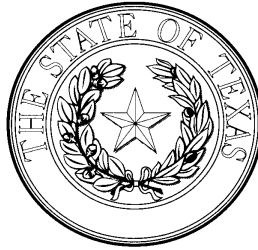


Opinion issued April 26, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00590-CV

IN THE INTEREST OF B.C. AND S.R., MINOR CHILDREN

**On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2017-03896J**

MEMORANDUM OPINION

In this appeal, the mother challenges the trial court's final decree terminating her parental rights to her minor children, Beth and Steve, based on a finding that she failed to comply with provisions of a court order specifying the actions

necessary to obtain their return.¹ TEX. FAM. CODE § 161.001(b)(1)(O). She challenges the sufficiency of the evidence to support (1) the predicate finding, (2) the finding that the affirmative defense to termination for failure to comply with a court order did not apply, and (3) the finding that termination was in the best interest of the children.

We affirm.

Background

In July 2017, the Department of Family and Protective Services removed three-and-a-half-year-old Beth and two-year-old Steve from their father's home due to severe physical abuse by the father's girlfriend. The children had been living with their father and his girlfriend for three months at the time. Steve had a traumatic brain injury, extensive bruising, spinal compression fractures, and numerous cuts and marks on his skin. Beth had a bruise beneath one eye and sores near the corner of her mouth, as well as age-indeterminate spinal compression fractures.

On October 23, 2018, after a bench trial, the trial court entered a final decree terminating the father's parental rights to Beth and Steve. The court appointed the Department managing conservator of Beth and Steve and appointed the mother

¹ The trial court terminated the parental rights of the father in a separate proceeding. This appeal concerns only the mother. We use the fictitious names "Beth" and "Steve" to identify the minor children, who are the subject of this appeal. *See* TEX. R. APP. P. 9.8(a).

possessory conservator. The court incorporated the mother's existing family service plan and a child support order into the decree. The mother was ordered to pay the Department \$222.24 per month in child support. The family service plan was revised on February 11, 2019, and on February 12, 2019, the trial court ordered the mother to comply with the amended family service plan. This plan required the mother to complete the following tasks:

1. Attend all medical appointments for Beth and Steve related to injuries caused by past abuse, especially "traumatic brain injuries and how this impacts their development";
2. Be actively involved in the children's speech and physical therapy;
3. Demonstrate an understand of Beth's genetic diagnosis and testing;
4. Participate in all permanency conferences and court hearings;
5. Abstain from engaging in criminal conduct;
6. Provide child support;
7. Provide verifiable proof of income through check stubs or a letter from her employer indicating her pay and hours or any other source of household income used to support the needs of the family;
8. Obtain and maintain suitable housing that is clean, stable, and free from safety hazards for six consecutive months;
9. Immediately provide the Department with a change of address or living circumstances;
10. Provide substantial proof that she legally rents or owns her residence;
11. Successfully complete a drug and alcohol assessment and follow all recommendations;

12. Complete a psychiatric evaluation and follow all recommendations made by the evaluator;
13. Attend, actively participate in, and successfully complete 6-8 week parenting classes for children with special medical needs.
14. Be responsible for locating (with a list provided by the Department), registering for, paying for, and securing the parenting class.

The mother did not complete the assigned tasks, and the Department sought termination of her parental rights.

Victoria Palmer, the Department caseworker assigned to the case from March 2018 to October 2020, testified at trial that she reviewed the family plan of service with the mother at least a dozen times. Palmer testified that she gave the family service plan to the mother in hard copy by hand delivery and electronically. Palmer said that the courtesy worker for the region where the mother lived also gave the mother a copy of the family service plan on three separate occasions. Palmer testified that the mother failed to complete the required tasks on the family service plan. In particular, the mother (1) did not complete a psychiatric evaluation; (2) did not complete the parenting class; (3) did not provide proof of employment; and (4) did not attend all of the children's medical appointments or demonstrate that she understood the children's medical needs. In addition, Palmer testified that the mother's visitations with the children were not always appropriate and that she was unaware that the mother had paid any child support.

