Opinion issued August 16, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00181-CV

IN THE INTEREST OF Y.G., A MINOR CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2021-00108J

MEMORANDUM OPINION

The trial court signed a decree terminating the parent-child relationship between two-year-old Y.G. (Yara) and her parents—D.E.T. (Mother) and R.G. (Father).[1] Both Mother and Father filed notices of appeal. In three issues, Mother

[1] We refer to Y.G., her family members, and current foster parents by pseudonyms. *See* TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

challenges (1) the trial court's denial of the parents' joint motion to retain the case on the docket and set a new dismissal deadline, (2) the legal and factually sufficiency of the evidence to support the trial court's predicate findings for termination under Family Code subsections 161.001(b)(1)(O) and (P), and (3) the legal and factual sufficiency of the evidence to support the trial court's finding that termination was in Yara's best interest. Father's court-appointed counsel has filed an *Anders* brief, stating that are no arguable grounds for reversal and that an appeal of the trial court's termination order is frivolous. [2]

We affirm.

Background

Yara was born in September 2019. She is Father's only child and Mother's sixth child. In 2018, the Department of Family and Protective Services (DFPS) removed Mother's five older children—born between 2008 and 2018—due to Mother's cocaine use. That same year, Mother's parental rights to her five older children were terminated. The children have been adopted, and Mother has no contact with them.

In November 2020, DFPS received a referral from Father's relative of neglectful supervision and physical neglect of then-one-year-old Yara. The relative reported that Mother and Father were selling illegal drugs from their home and

[2] *See Anders v. California*, 386 U.S. 738, 744 (1967).

smoking crack and synthetic marijuana in Yara's presence. It was also reported that Yara had been seen outside in the cold without shoes or a jacket and that she had an odor from a lack of bathing.

When a caseworker went to investigate the report, Mother and Father were not home. But a woman who also lived at the residence allowed the caseworker to enter. The caseworker saw what she believed to be marijuana on the couch. The woman told the caseworker that the marijuana belonged to her.

Mother and Father were asked to complete drug testing. Mother tested positive for cocaine, and Father tested positive for cocaine and marijuana. Yara was removed from the home and placed with fictive kin—Yara's godparents, the Smiths[3]—who were recommended by Father.

DFPS filed its original petition for protection in January 2021. In the petition, DFPS requested temporary managing conservatorship of Yara, and the trial court granted the request. DFPS also requested that Mother's and Father's parental rights be terminated and that DFPS be named Yara's sole managing conservator if reunification between the parents and Yara could not be achieved.

The trial court conducted a status hearing attended by Mother and Father and their respective counsel. Following the hearing, the trial court signed an order approving and incorporating by reference DFPS's family service plans for the

[3] We refer to the godparents by the pseudonym "Smith."

parents and making the service plans an order of the court. The trial court found "that the goal of the service plans is to return the child to the Parents, and the plans adequately ensure that reasonable efforts are being made to enable the Parents to provide a safe environment for the child." The trial court also found that Mother and Father had each reviewed their respective family service plan and understood that unless he or she were "willing and able to provide the child with a safe environment, even with the assistance of a service, within the reasonable period of time specified in the plan," his or her "parental and custodial duties and rights may be subject to restriction or to termination."

The court-ordered service plans set out tasks and services for Father and Mother to complete before reunification with Yara could occur. Among these, the parents were required "to maintain safe, stable, and sanitary housing." The service plans required the parents to provide the caseworker with the complete address for their residence and explained that "[a]ppropriate housing [would] be demonstrated by providing a copy of the lease agreement, a current utility bill and through home visits by the [DFPS] caseworker."

The service plans also required that each parent be able to financially support Yara and himself or herself by maintaining stable employment or income "throughout the duration of the case." The parents were required to provide the caseworker with "paycheck stubs or provide a tracking sheet of payments for the life

of the case." Other terms of the service plan required the parents to (1) "remain free from all mind altering substances including alcohol and drugs," (2) submit to random urine and hair drug tests requested by the caseworker, (3) complete parenting classes, (4) maintain monthly in-person contact with DFPS and attend court hearings and visitations, (5) participate, throughout the case, in Narcotics Anonymous (NA)/Alcoholics Anonymous (AA) meetings with a 12-step program, (6) participate in a substance-use assessment and follow the recommendations from that assessment, and (7) complete a psychosocial evaluation and follow all recommendations from that evaluation. The family service plan provided that all recommendations of the psychosocial evaluations became tasks of the plan.

On January 26, 2022, the case was called to a bench trial before an associate judge. Mother's counsel presented her and Father's joint motion to retain the case on the docket and to extend the case's statutory dismissal deadline. The trial court denied the motion. Trial recommenced via Zoom on February 1, continuing on February 9 and 10, 2022.

At trial, DFPS asserted that the parents had failed to complete the requirements of their court-ordered service plans and that termination of the parents' parental rights to Yara were in her best interest. DFPS indicated that it sought termination of Mother' and Father's parental rights because they had not established, within the year while the termination case was pending, that they were able to parent

Yara or to provide her with stability and permanency. DFPS emphasized that the parents' failure to complete their service plans demonstrated that they had not adequately addressed and alleviated the issues that had caused Yara to be removed from their home.

DFPS's trial exhibits included the parents' family service plans, the status-hearing order, and DFPS's most recent permanency report. DFPS's primary witness was D. Blackwell, the DFPS caseworker assigned to the case since its inception. Yara's godfather, Mr. Smith—whose family had been caring for Yara since her removal from her parents over one year earlier—also testified for DFPS.

Mother and Father each testified for the defense along with representatives from the inpatient therapy programs in which they were participating. Mother and Father also offered documentary evidence, including their psychosocial and psychological evaluations and their drug-test results.

In her testimony, caseworker Blackwell confirmed that Yara had been removed from her parents' care after an investigation of a report that Mother and Father were using synthetic marijuana and crack cocaine in Yara's presence. She also confirmed that Mother's parental rights to her five older children had been terminated "due to a CPS case regarding drugs," and she stated that those children have been adopted into permanent homes.

The evidence showed that, while the parents completed some of the requirements of their family service plans—such as completing parenting classes, a psychosocial evaluation, and a substance-use assessment—they did not complete other requirements of the service plans. Mother's and Father's psychosocial evaluations recommended that they each engage in individual therapy and substance-abuse counseling.

Mother and Father participated in outpatient individual therapy and substance-abuse counseling through a provider known as "AAMA." However, Mother and Father did not complete the recommended therapy and counseling. The evidence showed that both were terminated by AAMA from the program and "unsuccessfully discharged" on December 10, 2021.

Mother's AAMA discharge summary (admitted into evidence) stated, "[Mother] was terminated unsuccessfully due to lack of attendance." The evidence showed that she had cancelled two appointments and failed to attend 13 therapy sessions. At trial, Mother testified, without elaboration, that she had missed the appointments because AAMA was "not taking clients because of Covid" and because her job as a security guard interfered with her ability to complete the outpatient program.

