Affirmed and Memorandum Opinion filed March 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00716-CV

IN THE INTEREST OF S.G.F., CHILD

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2015-04655J

M E M O R A N D U M O P I N I O N

The trial court terminated the parental rights of L.F. ("Mother") and S.F. ("Father") with respect to their son, Sean,[1] and appointed the Texas Department of Family and Protective Services ("the Department") to be Sean's managing conservator. Mother appeals, challenging the sufficiency of the evidence to support the termination. She does not challenge the Department's appointment as managing conservator. Father does not appeal. We affirm the judgment.

BACKGROUND

The Department received a report that Father and his girlfriend, D.M., were

[1] Sean is a pseudonym. *See* Tex. R. App. P. 9.8(b)(2).

neglecting three-year-old Sean. The report alleged Sean had sores and bruises from being left in his highchair for too long, the house was hazardous and unclean, and Father and D.M. abused drugs. Mother was not mentioned in the referral, and she did not reside in Father's house at the time. A few days after the report was made, Father tested positive for marijuana and benzodiazepine and D.M. tested positive for marijuana. Father and D.M. were unable to arrange safe care for Sean, so about a month after the referral, the Department removed Sean and filed a petition for termination of Mother's and Father's parental rights.

Following removal, the trial court signed an order requiring both parents to comply with any family service plan by the Department. After that order was signed but before she was given a service plan, Mother tested positive for "very high levels" of marijuana, amphetamine, and methamphetamine.

Mother received her family service plan ten days after her drug test. The plan identified the tasks and services she needed to complete before Sean could be placed in her care. The plan required Mother to submit to random drug testing; refrain from participating in criminal activity or interacting with people who have a history of drug use; submit to a substance abuse assessment and follow the assessor's recommendations; participate in individual therapy and follow the therapist's recommendations; undergo a psychosocial assessment and follow the assessor's recommendations; complete a parenting class; obtain and maintain stable housing; provide the Department proof of employment or income; and attend and participate in all hearings, permanency conferences, scheduled visitations, and meetings requested by the court or the Department. Mother signed the service plan, acknowledging she understood her obligations.

The case went to trial nearly a year after the referral. Two witnesses testified for the Department: caseworker Shandra Davis and Sean's maternal aunt, R.W.

Neither Mother nor Father called witnesses, offered evidence, or personally appeared at trial.

Davis testified Mother did not complete the requirements of her service plan. Specifically, though Mother underwent substance abuse and psychosocial assessments, she did not follow the assessors' recommendations for treatment. Mother did not complete her individual therapy. She failed to appear for drug testing. Failures to appear are considered positive results under Department policy. She was supposed to visit Sean twice a month but had not visited him for four months before trial. She stopped checking in with the Department three months before trial. Mother failed to attend a scheduled mediation two weeks before trial or appear at trial.

Sean had been living with R.W. and her husband for about ten months at the time of trial. He wore a patch to correct a lazy eye. Sean was referred to and participated in play and occupational therapy. He had recently been removed from daycare due to his aggression toward other children and had undergone a psychological evaluation as a result. Sean suffered from focal seizures, which R.W. first noticed a few months after he was placed in her home. She said he "just kind of blanks out and doesn't respond." When R.W. asked Mother about it, Mother said she noticed Sean did the same thing when he was a young baby. The record suggests Mother did not seek treatment for the seizures or inform the Department about them.

By all accounts, Sean thrived with his aunt and uncle. Since he moved in to their house, R.W. testified, Sean had blossomed from a "little wild child [who] couldn't even sit at a table and eat, did not know social skills at all" into "a very bright, smart, happy child." She said Sean had bonded with her, her husband, and their 16-year-old son. Sean's aunt and uncle planned to adopt Sean if Mother's and

Father's parental rights were terminated.

Mother called Sean at R.W.'s house on his birthday, almost three months before trial. She called again on the Fourth of July, but R.W. did not let her speak with Sean. R.W. testified:

> She did not speak to [Sean] because I had just had a conversation with him about him staying with us, possibly and probably, because we had the mediation and it was changed to adoption. I didn't want to confuse him further, so I didn't allow her to speak to him.

Mother called again the next morning, but R.W. did not answer the phone.

At the conclusion of testimony, the trial court orally found termination of Mother's and Father's parental rights was in Sean's best interest and justified under Family Code section 161.001(b)(1), subsections D and E (both concerning endangerment of the child) and subsection O (failure to comply with a service plan). The court signed a final decree memorializing those findings and appointing the Department to be Sean's managing conservator.

ANALYSIS

I. Burden of proof and standards of review

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *See In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980); *In re S.R.*, 452 S.W.3d 351, 357 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Although parental rights are of constitutional magnitude, they are not absolute. The child's emotional and physical interests must not be sacrificed merely to preserve the parent's rights. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

Due to the severity and permanency of the termination of parental rights, the burden of proof is heightened to clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001; *In re J.F.C.*, 96 S.W.3d 256, 265–66 (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 Ann. § 101.007; *accord J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *S.R.*, 452 S.W.3d at 358.

Parental rights can be terminated upon clear and convincing evidence that (1) the parent has committed an act described in section 161.001(b)(1) of the Family Code, and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b)(2). Only one predicate finding under section 161.001(b)(1) is needed to support a decree of termination when there is also a finding that termination is in the child's best interest. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

In reviewing the legal sufficiency of the evidence in a termination case, we must consider all the evidence in the light most favorable to the finding to determine whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. *See In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *J.F.C.*, 96 S.W.3d at 266; *C.H.*, 89 S.W.3d at 25. We assume the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence a reasonable fact finder could have disbelieved. *J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266.