Palmer testified that the mother was asked to complete a psychiatric evaluation after being named possessory conservatory “due to concerns from her initial psychological [evaluation.] We wanted to redo that with a different provider to ensure that there [weren’t] any issues in her ability to care for two children who are medically needy.” The Department scheduled multiple appointments for a psychiatric evaluation. Palmer said that she scheduled five appointments at three different locations, some close to the mother’s residence outside Harris County and others in Houston on days when the mother also had visitation, in an attempt to accommodate the mother’s needs. The mother was informed by text message about every scheduled appointment, and the mother confirmed receipt by responding by text message. The mother gave “a plethora of reasons over the years” for why she did not complete the psychiatric evaluation including work schedule, transportation, and communication with the provider. Palmer testified that she, the courtesy worker, and the mother’s attorney all stressed the importance of completing the evaluation. However, Palmer testified that the mother never provided her work schedule to allow Palmer to schedule around it. Palmer also said that the Department provided transportation assistance in the form of bus passes.

In December 2019, the mother went to a community mental health center in Beaumont in an attempt to satisfy the requirement that she have a psychiatric evaluation. She said that, before the father’s rights were terminated, she had been

diagnosed with depression. She said that she went to the community mental health center to determine if she was really depressed and if she needed medication or services. She said that she filled out forms, met with the “doctor counselor lady” and answered questions. The mother said that the community mental health center determined that her only issue was her “hyperness.” She did not return to the community mental health center at any time after the intake evaluation. At trial, the mother said that Palmer never told her that the intake evaluation at the community mental health center did not satisfy the requirement for a psychiatric evaluation.

Records from the community mental health center indicated that the mother denied “having any legal issues at this time,” failed to mention that her children were in foster care, and stated that she was “just trying to see if [she] ha[d] anxiety, anger, or ADHD.” Palmer testified that the mother had completed only an “intake” at the community mental health center and that it was not sufficient to satisfy the requirement for a psychiatric evaluation because it was only a determination of whether the mother qualified for services. The Child Advocate who testified at trial also said that mother sought only a diagnosis of ADHD, not a psychiatric evaluation, from the community mental center.

Palmer testified that the mother did not attend and complete a class in parenting children with special medical needs. Palmer acknowledged the difficulty in finding classes specifically addressing children with special medical needs, but

she informed the mother about suitable classes offered by Texas Children's Hospital. The mother did not attend. Palmer testified that the Department also found a suitable class in Vidor, Texas, near the mother's residence, and it paid for the class, but the mother did not attend. The mother repeatedly told Palmer that she intended to attend parenting classes, but her work conflicted with the class schedules. However, the mother never gave Palmer any proof of her work schedule that would allow Palmer to provide help.

Palmer testified that there was no evidence to prove that the mother had worked during the majority of the case, but she acknowledged that the mother maintains that she has worked as a waitress or delivering food during that time. The mother testified that she had previously worked in security and was receiving unemployment from a security job. She also testified that she had worked delivering food since 2017. She said that she worked 20 to 30 hours each week and set her own schedule. The mother testified that she married in December 2020. She testified that she also relied on her husband, who worked full time for a recycling company, for financial support.

The mother was required to have knowledge of the children's medical conditions and attend medical appointments related to the injuries they sustained as a result of abuse. These appointments occurred two to six times per month. For a portion of the pendency of the case, the children lived with a relative near where

the mother lived. The mother had the opportunity to attend the children's medical appointments and speak with the pediatricians and specialists to gain an understanding of the children's conditions. The Department informed the mother of the appointments by giving her the list provided by Texas Children's Hospital of the next ten appointments.

The mother attended some, but not all, appointments. Palmer was concerned about the mother's erratic attendance at appointments and her failure to show up when one child required outpatient surgery. In addition, when Palmer spoke to the mother after the appointments, the mother was more interested in obtaining copies of the children's medical records than understanding the children's conditions and prescribed treatments. Palmer testified that she believes the mother lacks an understanding of the children's medical needs. Palmer believed that the mother was not able to effectively interact with her children's doctors regarding their diagnoses and care and that she did not ask "the right questions," despite having had the ability and opportunity to do so. Palmer testified that both children require medical care and multiple types of therapy and will require ongoing and specialized care in the future.

Both Palmer and the Child Advocate testified that they believed termination of the mother's parental rights to Beth and Steve was in the children's best interests.

At trial in August 2021, Palmer noted that the mother had not been a full-time parent to the children since 2017. Palmer testified that although some of the mother's supervised visitation with her children consisted of appropriate playtime and engagement, some of the mother's behavior was inappropriate. The mother arrived late to some visits. On some occasions, she interrogated her daughter, suggesting that the caregivers were acting inappropriately.