The drug-test results also showed that, at the time of Yara's removal in November 2020, Mother's hair tested positive for cocaine and synthetic marijuana.

Mother failed to appear for her March 2021 drug test, which her family service plan warned counted as a positive result. Mother again tested positive in November 2021, one year after Yara's removal, when her urine tested positive for marijuana.

Father also tested positive for illegal drugs during the pendency of the case. In November 2020, Father's hair tested positive for cocaine and marijuana. In March 2021, Father missed his drug test, which counted as a positive result. In April 2021 the results of his urine test were "diluted," which under the terms of his family service plan also constituted a positive result. Thereafter, Father's hair tested positive for cocaine in April, May, and October 2021.

When they were unsuccessfully discharged from their outpatient programs, AAMA recommended that Mother and Father each enter into an inpatient drug-treatment program. About a month before the case was called to trial, Mother was admitted for inpatient treatment at Santa Maria on December 31, 2021.

The evidence showed that since her admission to Santa Maria, Mother had been engaging in "intensive treatment," which included individual, group, and substance-abuse therapy. At the time of trial, she was eligible to receive an additional 15 days of intensive treatment at Santa Maria. After completing intensive treatment, Mother would be transferred to a "supportive residential [program]" for 30 days, which could be extended for an additional 15 days. Altogether, the intensive and supportive residential treatment at Santa Maria could last up to 90 days. After

completing those portions of the treatment program, Mother could then apply to Santa Maria's housing and Sober Living programs. If she was accepted into the housing program, Mother would be required to attend 90 days of intensive outpatient and supportive residential groups. In total, Santa Maria's combined inpatient and outpatient program lasted about 180 days. When trial commenced, Mother had completed approximately 30 days of the program. Santa Maria also offered services that could help Mother earn her GED and find employment.

In addition, the evidence showed that, if Mother were named Yara's managing conservator, as she requested, she could apply to a program at Santa Maria that permitted children to live with their parents while the parents completed therapy. However, there was no guarantee that Mother would be accepted into the program.

The permanency report reflected that Father was unsuccessfully discharged from outpatient therapy at AAMA after he "had 14 no shows and 4 cancellations to Group Substance Abuse." The report also reflected, "The provider Kerri Williams from AAMA has stated that [Father was] to be attending individual substance abuse, individual therapy, and group substance abuse weekly and ha[d] missed 18 appointments from 8/24/2021 to 11/30/2021." According to the report, Williams further conveyed that Father "consistently tested positive for Alcohol and ha[d] even show[n] up to session intoxicated."

After he was unsuccessfully discharged from AAMA on December 10, 2021, Father checked himself into Hogar Para El Alcholica Magnolia for inpatient treatment on December 18, 2021. Father testified that he was there for two weeks but then had to leave because the program was at capacity. He also stated that "[the program's administration] didn't want to do anything with CPS or the government investigating them because they did not want to be shut down." But other evidence in the record showed that the program had asked Father to leave because he was not being cooperative in group therapy and had denied having a drug or alcohol problem.

At the time of trial, Father was receiving inpatient services at the Cheyenne Center, where he had been since January 18, 2022. There, Father was engaging in intensive treatment that would last for 45 days. After that, if he met the program's requirements, Father would transition into supportive treatment for an additional 60 to 90 days.

At trial, Father testified that he and Mother had been together as a couple for nearly four years, and the parents' psychosocial evaluations recommended that they engage in couples therapy. Caseworker Blackwell testified that Mother and Father had attended "a few sessions" of couples therapy, "but their attendance was not great." The evidence showed that, while they are receiving inpatient therapy, the parents could not engage in couples therapy.

By the time of trial, Mother had not participated in an NA/AA 12-step program as required by her family service plan, and the evidence showed that she would not participate in NA/AA through Santa Maria until after she completed her intensive and supportive therapy. Father was participating in a 12-step program at Cheyenne Center, but, before his admission into that program, he had not been participating in a 12-step program.

Blackwell also testified that Mother and Father had each failed to provide her with verification of housing, as required by the family service plans. And she stated that she was unable "to confirm any stable housing throughout the case." Blackwell testified that, at the beginning of the case, Mother and Father told her that they were living in an apartment, but they also told her that their landlord would not allow her to visit the residence. The parents then informed Blackwell that they had moved to a different residence. According to Blackwell, the address that the parents provided for the residence "was in the middle of a street." When she went to the address, Blackwell could not find it, and she called Mother and Father. They told her that the house was "a little ways away from where [she] was on th[e] street." The parents then asked Blackwell to meet them "in a parking lot across the street." She met them in the parking lot but did not further attempt to go to the residence that day because she said the area looked "sketchy."

The family service plans required the parents to provide Blackwell with a lease for the residence. Blackwell testified that, while the parents provided her with a letter written in Spanish regarding the residence, they never provided her with a lease. Nor did they provide her with contact information for a leasing agent. Blackwell testified that she had lacked the information necessary to confirm where the parents were living during the pendency of the case before their inpatient admissions.

The family service plans also required each parent "[to] demonstrate the ability to provide" financially for herself or himself and Yara. The service plans stated that each parent "need[ed] to do this through finding stable legal employment or income, which must be maintained throughout the duration of this case."

Mother testified regarding her employment history. She stated that she had worked as a security guard at a fast-food restaurant from June to October 2021. She also testified that, at the beginning of the case, she was employed at a taqueria from for three weeks but was terminated from that position because she needed to take time off to complete the drug testing required by the service plan. She also stated that she had worked at a hospital for two weeks but could not remember the hospital's name. She said that she quit that job because she was not paid well.

Mother also testified that the landlord of the house where she and Father had lived also paid them $400 per month for work that they did for him. And she said

that the landlord paid the utility bills for the house. Mother further testified that she and Father received $645 in food stamps.

The service plans required each parent "[to] provide paycheck stubs or provide a tracking sheet of payments for the life of the case." Mother responded affirmatively when asked whether she had provided information regarding her employment history to Blackwell. However, Blackwell's testimony indicated that Mother had not provided her with information regarding her employment that met the requirements of the service plan. Blackwell stated that Mother provided her with a certificate showing that she had completed training to be a security guard. And Blackwell testified that Mother had worked for two months as a security guard before she was laid off at the end of 2021. Blackwell testified that, other than that two-month period, she had not received proof of employment from Mother.

Blackwell testified that she received a receipt from Father showing that he had been paid cash for work that he had performed for his landlord. She also responded affirmatively when asked if "there was a period where [Father] worked as a security guard." Blackwell also testified that she was aware that Father had been injured in an auto-pedestrian accident in June 2021, requiring him to be hospitalized, and that Father continued to receive treatment for an injury to his back after he was discharged from the hospital. Father had informed Blackwell that he had applied for disability benefits but, as far as she knew, the application was still pending.

