The evidence showed that his foster placement wanted to adopt him and that he had bonded with the foster parents and their biological daughter. The evidence further shows that since Alex's birth through trial, Father had seen him only once. The trial court could infer from this evidence that the child wanted to remain with his foster family. *See In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("When children are too young to express their desires, the fact finder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent.").

The evidence showed further that Father only met with his son once during the pendency of these proceedings, although a second meeting was scheduled. Other than testifying that he had moved to Colorado to find work, Father did not explain why he was not present in his son's life. *See K.M. v. Tex. Dep't of Family*

& Protective Servs., 388 S.W.3d 396, 405 (Tex. App.—El Paso 2012, no pet.) (discussing parent's failure to visit child as factor supporting finding that termination was in child's best interest).

Regarding Alex's emotional and physical needs now and in the future, and the possible emotional and physical danger to him now and in the future, the trial court had evidence of Father's repeated criminal activity and resulting incarcerations. *See generally In re O.N.H.*, 401 S.W.3d at 684 (stating that past conduct is probative of future conduct when evaluating child's best interest). The trial court could have concluded that Father's pattern of repeated incarcerations shows that he "was not willing and able to provide the child with a safe environment—a primary consideration in determining the child's best interest." *See In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The evidence also showed that Father was convicted of assaulting Mother while she was pregnant with Alex. *See Walker*, 312 S.W.3d at 619 (considering father's past violence in best-interest assessment and noting that evidence of endangering conduct under subsection (E) is also probative of best-interest analysis).

Regarding parental abilities, Father had shown very little parental abilities. He agreed that he was not present when Alex was born and that he did not meet Alex until February 2019. At that visit, Father brought his girlfriend with him

because he did not know how to hold a baby. Although Father testified that he had taken some parenting classes, other evidence showed that he had not completed the parenting classes as required by his family service plan. In contrast to this evidence, witnesses testified that Alex had bonded with his foster family, he was happy, healthy, and thriving in his foster home, and the foster family planned to adopt him.

Regarding plans for the child, Father testified that he moved back to Texas, found employment, rented a two-bedroom apartment and had furnished Alex's room and purchased toys. In contrast, DFPS testified that Alex's foster family wanted to adopt him if parental rights were terminated. Although the trial court heard evidence that Father made efforts to provide a safe home for Alex, the trial court could have weighed this evidence and determined that DFPS's plans were more likely to ultimately provide Alex with a stable, safe, and permanent home, which is a paramount consideration in a court's best-interest determination. *See* TEX. FAM. CODE § 263.307(a); *see also In re K.C.*, 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

Viewing the evidence in the light most favorable to the trial court's finding, we conclude that the trial court could have formed a firm belief or conviction that termination of Father's parental rights is in Alex's best interest. *See In re J.O.A.*, 283 S.W.3d at 344 (citing *In re J.F.C.*, 96 S.W.3d at 266); *In re J.M.T.*, 519

S.W.3d 258, 270 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (placement in safe, stable foster home and that child was doing well there was relevant to child's emotional and physical needs and stability of home or proposed placement and therefore supported trial court's best-interest finding); *Rogers v. Dep't of Family & Protective Servs*., 175 S.W.3d 370, 378 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd w.o.j.) (successful foster placement and possibility of adoption by foster parents supported determination that termination of parental rights was in children's best interest). In view of the entire record, we conclude that the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination of Father's parental rights is in Alex's best interest. *See In re J.O.A.*, 283 S.W.3d at 345 (citing *In re J.F.C.*, 96 S.W.3d at 266). Accordingly, we hold that legally and factually sufficient evidence supports the trial court's best interest finding.

We overrule Father's fourth issue.

Appointment of Department as Sole Managing Conservator

In his fifth issue, Father argues that legally and factually insufficient evidence supports the appointment of DFPS as sole managing conservator of Alex.

When the parents' rights are terminated, the trial court must appoint "a suitable, competent adult, DFPS, or a licensed child-placing agency as managing conservator of the child." TEX. FAM. CODE § 161.207(a); *see In re M.M.M.*, No.

01-16-00998-CV, 2017 WL 2645435, at *17 (Tex. App.—Houston [1st Dist.] June 16, 2017, no pet.) (mem. op.). We review conservatorship determinations for an abuse of discretion and will reverse one only if the trial court's decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *see also A.C.*, 394 S.W.3d at 644.

An order terminating the parent-child relationship divests the parent of all legal rights and duties with respect to the child. TEX. FAM. CODE § 161.206(b). Once we overrule a parent's challenge to a termination order, the trial court's appointment of DFPS as sole managing conservator may be considered a "consequence of the termination pursuant to Family Code section 161.207." *In re A.S.*, 261 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

Because we have overruled Mother's and Father's challenges to the trial court's order terminating their parental rights, the order has divested Mother and Father of their legal rights and duties related to Alex. *See* TEX. FAM. CODE § 161.206(b); *In re D.K.W., Jr.*, No. 01-17-00622-CV, 2017 WL 6520439, at *5 (Tex. App.—Houston [1st Dist.] Dec. 21, 2017, pet. denied) (mem. op.). As a result, Father does not have standing to challenge the portion of the order appointing DFPS as permanent managing conservator of Alex because any alleged error could not injuriously affect his rights. *D.K.W.*, 2017 WL 6520439, at *5.

We overrule Father's fifth issue.

Conclusion

Having overruled all of Mother's and Father's issues, we affirm the trial court's Final Decree for Termination.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Hightower and Adams.