The mother was also allowed to visit her children at their daycare or school. It is undisputed that the mother would bring the children clothing, gifts, food, and school supplies to visits. Palmer testified, however, that the frequency and unpredictability of the mother's visits at school was "disrupting," and the mother did not keep a regular visitation schedule when asked to do so. After visits with their mother, the children would regress in terms of behavior and development. The daughter's language skills and behavior would regress, and the son was hesitant to return to school after each visit with the mother. In March 2020, the mother's visits became virtual only, and the children responded poorly to that, experiencing behavioral regression after virtual visits.

By the time of trial, the children had been in five placements. The last placement had cared for the children the longest, and although two earlier placements ended due to Steve's disruptive and violent behavior, neither child had behavior problems at the last placement. Palmer testified that the children were

“blossoming” and had made significant improvements developmentally and academically. She testified that the foster parents exceed the children’s medical and therapeutic needs, the children had been discharged from certain therapies that were no longer needed, and the children’s speech and social skills had improved. Palmer said that the children had benefited from the safe and stable environment, routine, consistency, and nurturing they have received from the foster parents. The foster parents want to adopt the children, and the children have expressed that they want to remain with the foster parents.

Palmer testified that termination of the mother’s rights was in the best interest of the children because she had not demonstrated an ability to provide the children with a safe and stable home or the ability to care for their special medical needs. In addition, because the children regress with even brief visits with the mother, Palmer testified that she believed termination of the mother’s rights and adoption by the current foster parents was preferable to continuation of the mother as possessory conservator. Palmer also noted that although the children entered care due to abuse that occurred while in their father’s care, there were prior allegations that the mother had also harmed the children.

The Child Advocate testified that she was assigned to the case a week after the children were moved to their current placement. She testified that she had seen social, emotional, psychological, academic, developmental, and physical growth in

the children since she was appointed in December 2019. The Child Advocate testified that the foster parents provided stability and routine, ensured the children attended all medical and therapeutic appointments, and worked with them to meet their goals between appointments. She believes the foster parents understand the children's current and future needs and can meet them. The Child Advocate testified that the children are bonded to their current foster parents. She said that the children rely on the foster parents: "They look to them for answers and hugs, and I see a genuine family commitment when I see them all together."

The Child Advocate opined that it was in the children's best interest to terminate the mother's parental rights due to her failure to demonstrate an ability to parent the children and provide them with a safe and stable home. She did not believe that the mother could meet the children's physical, mental, and emotional needs. The Child Advocate had reviewed the family service plan with the mother and emphasized the importance of completing the plan. She said that the mother often failed to respond to her attempts at communication.

The mother testified at trial. She knew that the court entered orders in December 2018 and February 2019 establishing what she needed to do to regain custody of her children. The mother acknowledged that she did not complete all the required tasks on her family service plan, but she said that she tried to do so. She testified that she kept in touch with Palmer regularly, though Palmer

disagreed. The mother testified that the only task she failed to do was the parenting class. She said that she made about ten phone calls to possible providers looking for a parenting class for parents of children with special medical needs, and she was unable to find one.

The mother's testimony about her housing was contradictory. First, she testified that she had lived in two homes since December 2018: a three-bedroom mobile home in a trailer park that her mother—Beth and Steve's grandmother—made available for her use and the home in Alabama that she shares with her husband, whom she married in December 2020. The mother maintained that she had not been homeless or evicted since December 2018. She also testified however, that she lived with a family member during the course of this case and lived with a friend in Galveston after moving out of the three-bedroom mobile home.

The mother testified that she paid child support in the amounts withdrawn from her unemployment checks. She presented a hard copy of a screen shot showing four payments of \$72.00 in child support from unemployment checks received between November 15, 2020 through December 12, 2020. She also provided a hard copy of a screen shot of a website showing "Noncustodial Parent: Payment Record" indicating a total amount of \$3,648.00 had been paid for the 2020 year in association with the underlying case.

The mother testified generally about the children's abuse-related injuries and their need for therapy to address physical and developmental needs. She testified that she attended some of the children's medical appointments, but her cousin, who had been the children's caregiver at the time, prevented her from attending some appointments by telling her and the doctors that the mother was not permitted to be present. The mother said that she knew she could meet her children's current and future needs, and she asked to remain a part of their lives legally.

The trial court entered a decree terminating the mother's parental rights to Beth and Steve, and the mother appealed.