When asked, Blackwell acknowledged that Father had some health restrictions following his accident that could have "caused some problems with his participation in his services." However, she added that even before his accident Father "wasn't engag[ing] in services the way he should have been." Blackwell also indicated that Father could have completed his services virtually, and, in fact, the parents had completed some of their services by that means.

The family service plans also required the parents to attend visitations with Yara. Blackwell described the parents' visitation with Yara as "spotty." Blackwell testified that the parents missed six visits with Yara but that three of the missed visits were not the parents' fault. Even though the parents missed three visits that DFPS considered to be their fault, Blackwell agreed, when asked by Mother's counsel, that DFPS was not "holding" the missed visits against Mother.

The evidence further showed that Yara had been residing in a fictive kin placement with her godparents—the Smiths—since she was removed from her parents in November 2020. Blackwell testified that the parents had provided the Smiths as a placement for Yara when she was removed. Blackwell stated that the Smiths had completed the licensing process to be a certified foster home. She testified that Yara is thriving in the Smiths' home and doing well in daycare. Blackwell testified that Yara "plays with [the Smiths]," and Yara is "very well-bonded to them." Blackwell had observed the Smiths interacting with Yara, and the

interactions were appropriate. Blackwell stated that DFPS had no concerns about the Smiths' ability to provide a stable environment for Yara, and she believed that the Smiths were meeting all of Yara's needs and would provide her with permanency. Blackwell confirmed that if the parents' rights to Yara were terminated, then the Smiths wanted to adopt Yara. Mr. Smith also testified, and he confirmed that he and his wife wished to adopt Yara if the parents' rights were terminated.

At the conclusion of trial, the associate judge stated that he was taking the matter under advisement to review the evidence. The associate judge later signed his report in the form of a decree terminating the parent-child relationship between Mother and Father and Yara and naming DFPS as Yara's sole managing conservator. *See* TEX. FAM. CODE § 201.011(a). The presiding judge of the referring court then signed the decree, thereby adopting it. *See id.* § 201.014.

In support of termination, the decree reflects that the trial court found that termination of Mother's and Father's parental rights were in Yara's best interest. The decree reflects that the trial court also found that Mother and Father had each engaged in the predicate acts listed in Family Code subsections 161.001(b)(1)(O) and (P). Specifically, the trial court found that clear and convincing evidence showed that (1) Mother and Father had each failed to comply with the provisions of a court order that specifically established the actions necessary for her or him to obtain the return of Yara (subsection (O)), and (2) the parents had each used a controlled

substance in a manner that endangered the health or safety of Yara and had failed to complete a court-ordered substance-abuse treatment program, or they had continued to abuse a controlled substance after completing such program (subsection (P)).

Mother and Father each appealed the decree of termination.

Mother's Appeal

A. Joint Motion to Retain Suit on Docket and Set New Dismissal Date

In her first issue, Mother contends that the trial court erred when it denied her and Father's joint motion to retain the suit on the trial court's docket and to set a new dismissal deadline.

1. Standard of Review

"We review a trial court's decision to grant or deny an extension of the dismissal date under the abuse of discretion standard." *In re A.J.M.*, 375 S.W.3d 599, 604 (Tex. App.—Fort Worth 2012, pet. denied) (en banc op. on reh'g). A trial court abuses its discretion when it acts unreasonably or arbitrarily, or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985)). We may not substitute our judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *See Zagorski v. Zagorski*, 116 S.W.3d 309, 313–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

2. Analysis

In a suit filed by DFPS seeking termination of parental rights, a trial court generally loses jurisdiction over the case on the first Monday after the first anniversary of the date the court rendered a temporary order appointing DFPS as temporary managing conservator. *See* TEX. FAM. CODE § 263.401(a). Unless trial has commenced on the merits, the case is automatically dismissed on that date. *Id.* Dismissal may be avoided if the trial court grants an extension of the dismissal date before trial commences. *See id.* Under subsection (b), the trial court may grant an extension, retaining the suit on its docket for a period not to exceed 180 days after the original dismissal date. *Id.* § 263.401(b). But to do so, the trial court must make two findings: (1) that extraordinary circumstances necessitate continuing DFPS's temporary managing conservatorship of the child and (2) that continuing the conservatorship is in the child's best interest. *Id.* In determining whether extraordinary circumstances exist in a case in which a parent has been ordered to complete a substance-abuse treatment program, the trial court must consider whether the parent made a good-faith effort to successfully complete the program. *Id.* § 263.401(b-2).

This case was filed on January 26, 2021, and DFPS was appointed temporary managing conservator of Yara on February 25, 2021. Under section 263.401(a), the automatic dismissal date was February 28, 2022. In their joint motion, the parents

asserted that the trial court should retain the suit on its docket and extend the dismissal deadline for 180 days, as permitted by subsection (b), because "extraordinary circumstances"—namely, the completion of their respective inpatient substance-abuse treatment—necessitated an extension. *See id.*

When the joint motion was presented to the trial court, both Yara's attorney ad litem and DFPS were opposed to extending the dismissal date. They argued that the parents had "had ample opportunities to work their services" and had failed to make good-faith efforts to complete them. They also emphasized that the legislature had set dismissal deadlines in termination-of-parental-rights cases "because it is of the utmost importance for children to achieve permanency and time is of the essence." After hearing the parties' arguments, the trial court denied the parents' joint motion to retain the suit on the trial court's docket and to set a new dismissal deadline.

On appeal, Mother points out that the Texas Legislature amended section 263.401 in 2021, adding subsection 263.401(b-3), as follows:

> (b-3) A court shall find under Subsection (b) that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department if:
>
> > (1) a parent of a child has made a good faith effort to successfully complete the service plan but needs additional time; and
> >
> > (2) on completion of the service plan the court intends to order the child returned to the parent.

Act of May 25, 2021, 87th Leg., ch. 8, § 9, 2021 Tex. Sess. Law Serv. 10, 15 (codified at TEX. FAM. CODE § 263.401(b-3)). Mother recognizes that the joint motion to retain the case on the court's docket and to extend the dismissal deadline did not specifically mention subsection (b-3), but she asserts that, "[g]iven that the motion focuses on the parents' efforts to comply with their family plans of service, it can be inferred that the motion [was] filed pursuant to subsection b-3." Mother emphasizes that a trial court *shall* find that extraordinary circumstances exist if subsection (b-3)'s two prongs are met. However, Mother incorrectly relies on subsection (b-3). When DFPS filed this suit on January 26, 2021, Family Code section 263.401 did not include subsection (b-3), and subsection (b-3) does not apply retroactively.[4] *See* Act of April 28, 2021, 87th Leg., R.S., ch. 8, §§ 15, 16, 2021 Tex. Sess. Law Serv. 10, 18; *In re J.M.*, No. 02-21-00346-CV, 2022 WL 872542, at *2 (Tex. App.—Fort Worth Mar. 24, 2022, no pet.) (mem. op.). Thus, because the subsection does not apply to this suit, Mother's arguments relating to subsection (b-3), including her argument (raised for the first time on appeal) that the second prong of the subsection is facially unconstitutional, do not support her contention that the trial court abused its discretion in denying the joint motion.

[4] The effective date of the legislative act adding subsection 263.401(b-3) was September 1, 2021, and the Act provides that changes made by the Act "apply only to a suit filed by the Department of Family and Protective Services on or after the effective date." *See* Act of April 28, 2021, 87th Leg., R.S., ch. 8, §§ 15, 16, 2021 Tex. Sess. Law Serv. 10, 18.

To extend the deadline, the pre-2021 version of section 263.401 (applicable here) required a finding of extraordinary circumstances and best interest pursuant to section 263.401(b). The record shows that the trial court conducted a hearing on the joint motion when the case was called for trial but before any trial evidence was admitted. Neither party requested nor offered any evidence at the hearing on the motion. The trial court denied the motion after hearing the arguments of the parties' counsel and the argument of Yara's attorney ad litem. On appeal, Mother complains that the trial court abused its discretion because it denied the joint motion without taking evidence at the hearing. However, "[t]he burden is on the movant to provide evidence supporting a determination that the trial court abused its discretion by denying the motion for an extension." *In re R.A.*, No. 10-21-00022-CV, 2021 WL 2252193, at *6 (Tex. App.—Waco May 27, 2021, pet. denied) (mem. op.); *see In re A.L.K.*, No. 11-08-00226-CV, 2009 WL 1709249, at *9 (Tex. App.—Eastland June 18, 2009, no pet.) (mem. op.) (recognizing that, "[t]o obtain an extension under Section 263.401(b), appellant had the burden of demonstrating that extraordinary circumstances' necessitate[d] the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator [was] in the best interest of the child" (internal quotation marks omitted)).

Here, the record reflects that the parents did not offer, nor did they request to offer, any evidence at the hearing to meet their burden under subsection 263.401(b) to demonstrate the extraordinary circumstances and best-interest elements. Because the parents did not meet their burden to provide evidence of the two required elements, it was within the trial court's discretion to deny the joint motion to retain the case on the docket and extend the dismissal deadline. *See In re D.W.*, 249 S.W.3d 625, 648 (Tex. App.—Fort Worth 2008, no pet.) (holding that because mother presented no evidence when she re-urged her motion to extend dismissal deadline, trial court did not abuse its discretion by denying her motion); *In re A.S.J.*, No. 04-06-00051-CV, 2006 WL 1896335, at *2 (Tex. App.—San Antonio July 12, 2006, no pet.) (mem. op.) (holding that trial court did not abuse its discretion by denying parents' motion to extend dismissal deadline when parents "failed to provide any evidence of an extraordinary circumstance that would warrant an extension of time"). In short, "a trial court does not abuse its discretion by denying an extension motion that is unsupported by evidence of extraordinary circumstances." *In re J.M.*, No. 02-21-00346-CV, 2022 WL 872542, at *4 (Tex. App.—Fort Worth Mar. 24, 2022, no pet.) (mem. op.).

We note that the argument offered by parents' counsel in support of the joint motion to extend the dismissal deadline included unobjected-to factual assertions. *See id.* (citing *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (noting that

unsworn, unobjected-to factual statements by attorneys can constitute evidence)). Mother's attorney listed the services that Mother had completed, while also acknowledging that Mother had not completed the recommended outpatient individual therapy, drug-abuse counseling, or couples counseling, which were incorporated into her court-ordered service plan. She also acknowledged that Mother tested positive for marijuana in November 2021, nearly a year into the case. Nonetheless, Mother's attorney argued that the dismissal deadline should be extended because Mother was engaging in inpatient services at Santa Maria and had made progress in the month that she had been at the facility. The attorney stated that Santa Maria was not only assisting Mother with her therapy but was also assisting her in obtaining "government support" and her GED.

Similarly, Father's attorney acknowledged that Father had failed to complete the services required in his service plan. The attorney told the trial court that Father had been in an auto-pedestrian accident in June 2021, which had required him to be hospitalized. His attorney argued that Father had "managed best he could" to complete the services. She also stated that Father was receiving inpatient therapy at Cheyenne Center, where he was progressing well. The attorneys requested the trial court to extend the dismissal deadline for 180 days to allow Mother and Father to engage in their inpatient services and to otherwise comply with their service plans.

Even considering the unobjected-to factual assertions of the parents' attorneys, the trial court could have reasonably determined that the required extraordinary circumstances had not been demonstrated. *See id.* Mother's attorney did not explain why Mother had not completed her outpatient therapy. *See* TEX. FAM. CODE § 263.401(b-2) (requiring trial court to consider whether parent made good-faith effort to complete court-ordered substance-abuse-treatment program when determining whether extraordinary circumstances exist). Nor did Mother's attorney offer any indication that Mother was not at fault for failing to complete other required services. Although she informed the trial court that Father had been in an accident, Father's attorney spoke in generalities and did not provide details of the accident or his injuries, nor did she explain whether Father had sought accommodations following the accident to complete his therapy and other services or otherwise explain why the accident had prevented him from successfully completing outpatient therapy for six months following the accident.

"[W]hen a parent, through [his or] her own choices, fails to comply with a service plan and then requests an extension of the statutory dismissal date in order to complete the plan, the trial court does not abuse its discretion by denying the extension." *In re A.P.*, No. 10-22-00008-CV, 2022 WL 1417356, at *5 (Tex. App.—Waco May 4, 2022, no pet.) (mem. op.) (citing *In re K.P.*, No. 2-09-028-CV, 2009 WL 2462564, at *4 (Tex. App.—Fort Worth Aug. 13, 2009) (mem. op.)). "Actions

that are considered to be the parent's fault will generally not constitute extraordinary circumstances." *Id.*; *see In re J.M.*, 2022 WL 872542, at *4 ("Father's belated attempt to comply with his service plan requirements in the few weeks before trial and his wanting more time to work his services is not an extraordinary circumstance."). Further, neither parent's attorney presented argument addressing Yara's best interest—the other required element to obtain an extension of the dismissal deadline. *See In re J.M.*, 2022 WL 872542, at *5. Thus, we hold that the trial court did not abuse its discretion when it denied the parents' joint motion to retain the suit on the docket and set a new dismissal deadline.

We overrule Mother's first issue.

B. Sufficiency of the Evidence

In her second and third issues, Mother challenges the legal and factual sufficiency of the evidence to support the trial court's decree of termination.