Analysis

On appeal, the mother raises three issues, challenging (1) the legal and factual sufficiency of the evidence to support the finding that she failed to comply with a court order establishing the actions necessary for the parent to obtain the return of the child, (2) whether a preponderance of the evidence established the statutory defense to this ground for termination, and (3) the factual sufficiency of the evidence to support the finding that termination was in the children's best interest.

I. Standards of review

The interest of parents in the care, custody, and control of their children is a fundamental liberty interest protected by the Constitution. *See, e.g., Troxel v.*

Granville, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982). But the rights of natural parents are not absolute. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). Protection of the child is paramount, and when the State institutes proceedings to terminate parental rights, courts focus on protecting the best interests of the child. *See id.*

“A strong presumption exists that a child’s best interests are served by maintaining the parent-child relationship.” *Walker v. Tex. Dep’t of Family & Protective Servs.*, 312 S.W.3d 608, 618 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). We strictly scrutinize termination proceedings on appeal because “the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent’s rights.” *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (citing *Santosky*, 455 U.S. at 747–48); *see In re J.F.C.*, 96 S.W.3d 256, 263–64 (Tex. 2002). “‘Clear and convincing evidence’ means 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 § 101.007.

In conducting a legal sufficiency review, we view “the evidence in the light most favorable to the judgment,” which means that we “must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.” *J.F.C.*, 96 S.W.3d at 266. The factfinder is the sole arbiter when

assessing the credibility and demeanor of witnesses. *In re H.R.M.*, 209 S.W.3d 105, 109 (Tex. 2006). A reviewing court may not disregard undisputed facts that do not support the finding, but it “should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *J.F.C.*, 96 S.W.3d at 266. Evidence is legally sufficient when it enables a factfinder to “reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof.” *Id.* at 265–66; *see* TEX. FAM. CODE § 101.007.

In a factual sufficiency review, the reviewing court again determines “whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State’s allegations.” *J.F.C.*, 96 S.W.3d at 266 (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). But rather than disregarding disputed evidence that the factfinder could have disbelieved, we consider whether “a reasonable factfinder could not have resolved that disputed evidence in favor of its finding.” *Id.* “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.*; *see In re A.R.R.*, No. 01-18-00043-CV, 2018 WL 3233334, at *4 (Tex. App.—Houston [1st Dist.] July 3, 2018, pet. denied) (mem. op.).

A court may order termination of the parent-child relationship when it finds by clear and convincing evidence that the parent has committed one or more of the statutorily enumerated predicate acts or omissions and that termination is in the children's best interests. TEX. FAM. CODE § 161.001(b)(1), (2). "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." *A.V.*, 113 S.W.3d at 362; *see In re A.H.L.*, No. 01-16-00784-CV, 2017 WL 1149222, at *3 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied) (mem. op.).

The "best interest" finding is a separate inquiry from the finding of a predicate act, but evidence that supports a predicate-act finding may also be probative of the best interest of the child. *See* TEX. FAM. CODE § 161.001(b)(2); *A.R.R.*, 2018 WL 3233334, at *4. "Our review of a trial court's best interest finding is guided by the following non-exclusive factors: (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by these individuals or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent that may

indicate the existing parent-child relationship is not proper, and (9) any excuse for the acts or omissions of the parent.” *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *A.R.R.*, 2018 WL 3233334, at *4.

II. The evidence is sufficient to support the predicate act finding.

An individual’s parental rights may be terminated under subsection (O) if (1) the Department has been the child’s temporary managing conservator for at least nine months, (2) the Department took custody of the child as a result of an emergency removal for child abuse or neglect, (3) a court issued an order establishing the actions necessary for the parent to obtain the return of the child, and (4) the parent did not comply with the court order. TEX. FAM. CODE § 161.001(b)(1)(O); *In re S.M.R.*, 434 S.W.3d 576, 582 (Tex. 2014).

A. The family service plan was sufficiently specific.

“Section 161.001(b)(1)(O) makes clear that an order must be sufficiently specific to warrant termination of parental rights for failure to comply with it.” *Interest of N.G.*, 577 S.W.3d 230, 239 (Tex. 2019) (citing TEX. FAM. CODE § 161.001(b)(1)(O)). On appeal, a court of appeals must consider whether the order, and the service plan if it was incorporated into the order, was sufficiently specific. *N.G.*, 577 S.W.3d at 239. An order that establishes the actions necessary for the parent to obtain return of a child in the Department’s custody is sufficiently specific when the terms for compliance are set forth with certainty so that the

parent knows what duties and obligations have been imposed. *Id.*; *see* TEX. FAM. CODE § 161.001(b)(1)(O).