1. Standard of Review

A trial court may order termination of the parent-child relationship if DFPS proves, by clear and convincing evidence, one of the statutorily enumerated predicate findings for termination and also proves that termination of parental rights is in the best interest of the child. TEX. FAM. CODE § 161.001(b); *see In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012) (recognizing that federal due process clause and Family Code both mandate "heightened" standard of review of clear and convincing

evidence in parental-rights termination cases). DFPS must prove both elements—a statutorily prescribed predicate finding and that termination is in the child's best interest—by clear and convincing evidence. *See In re E.N.C.*, 384 S.W.3d at 803. The Family Code defines "clear and convincing evidence" as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE § 101.007.

To assess the legal sufficiency of the evidence in a termination proceeding, we consider all evidence in the light most favorable to the trial court's finding and decide "whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *see City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005). We assume that any disputed facts were resolved in favor of the finding if a reasonable factfinder could have done so. *J.F.C.*, 96 S.W.3d at 266. When "no reasonable factfinder could form a firm belief or conviction" that the matter on which DFPS bears the burden of proof is true, we "must conclude that the evidence is legally insufficient." *Id.* In reviewing the evidence's factual sufficiency, we consider the entire record, including disputed evidence. *Id.* The evidence is factually insufficient if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have resolved in favor

of the finding is so significant that the factfinder could not reasonably have formed a firm belief or conviction. *Id.*

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

2. Predicate Finding under Subsection 161.001(b)(1)(O)

In her second issue, Mother contends that the evidence was legally and factually insufficient to support the trial court's predicate findings that termination was warranted under Family Code subsections 161.001(b)(1)(O) and (P).

Subsection (O) provides that the court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has

> failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under [Family Code] Chapter 262 for the abuse or neglect of the child.

TEX. FAM. CODE § 161.001(b)(1)(O). Thus, pursuant to subsection (O), DFPS must prove that (1) it has been the child's temporary or permanent managing conservator for at least nine months; (2) it took custody of the child as a result of a removal from

the parent under Chapter 262 for 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. *See id.*

Here, Mother does not dispute that (1) DFPS has been Yara's temporary managing conservator for at least nine months; (2) DFPS had taken custody of Yara as a result of a removal from the parent under Chapter 262 for abuse or neglect; and (3) the court-ordered family service plan constituted an order of the trial court establishing the actions necessary for her to be reunited with Yara. Mother also does not dispute that the evidence showed that she failed to comply with all the terms of the court-ordered family service plan, and we agree.

The evidence showed that Mother did not successfully complete the individual therapy, substance-abuse treatment, or couples counseling recommended by her psychosocial evaluation and incorporated into her family service plan. The evidence also showed that Mother failed to comply with the service plan by missing a drug test in March 2021, testing positive for marijuana in November 2021, failing to participate in an NA/AA 12-step program, and failing to verify to DFPS that she had maintained stable housing and income during the duration of the case.

Mother acknowledges that Texas courts generally take a strict approach to subsection (O)'s application, *In re D.N.*, 405 S.W.3d 863, 877 (Tex. App.—Amarillo 2013, no pet.), and that a parent's failure to complete one requirement of her family

service plan supports termination under that subsection, *In re J.M.T.*, 519 S.W.3d 258, 267 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). Nonetheless, Mother argues that termination under subsection (O) is not justified based on the affirmative defense found in Family Code subsection 161.001(d):

> (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).

Mother argues that "[t]he evidence is insufficient for the finding of termination under subsection O because [she showed] by a preponderance of the evidence that she made a good-faith effort to comply with her family plan of service and the failure to complete the plan was beyond her control." Mother asserts that the issues raised by the affirmative defense in subsection 161.001(d) are the same as those "raised by [her] in [the joint] pre-trial motion asking for more time to complete services." Specifically, Mother frames her argument on appeal as follows:

> As the facts developed in this case, the evidence show[ed] that [Mother] was engaged in services throughout, did have a relapse as shown by positive marihuana test and entered a recommended in-patient rehabilitation facility as soon as she was discharged from an out-patient program. The timeframe made it impossible to complete the in-patient

> program by trial. The testimony and evidence also showed that the remaining items left on her service plan either were hampered in the case of the couples counseling or were part of the next phase of her program in the facility, such as qualifying for housing outside of the facility and getting a job. The requirement of the in-patient program, while a positive step for [Mother], rendered her unable to complete the program in time for trial and to complete other goals of her service plan in time for trial.

In short, Mother argues that she was unable to comply with all the requirements of her family service plan because she was discharged from the AAMA outpatient program, necessitating her admission to the inpatient program at Santa Maria, which she needed time to complete. She asserts that she was unable to comply with the housing and employment requirements of the service plan until she completed the first phase of Santa Maria's program.

But in making her argument, Mother fails to recognize that the evidence showed that she had eight months—that is, from the time that her family service plan was made an order of the trial court until she was admitted for inpatient treatment—to verify that she was able to maintain suitable housing and employment, but she failed to do so. Mother offers no explanation why she could not fully comply with the housing and employment requirements during that period. Nor does Mother explain how her missed drug test in March 2021 or her positive drug test in November 2021 were not attributable to her own fault. *See In re T.L.B.*, No. 01-21-00081-CV, 2021 WL 3501545, at *6 (Tex. App.—Houston [1st Dist.] Aug. 10, 2021, pet. denied) (mem. op.) (recognizing that "voluntary drug use while one's

children have been removed based on a history of drug use and child neglect [went] against [parent's] argument that her failure to comply with the family services plan was due to no fault of her own").

Mother also fails to recognize that the evidence showed that her termination from the outpatient treatment program—necessitating her inpatient treatment and causing delay in completing the required services—was due to her lack of attendance of the outpatient program. *See In re H.G.*, No. 07-21-00278-CV, 2022 WL 1215469, at *5 (Tex. App.—Amarillo Apr. 25, 2022, pet. denied) (mem. op.) (concluding that trial court did not err in finding that father "did not prove that his failure to comply with the service plan as ordered by the trial court was not attributable to any fault of his own" when he voluntarily quit required drug treatment program). When questioned by Yara's attorney ad litem, Blackwell agreed that Mother "could have avoided inpatient services if she would have participated successfully in the treatment program that AAMA had created for her." Blackwell also agreed that Mother had to start her therapy "all over again" and engage in inpatient, rather than outpatient therapy, because she was unsuccessfully discharged from outpatient services. And Blackwell agreed that "the delay was caused solely by Mom's inability to successfully complete the AAMA program."

Without elaboration or further explanation, Mother testified that she had missed her appointments because AAMA was "not taking clients because of Covid"

and because her job as a security guard interfered with her ability to complete the outpatient program. However, the trial court, as factfinder, could have resolved issues of credibility and any conflicts in the evidence against Mother and found that her missed appointments and failure to complete the AAMA outpatient program were her own fault. *See In re M.C.L. IV*, No. 04-21-00276-CV, 2022 WL 218998, at *4 (Tex. App.—San Antonio Jan. 26, 2022, no pet.) (mem. op.) (explaining that trial court "reasonably could have resolved credibility issues and conflicts in [the] evidence about the reasons that [the mother] did not comply with the plan to find [the mother's] failure to comply was her own fault").