It is undisputed that the trial court incorporated the family service plan dated February 11, 2019 into an order that established the actions necessary for the mother to obtain return of Beth and Steve. *See id.* The family service plan identified the tasks the mother was required to complete, and it was specific as to what the mother was required to do, where to do it, and who bore responsibility for securing services. For example, the family service plan required the mother to “be present” for her children’s “medical appointments in regard to injuries sustained due to past child abuse.” The plan stated that these appointments “occur at Texas Children’s Hospital—Child Abuse Division in Downtown Houston” and that the mother “should not miss any medical appointments that occur at Texas Children’s Hospital.” Likewise, the mother was not simply required to be employed; instead, the family service plan required the mother to “provide verifiable proof of income through check stubs or a letter from her employer indicating pay and hours, or any other source of household income used to support needs of the family.”

The family service plan was similarly specific about the required parenting classes, stating that the mother was required to “attend, actively participate in, and successfully complete 6–8-week parenting classes for children with special medical needs.” The family service plan specified that the mother would be given a

list of parenting classes, and the mother would “be responsible for contacting the parenting education provider, registering for classes and any fees associated with the classes.” The family service plan specifically put the responsibility for these classes on the mother, stating that the mother “understands that [the Department] does not make referrals for the service. It is the sole responsibility of the parent to secure the service for them. ONLINE PARENTING IS NOT ACCEPTED.” Finally, the requirement for a mental health assessment specified that the mother would “complete a psychiatric evaluation and follow all recommendations made by the evaluator.”

Based on the level of detail and clear identification of tasks and responsibilities, we conclude that the February 11, 2019 family service plan that was incorporated into the court’s February 12, 2019 order was sufficiently specific because it set forth the terms of compliance with certainty and informed the mother what duties and responsibilities had been imposed. *See N.G.*, 577 S.W.3d at 239. In addition, the mother did not assert that she was unaware of any of the requirements in the family service plan.

B. The mother failed to complete the family service plan.

The mother conceded at trial that she did not complete the service plan. Although she minimized her actions by saying that the only task she failed to complete was the parenting class, other evidence—including the mother’s

testimony—supports a conclusion that she did not complete other tasks in the parenting plan. The mother testified that she did not attend all of the children’s medical appointments. Both Palmer and the Child Advocate agreed that the mother failed to attend all of the medical appointments required by the family service plan. The mother said that she failed to attend medical appointments due to her cousin’s influence, but on further questioning, she specified that her cousin interfered with her presence at medical appointments that took place in Beaumont. The family service plan required the mother to attend all appointments at Texas Children’s Hospital in Houston. The mother testified that when she traveled to Houston for an appointment, she would arrive to discover that the appointments had been rescheduled or cancelled. Palmer testified that the mother was provided with updated lists of the children’s next ten Texas Children’s Hospital appointments and was personally informed about upcoming medical appointments. Nevertheless, the mother did not attend all the required appointments. In addition, Palmer and the Child Advocate testified that the current foster parents, with whom the children lived since late 2019, ensured that the children went to every appointment.

The mother testified that she had worked continually throughout the course of the case, but there was no verifiable proof of how much she earned or for whom she worked. She testified that she worked delivering food and set her own hours, but she did not testify about what hours she actually worked. The mother did not

testify about how much she or her husband earned despite her testimony that her husband was source of financial support.

The mother testified that she went to the community mental health center in an attempt to satisfy the requirement in the parenting plan. The parenting plan required the mother to complete a psychiatric evaluation, but the records from the community mental health center indicate that she was interviewed by a nurse and evaluated by a licensed professional counselor, not a psychiatrist. In addition, the records also demonstrate that the mother did not inform the evaluator about the ongoing case or her children being in foster care. Rather, she stated that her goal was to determine if she was anxious, angry, or had ADHD. Palmer testified that she, the courtesy worker for the region where the mother lived, and the mother's attorney all told the mother how important it was for her to complete the psychiatric evaluation. Palmer scheduled multiple appointments for the mother in more than one location and verified by text message (and return text message from the mother) that the mother was aware of the appointments. Nevertheless, the mother did not appear at any of the appointments and did not complete a psychiatric evaluation.