Applying the applicable standards of review, we hold that the evidence is legally and factually sufficient to support the trial court's predicate finding under subsection (O). *See* TEX. FAM. CODE § 161.001(b)(1)(O). We further hold that the evidence is legally and factually sufficient to support a finding by the trial court that Mother failed to carry her burden to prove, by a preponderance of the evidence, that she made a good-faith effort to comply with the court order and that her failure to comply with the court order is not attributable to her own fault. *See* TEX. FAM. CODE § 161.001(d).

We overrule the portion of Mother's second issue challenging the legal and factual sufficiency of the evidence supporting the trial court's predicate finding under subsection 161.001(1)(O). Because only one predicate ground is needed to

support a termination order, we need not address the remainder of Mother's second issue challenging the legal and factual sufficiency of the evidence supporting the predicate finding under subsection 161.001(b)(1)(P). *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

C. Best-Interest Finding

In her third issue, Mother challenges the legal and factual sufficiency of the trial court's best-interest finding.

1. Legal Principles

The Texas Legislature has listed factors that courts should consider in determining whether a child's parent is willing and able to provide the child with a safe environment, including: (1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude and frequency of harm to the child; (4) whether the child has been the victim of repeated harm after the initial intervention by DFPS; (5) whether there is a history of abusive or assaultive conduct or substance abuse by the child's family or others who have access to the child's home; (6) the willingness of the child's family to seek out, accept, and complete counseling services; (7) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; and (8) whether the child's family demonstrates adequate parenting skills, including providing minimally adequate care for the

child's health and nutritional needs, care consistent with the child's physical and psychological development, guidance and supervision consistent with the child's safety, a safe physical home environment, and an understanding of the child's needs and capabilities. TEX. FAM. CODE § 263.307(b).

In *Holley v. Adams*, the Supreme Court of Texas also identified several non-exclusive factors that we should consider when determining whether the termination of a parent's rights is in the child's best interest, including (1) the child's desires; (2) the child's current and future physical and emotional needs; (3) the current and future physical danger to the child; (4) the parental abilities of the person seeking custody; (5) whether programs are available to assist the person seeking custody in promoting the best interests of the child; (6) the plans for the child by the person seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate the parent-child relationship is not proper; and (9) any excuse for acts or omissions of the parent. 544 S.W.2d 367, 371–72 (Tex. 1976). These factors are not exhaustive, and it is not necessary that DFPS prove all these factors "as a condition precedent to parental termination." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The absence of evidence concerning some of the factors does not preclude a factfinder from forming a firm belief or conviction that termination is in the children's best interest. *In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The best-interest analysis may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence. *In re B.R.*, 456 S.W.3d 612, 616 (Tex. App.—San Antonio 2015, no pet.). "A trier of fact may measure a parent's future conduct by his past conduct and determine whether termination of parental rights is in the child's best interest." *Id.*; *see In re C.H.*, 89 S.W.3d at 28 (stating that past performance as parent "could certainly have a bearing on [parent's] fitness to provide for [the child]" and indicating courts should consider prior history of child neglect in best-interest analysis).

2. Analysis

Here, multiple factors support the trial court's finding that termination of Mother's parental rights to Yara was in the child's best interest.

The evidence showing that Mother failed to complete all of the tasks and services required in her service plan not only supported the predicate finding, but it also supported the trial court's best-interest finding. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (holding that finding that parent failed to complete court-ordered services can support best-interest finding). In short, "[a] fact finder may infer from a parent's failure to take the initiative to complete the services required to regain possession of her child that she does not have the ability to motivate herself to seek out available resources needed now or in the future." *In re J.M.T.*, 519 S.W.3d at 270.

The evidence showed that, despite being required to participate in outpatient substance-abuse counseling and individual therapy to be reunited with Yara, Mother did not refrain from illegal drug use. She missed her March 2021 drug test, constituting a presumptively positive result under the service plan. *See In re W.E.C.*, 110 S.W.3d 231, 239 (Tex. App.—Fort Worth 2003, no pet.) (recognizing that factfinder could reasonably infer that parent's failure to complete scheduled screenings indicated she was avoiding testing because she was using drugs). And she tested positive for marijuana in November 2021. Mother also did not successfully complete her outpatient drug treatment program because she was terminated from it due to her non-attendance. Mother's termination from the outpatient program and her positive drug test in November 2021 are particularly probative because Yara was removed from her parents' care in November 2020 due to Mother's and Father's drug use and neglect of Yara. *See* TEX. FAM. CODE § 263.307(b)(10), (11) (stating courts may consider willingness and ability of the child's family to seek out, accept, and complete counseling services and willingness and ability of child's family to effect positive environmental and personal changes within reasonable period of time); *Holley*, 544 S.W.2d at 372 (listing, as best-interest factors, programs available to assist these individuals to promote best interest of child and acts or omissions of parent that may indicate parent-child relationship is not proper); *J.M.T.*, 519 S.W.3d at 270 (recognizing that father's failure to refrain

from illegal drug use and complete substance-abuse counseling and individual therapy supported best-interest finding).

Blackwell testified that she believed that termination of Mother's and Father's parental rights was in Yara's best interest because the parents "had over a year and services are still not complete." Blackwell emphasized that, in the 14 months since Yara had been removed from their care, the parents had not "dealt with" the issues—which included drug abuse—that had caused Yara's removal.

As we have previously recognized, "Parental drug abuse reflects poor judgment and may be a factor to consider in determining a child's best interest." *Id.*; *see* TEX. FAM. CODE § 263.307(b)(8) (stating courts may consider whether there is history of substance abuse by child's family or others who have access to child's home). Mother's drug abuse is relevant to multiple *Holley* factors, including her parenting abilities and the stability of her home as well as Yara's emotional and physical needs now and in the future and the and physical danger in which Yara could be placed now and in the future. *See Holley*, 544 S.W.2d at 372 (factors two, three, four, and seven); *In re N.J.H.*, 575 S.W.3d 822, 834 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (recognizing pattern of drug abuse relevant to multiple *Holley* factors).

The trial court also could have reasonably inferred that Mother's drug abuse would continue in the future. As discussed, Mother had a history of drug abuse. The

evidence showed that Mother's parental rights to her five older children were terminated in 2018 due to her cocaine use, and Mother had positive drug tests during the pendency of this case—at the beginning of the case and toward the end of the case. Even though she knew her parental rights were in jeopardy, Mother failed to complete the outpatient substance-abuse counseling provided to her. Thus, the evidence of Mother's history of illegal drug use, her positive drug tests, and her non-attendance of outpatient therapy supported an inference by the trial court that Mother was at risk for continuing drug use. *See J.M.T.*, 519 S.W.3d at 269.

Mother points out that, in between her positive drug tests in November 2020 and November 2021, her drug-test results were negative. While Mother correctly cites the evidence, the negative drug tests do not negate the uncontradicted evidence that Mother had a positive drug test one year after Yara had been removed from her care related to her drug use and after she had been engaged in outpatient therapy. Nor do they negate evidence of Mother's history of drug abuse, resulting in child neglect not only of Yara but of her five older children for whom she had lost her parental rights the year before Yara's birth. Considering the evidence as a whole, Mother's negative drug-test results did not prevent the trial court from inferring that she was a risk for future drug abuse. *See In re R.J.*, 579 S.W.3d 97, 118 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (finding that father's nonuse of drugs for extended period and completion of outpatient drug treatment program did not

disallow factfinder from inferring he was at risk of continuing substance abuse from evidence of past use).

Mother also emphasizes that, at the time of trial, the evidence showed that she had completed some of the required tasks in her service plan, such as parenting classes, and that she had successfully engaged in inpatient treatment at Santa Maria for over 30 days. The representatives from Santa Maria who testified at trial stated that Mother was doing well in her treatment and indicated that she appeared to be motivated. Mother testified that she was learning what triggered her drug use, and she testified about her dedication to finishing treatment. She also planned to use Santa Marial's services to earn her GED, find a job, and obtain housing so that she could care for Yara. However, a parent's "recent improvement alone is not sufficient to avoid termination of parental rights." *In re K.D.C.*, No. 02–12–00092–CV, 2013 WL 5781474, at *16 (Tex. App.—Fort Worth Oct. 24, 2013, no pet.) (mem. op.); *see In re J.O.A.*, 283 S.W.3d 336, 346–47 (Tex. 2009) ("[E]vidence of improved conduct, especially of short duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices.").

The evidence also showed that Blackwell could not verify whether Mother had safe and stable housing because Mother did not comply with the terms of her family service agreement. The service plan required Mother to provide Blackwell with the complete address for her residence, and it stated that "[a]ppropriate housing

[would] be demonstrated by providing a copy of the lease agreement, a current utility bill and through home visits by the [DFPS] caseworker." Blackwell testified that Mother provided her with the address of the apartment complex where she and Father lived at the beginning of the case, but the parents had also told Blackwell that she could not visit the apartment because the owner of the apartment would not allow it. Blackwell stated that, when Mother and Father moved to a new residence, the parents provided her with an incorrect address. Blackwell testified that the parents never provided her with the lease for the residence, and she was never given sufficient information to confirm where the parents lived before their inpatient admissions.

Blackwell testified that, while Mother verified that she was employed for two months as a security guard during the pendency of the case, she did not otherwise provide sufficient proof of employment, such as paystubs, as required by the service plan. Blackwell acknowledged that she received a letter from Mother's landlord indicating that Mother worked for him in exchange for rent, but the information did not comply with the service plan's requirements for verifying employment. Mother testified that she had two other jobs of short duration during the case and that she and Father received food stamps. In short, the evidence was as such that the trial court could have inferred that Mother did not have stable housing or income during the pendency of the case. This evidence was probative of Yara's best interest because

"[a] parent who lacks stability, income, and a home is unable to provide for a child's emotional and physical needs." *In re J.R.W.*, No. 14-12-00850-CV, 2013 WL 507325, at *9 (Tex. App.—Houston [14th Dist.] Feb. 12, 2013, pet. denied) (mem. op.); *see Holley*, 544 S.W.2d at 372 (best-interest factors include stability of home and child's physical and emotional needs); *see also In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.) ("A parent's drug use, inability to provide a stable home, and failure to comply with a family service plan support a finding that termination is in the best interest of the child.").

In comparison, the evidence showed that, at the time of trial, the Smiths—who had been caring for two-year-old Yara for 14 months and wished to adopt her—had a safe and stable home. Mr. Smith testified that he owns two business, and Mrs. Smith was employed at a private school. They live in a three-bedroom home with their three children. Two of their children were young adults, who were employed, and their third child was a high-school student. Blackwell testified that Yara was doing well in daycare, thriving in the Smith's home, and had all her needs met by the Smiths, who could provide Yara with permanency. *See Holley*, 544 S.W.2d at 372 (listing stability of home as best-interest factor); *In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (stating that stability and permanence are important to upbringing of child and affirming finding that termination was in child's best interest when child was thriving in foster care). The

evidence regarding the Smiths supports the trial court's best-interest finding under the following factors: the emotional and physical needs of the child now and in the future and the stability of the home or proposed placement. *See Holley*, 544 S.W.2d at 372 (factors two and seven). We note that a child's need for a permanent home has been "recognized as the paramount consideration in a best interest determination." *In re B.J.C.*, 495 S.W.3d 29, 39 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

We also note that Yara was only two years old at the time of trial. As such, the *Holley* factor regarding the desires of the child is neutral in this case. *See Holley*, 544 S.W.2d at 372 (factor one). However, Yara's young age does weigh in favor of the best-interest determination. *See* TEX. FAM. CODE § 263.307(b)(1) (providing that court may consider child's age and physical and mental vulnerabilities in best-interest determination); *In re J.M.T.*, 519 S.W.3d at 270 (noting that young age of child—14 months at time of trial—weighed in favor of trial court's finding that termination was in child's best interest); *see also In re A.L.B.*, No. 01-17-00547-CV, 2017 WL 6519969 *5 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (mem. op.) (stating children's young ages—five and six years old—rendered them "vulnerable if left in the custody of a parent unable or unwilling to protect them or to attend to their needs").

"When children are too young to express their desires, the factfinder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with [their] parent." *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see In re N.J.H.*, 575 S.W.3d at 834 (stating that evidence showing that young child had bonded with foster family supported best-interest finding); *In re L.M.N.*, No. 01-18-00413-CV, 2018 WL 5831672, at *20 (Tex. App.—Houston [1st Dist.] Nov. 8, 2018, pet. denied) (mem. op.) ("A child's bonding with her foster family implies that the child's desires would be fulfilled by adoption by the foster family.").

The evidence reflected that Mother attended most of her scheduled visits with Yara. Mr. Smith testified that he recalled the parents bringing food for Yara when they attended their scheduled visits at his home. He also recalled that they brought her clothing and gifts once or twice. There was evidence that Yara was bonded to Father but no evidence was elicited showing that Yara was bonded with Mother. The evidence showed that two-year-old Yara had been living with the Smiths for fourteen months. Blackwell testified that Yara was doing well in the Smiths' care and that Yara was "very well-bonded" to the Smiths and to their three children. This evidence supports the trial court's finding that termination of Mother's parental rights was in Yara's best interest. *See In re N.J.H.*, 575 S.W.3d at 834.