The mother also testified that she did not complete the parenting class because, despite calling approximately ten providers from a list she received from the Department, she was unable to find a class for parenting children with special

medical needs. The family service plan is expressly clear that the mother had the responsibility to find and complete the class. Palmer testified that it was difficult to find a class, but not impossible. Due to the scarcity of these classes as compared to ordinary parenting classes, Palmer intervened, found two options—one at Texas Children’s Hospital and one in Vidor, Texas—and informed the mother about the classes.

In October 2018, the mother was ordered to pay child support of \$222.24 per month. At trial the mother provided evidence at trial that she paid a total of \$3,648.00 in child support in the year 2020, but there was no evidence that she paid child support at any other time after the entry of the order. Trial was held in August 2021, 34 months after the trial court entered the child support order. At a rate of \$222.24 per month, the mother owed a total of \$7,556.16 in child support by the time of trial, but she had paid only about half of that amount.

Considering the evidence in the light most favorable to the judgment, and disregarding all evidence that a reasonable factfinder could have disbelieved or found to be incredible, we conclude that the evidence would enable a reasonable factfinder to form a firm belief that the mother failed to complete the family service plan. *See J.F.C.*, 96 S.W.3d at 266. We hold that the evidence is legally sufficient to support the finding that the mother failed to comply with a court order

that established the actions necessary to obtain return of the children. *See id.*; *see also* TEX. FAM. CODE § 161.001(b)(1)(O).

Considering the entire record, the evidence that cannot be credited in favor of the finding is not so significant that a factfinder could not reasonably have formed a firm belief that the mother failed to complete the family service plan because the mother's explanations for her failure to complete the plan do not create doubt about whether the tasks were completed. *See J.F.C.*, 96 S.W.3d at 266. We hold that the evidence was factually sufficient to support the finding that the mother failed to comply with a court order that established the actions necessary to obtain return of the children. *See id.*; *see also* TEX. FAM. CODE § 161.001(b)(1)(O).

We overrule the mother's first issue.

III. The mother did not establish the statutory defense to subpart (O) grounds for termination.

In her second issue the mother questions whether a preponderance of the evidence established the statutory defense to termination on grounds of failure to comply with a court order that specifically established the actions necessary for the parent to obtain return of the child. *See* TEX. FAM. CODE § 161.001(b)(1)(O) (ground for termination); *id.* § 161.001(d) (defense).

We may not reverse a termination decree based on substantial compliance. *Interest of 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.); *In re A.D.N.*, No. 01-

16-00785-CV, 2017 WL 491286, at *7 (Tex. App.— Houston [1st Dist.] Feb. 7, 2017, pet. denied) (mem. op.). However, the Texas Family Code establishes a single affirmative defense to termination for failure to comply with a court order:

(d) A court may not order termination under Subsection (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 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 §161.001(d); *see In re L.L.-M.C.*, No. 01-21-00233-CV, 2021 WL 4898076, at *5 (Tex. App.—Houston [1st Dist.] Oct. 21, 2021, pet. denied) (affirming decree terminating parental rights based on subpart (O) when no evidence showed parent’s good faith effort to comply or that failure to comply was not attributable to fault of parent).

The mother argues that she made good faith attempts to comply with the court order by seeking an intake evaluation at the community mental health center, by calling and inquiring about the availability of parenting classes for parents of children with special medical needs, by testing negative on drug tests and failing to appear for only one test due to a work schedule conflict, and by attending some medical appointments. The mother argues that her failure to attend medical

appointments was related to the failure of the children's caregiver to provide information about the appointments or allow her to attend. Assuming without deciding that these actions constitute a good faith effort to comply with the court's order, we nevertheless conclude that the defense does not apply because the mother has not shown by a preponderance of the evidence that her failure to comply was not attributable to any fault of her own. For example, the evidence showed that Palmer informed the mother of two classes regarding parenting children with special medical needs, and the mother did not attend either. The evidence also showed that the Department kept the mother informed about the children's medical appointments and did not depend on the children's caregivers to provide that information. In addition, the mother testified that she made her own work schedule. No evidence explains how the mother's failure to appear for drug testing or any other required task due to a conflict in her work schedule would not be attributable to any fault of her own when she set her own work schedule.

We conclude that the preponderance of the evidence does not support a finding in favor of the statutory affirmative defense, and we overrule the mother's second issue. *See L.L.-M.C.*, 2021 WL 4898076, at *5.