Regarding the plans for Yara of those seeking custody of her, *see Holley*, 544 S.W.2d at 372, the evidence showed that the Smiths wanted to adopt Yara if the parents' rights were terminated. The record also reflects that Mother requested the trial court to award her either sole or joint managing conservatorship of Yara. Mother planned to apply to a program administered by Santa Maria at a facility that was different from the facility where she was currently a patient that would permit Yara to live with Mother while she engaged in therapy. But, as DFPS points out, Mother's admission to that program was not certain and could be denied. The trial court may have reasonably found that Mother's admission to the program was too speculative and appropriately not afforded that evidence much weight. *See In re B.H.R.*, 535 S.W.3d 114, 125 (Tex. App.—Texarkana 2017, no pet.) (concluding, in sufficiency review of best-interest finding, that fact finder may have found that parent's "plans and expectations were purely speculative").

We acknowledge that some evidence exists in the record weighing against the trial court's best-interest finding. The record contains evidence showing that Mother had taken steps to improve her life and to address her drug use. Mother offered evidence showing that (1) she complied with some provisions of her family service plan, (2) she attended the majority of her scheduled visits with Yara, (3) she successfully completed 30 days of Santa Maria's inpatient program and appeared motivated to complete the remainder of the program, (4) Santa Maria could assist

her in earning her GED and in finding employment and housing, and (5) she planned to apply to Santa Maria's program that would permit Yara to live with her while she completed the program.

"Although there is some evidence weighing against the best-interest finding, evidence cannot be read in isolation; it must be read in the context of the entire record." *In re J.M.T.*, 519 S.W.3d at 271. As discussed, the evidence showed that Yara had been removed from her Mother's care in November 2020 due to Mother's illegal drug use and neglect of Yara. This was after Mother's parental rights to her five older children had been terminated related to her drug abuse in 2018. Mother was unsuccessfully discharged from her outpatient substance-abuse therapy for inadequate attendance and had a positive drug test one year after Yara's removal and after Mother had been engaging in outpatient therapy. Mother did not begin the inpatient program at Santa Maria until approximately 30 days before the case was set for trial, and it would take approximately 180 days for Mother to complete the inpatient and outpatient programs with Santa Maria. The evidence also indicated that Mother had failed to maintain suitable housing or employment for the duration of the case.

On balance, an analysis of the evidence showed that the applicable statutory factors and *Holley* factors weigh in favor of the best-interest finding. The evidence reasonably supported implied findings by the trial court that Mother was not willing

or able to address the concerns that had caused Yara's removal in the first place, namely, Mother's drug abuse, and that Mother was not able to provide a stable and suitable home for Yara or the permanency that a young child, such as Yara, requires.

After viewing all the evidence in the light most favorable to the best-interest finding, we conclude that the evidence was sufficiently clear and convincing that a reasonable factfinder could have formed a firm belief or conviction that termination of the parent-child relationship between Mother and Yara was in the child's best interest. We also conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the trial court's finding that termination of the parent-child relationship between Mother and Yara was in the child's best interest or was not so significant that the trial court could not reasonably have formed a firm belief or conviction that termination was in Yara's best interest. Therefore, after considering the relevant factors under the appropriate standards of review, we hold the evidence is legally and factually sufficient to support the trial court's finding that termination of the parent-child relationship between Mother and Yara was in Yara's best interest.

Father's Appeal

Father's court-appointed appellate counsel filed an *Anders* brief, stating that, in her professional opinion, Father's appeal is without merit and that there are no arguable grounds for reversal. *See Anders v. California*, 386 U.S. 738, 744 (1967).

Anders procedures are appropriate in an appeal from a trial court's final order in a suit brought by DFPS for the protection of a child, for conservatorship, or for parental-rights termination. *See In re K.D.*, 127 S.W.3d 66, 67 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see also In re E.L.W.*, No. 01-17-00546-CV, 2017 WL 5712545, at *1 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017, no pet.) (mem. op.) (applying *Anders* to final order in which trial court did not terminate parental rights but appointed paternal grandparents as managing conservators and parents' as possessory conservators). An attorney has an ethical obligation to refuse to prosecute a frivolous appeal. *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008). If an appointed attorney finds a case to be wholly frivolous, her obligation to her client is to seek leave to withdraw. *Id.* Counsel's obligation to the appellate court is to assure it, through an *Anders* brief, that, after a complete review of the record, the request to withdraw is well-founded. *Id.*

Here, counsel has certified that she delivered a copy of the brief to Father and informed him of his right to file a response. *See id.* at 408. This Court also sent notice to Father informing him of his right to file a pro se response and informing him of his right to obtain a copy of the record along with a form to obtain it. Father did not file a response.

The brief submitted by Father's appointed appellate counsel states her professional opinion that no arguable grounds for reversal exist and that any appeal

would therefore lack merit. *See Anders*, 386 U.S. at 744. Counsel's brief meets the minimum *Anders* requirements by presenting a professional evaluation of the record and stating why there are no arguable grounds for reversal on appeal. *See id.*; *Schulman*, 252 S.W.3d at 409 n.23.

When we receive an *Anders* brief from an appellant's appointed attorney who asserts that no arguable grounds for appeal exist, we must determine that issue independently by conducting our own review of the entire record. *Johnson v. Dep't of Family & Protective Servs.*, No. 01-08-00749-CV, 2010 WL 5186806, at *1 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.); *see In re K.D.*, 127 S.W.3d at 67. Thus, our role in this appeal is to determine whether arguable grounds for appeal exist. *See Bledsoe v. State*, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005). If we determine that arguable grounds for appeal exist, we abate the appeal and remand the case to the trial court to allow the appointed attorney to withdraw. *See id.* Then, the trial court appoints another attorney to present all arguable grounds for appeal. *See id.* "Only after the issues have been briefed by new counsel may [we] address the merits of the issues raised." *Id.*

On the other hand, if our independent review of the record leads us to conclude that the appeal is wholly frivolous, we may affirm the trial court's judgment by issuing an opinion in which we explain that we have reviewed the record and find no reversible error. *See id.* at 826–27. Although we may issue an opinion explaining

why the appeal lacks arguable merit, we are not required to do so. *See id.* The appellant may challenge the holding that there are no arguable grounds for appeal by petitioning for review in the Supreme Court of Texas. *See id.* at 827 & n.6.

We have independently reviewed the entire record and counsel's *Anders* brief and agree with counsel's assessment that the appeal is frivolous and without merit. Accordingly, we affirm the trial court's decree, but we deny counsel's request in the prayer of the *Anders* brief to withdraw. *See In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (stating motion to withdraw brought in court of appeals may be premature); *In re A.M.*, 495 S.W.3d 573, 583 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (denying appointed-counsel's motion to withdraw). Counsel's duty to her client extends through the exhaustion or waiver of "all appeals." TEX. FAM. CODE. § 107.016(2)(B). If Father wishes to pursue an appeal to the Supreme Court of Texas, "appointed counsel's obligations can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief." *P.M.*, 520 S.W.3d at 27–28.

Conclusion

We affirm the trial court's decree of termination.

Richard Hightower
Justice

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