IV. The evidence is sufficient to support the best interest of the child finding.

In her third issue, the mother challenges the factual sufficiency of the evidence to support the finding that termination of her parental rights is in the

children's best interest. In particular, she argues that there was no evidence that the children would be adopted and no evidence that they would be adopted by the current foster parents. She also relies on her testimony that she is employed, had financial assistance from her husband, and had a home. Finally, she argues that there is no evidence that she physically harmed or injured the children. We consider the mother's challenge to the factual sufficiency of the evidence in light of the *Holley* factors. *See Holley*, 544 S.W.2d at 371–72.

Desires of the child. The evidence showed that both children had become bonded with the current foster parents and wished to remain in their home. Steve, who was about two years old at the time of removal, was six years old at the time of trial. He had spent the majority of his life with caregivers other than his mother. *Cf. A.H.L.*, 2017 WL 1149222, at *5 (“When a child is too young to express his desires, the factfinder may consider that the child has bonded with the foster family, is well cared for by them, and has spent minimal time with a parent.”). This factor weighs in favor of termination of parental rights.

Emotional and physical needs of the child now and in the future, and the emotional and physical danger to the child now and in the future. The evidence at trial showed that both children have extensive, serious, and ongoing medical, physical, developmental, and psychological needs, most of which relate to the past abuse suffered by the children. The evidence also indicated that a failure to

maintain medical and therapeutic regimens as the children grow in the future would negatively impact their development. The children were seven and six years old at the time of trial, so their needs for care, treatment and therapy will persist for many years. Despite numerous reminders from the Department, the mother failed to attend all of the children's medical appointments that related to care needed as a result of their prior abuse. Palmer testified at trial that she believed the mother lacks an understanding of the children's medical needs and was not able to interact effectively with their doctors. These factors weigh in favor of termination of parental rights.

Parental abilities of the individuals seeking custody and programs available to assist these individuals to promote the best interest of the child.

The evidence showed that the current foster parents, who had been caregivers to the children for nearly two years by the time of trial, provided the children with a safe, stable, and nurturing home. The foster parents ensured that the children received all medical and therapeutic treatments that were recommended, and they worked individually with the children to help them meet their goals. The Child Advocate testified that she observed a familial bond between the foster parents and the children.

The mother's inconsistent appearances at visitation often left the children distressed and caused emotional and behavioral regression. In addition, Palmer

testified that although the mother brought gifts and food to the visitations, the mother's behavior was sometimes inappropriate. The mother failed to attend parenting classes or complete a psychiatric evaluation, both of which could have helped the mother promote the best interest of the children.

This factor weighs in favor of parental termination.

Plans for the children by these individuals or by the agency seeking custody and the stability of the home or proposed placement. Palmer testified that the plan for the children was adoption by the current foster parents. The evidence showed that the foster parents provided the children with a stable home and enforced a routine that enabled the children to progress socially, emotionally, developmentally, physically, and academically.

The mother did not testify about any specific plans for the children, and she did not indicate that she wanted custody of them. She said that she wished to remain a part of their lives. At the time of trial the mother was living in Alabama with her husband. There was no evidence about whether the husband knew the children, or whether a home with the husband was a safe or stable place for these children.

This factor weighs in favor of parental termination.

Acts or omissions of the parent that may indicate the existing parent-child relationship is not proper, and any excuse for the acts or omissions of the

parent. There was no evidence that the mother physically harmed her children, but there was evidence that the children regressed emotionally and behaviorally after visits with the mother. *See J. T. v. Tex. Dep't of Family & Protective Services*, No. 03-21-00070-CV, 2021 WL 2672055, at *7 (Tex. App.—Austin June 30, 2021, no pet.) (mem. op.) (child experienced regression after visits with father); *In Interest of S.D.*, No. 02-15-00165-CV, 2015 WL 5297646, at *6 (Tex. App.—Fort Worth Sept. 10, 2015, no pet.) (mem. op.) (children experienced regression after visits with their mother). This factor is neutral in our review.

* * *

Having considered the *Holley* factors, and viewing the evidence in light of the entire record, we conclude that the disputed evidence that a reasonable factfinder could not have credited in favor of the best interest finding is not so significant that the factfinder could not have formed a firm belief that termination of the mother's rights is in the best interest of the children. *See J.F.C.*, 96 S.W.3d at 266; *see also Holley*, 544 S.W.2d at 371–72. We hold that the evidence is factually sufficient to support the best interest finding, and we overrule the mother's third issue.

Conclusion

We affirm the trial court's decree.

Peter Kelly
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.