In reviewing the factual sufficiency of the evidence, we consider and weigh all the evidence, including disputed or conflicting evidence. *See J.O.A.*, 283 S.W.3d at 345. "If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

We give due deference to the fact finder's findings, and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109. We are not to "second-guess the trial court's resolution of a factual dispute by relying on evidence that is either disputed, or that the court could easily have rejected as not credible." *In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003).

II. Predicate ground for termination: failure to comply with service plan

Subsection O of Family Code section 161.001(b)(1) requires clear and convincing evidence that the parent:

> [1] 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 [2] who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months [3] as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

Tex. Fam. Code Ann. § 161.001(b)(1)(O); *In re S.M.R.*, 434 S.W.3d 576, 582 (Tex. 2014).

Mother concedes the evidence is legally and factually sufficient to support the trial court's finding that termination was proper under subsection O. An unchallenged fact finding is binding on us "unless the contrary is established as a matter of law, or if there is no evidence to support the finding." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *see In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (unchallenged findings of fact supported termination under section 161.001(1)(O) because record supported those findings); *In re C.N.S.*, No. 14–14–00301–CV, 2014 WL 3887722, *7 (Tex. App.—Houston [14th Dist.] Aug. 7, 2014) (mem. op.) (same).

The record supports the unchallenged finding. First, the trial court approved and incorporated the requirements of the family service plans as court orders. *See In re K.F.*, 402 S.W.3d 497, 504–05 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Second, Sean had been in the Department's managing conservatorship for nearly a year at the time of trial. Third, in early orders, the trial court found that Sean was removed under chapter 262 of the Family Code, namely section 262.104, because there existed an immediate danger to his health and safety. *See* Tex. Fam. Code Ann. § 262.104(a)(1).

The evidence is undisputed that Mother did not complete the requirements of her service plan. She did not participate in a drug treatment program, follow the recommendations resulting from her psycho/social assessment, or complete her individual therapy. She failed to appear for drug testing. She stopped visiting Sean and checking in with the Department several months before trial. Mother failed to appear at mediation or trial.

We conclude the evidence is legally and factually sufficient to support the trial court's determination that termination of Mother's parental rights was justified under section 161.001(b)(1)(O) of the Family Code. *J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266.

III. Collateral consequences of endangerment findings

In light of our conclusion the evidence is sufficient to support the trial court's finding on subsection O, we need not make a determination as to its findings on the other predicate grounds, subsections D and E. *See A.V.*, 113 S.W.3d at 362. However, citing two decisions by this court, Mother urges us in her first issue to review the sufficiency of the evidence to support those findings because they may have negative collateral consequences. *See In re A.A.L.A.*, No. 14-15-00265-CV, 2015 WL 5437100, *4 (Tex. App.—Houston [14th Dist.] Sept.

15, 2015, no pet.) (mem. op.); *In re J.J.G.*, No. 14-15-00094-CV, 2015 WL 3524371, *4 (Tex. App.—Houston [14th Dist.] June 4, 2015, no pet.) (mem. op.). Those consequences include the binding nature of the endangerment findings on the best-interest analysis in this case and their potential to support termination of her relationship with another child under subsection M in a future case. *J.J.G.*, 2015 WL 3524371, at *4. Subsection M permits termination based on a finding that the parent's previous conduct violated subsection D or E or substantially equivalent provisions of another state's law. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(M). Because this is the only possible appeal of those findings, which would be binding in a future proceeding, we will address Mother's arguments.[2]

A. Legal standards

Both subsections D and E of section 161.001(1) use the term "endanger." *Compare* Tex. Fam. Code Ann. § 161.001(b)(1)(D) (parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child") *with id.* § 161.001(b)(1)(E) (parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child"). "To endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996); *S.R.*, 452 S.W.3d at 360.

A finding of endangerment under subsection E requires evidence that the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no

[2] By doing so we are not concluding that this review is always necessary *See A.A.L.A.*, 2015 WL 5437100, at *4.

pet.). Termination under subsection E must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id.* A court properly may consider actions and inactions occurring both before and after a child's birth to establish a "course of conduct." *In re S.M.*, 389 S.W.3d 483, 491–92 (Tex. App.—El Paso 2012, no pet.). While endangerment often involves physical endangerment, the statute does not require that conduct be directed at a child or that the child actually suffer injury; rather, the specific danger to the child's well-being may be inferred from the parent's misconduct alone. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738–39 (Tex. App.—Fort Worth 2004, pet. denied). A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re A.B.*, 412 S.W.3d 588, 599 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014).

In evaluating endangerment under subsection E, courts may consider conduct both before and after the Department removed the child from the home. *See Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ) (considering persistence of endangering conduct up to time of trial); *In re A.R.M.*, No. 14-13-01039-CV, 2014 WL 1390285, at *7 (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.) (considering pattern of criminal behavior and imprisonment through trial).

B. Subsection E: Sufficient evidence

A finding of endangerment under subsection E requires clear and convincing evidence that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Tex. Fam. Code Ann. § 161.001(b)(1)(E). "Conduct" under

subsection E includes omissions and failures to act. *See J.T.G.*, 121 S.W.3d at 125. Evidence of the child's environments before and after the Department obtained custody is relevant to the analysis under subsection E.

Drug use. A parent's continuing substance abuse can qualify as a voluntary, deliberate, and conscious course of conduct endangering the child's well-being. *See J.O.A.*, 283 S.W.3d at 345; *S.R.*, 452 S.W.3d at 361–62. By using drugs, the parent exposes the child to the possibility that the parent may be impaired or imprisoned and, therefore, unable to take care of the child. *See Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617–18 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

Mother tested positive for drugs twice within a few months of Sean's removal. The first time, she was positive for "very high levels" of marijuana, amphetamine, and methamphetamine. The second time, she was still positive for those drugs but at lower levels, and she was positive for benzodiazepine. After the second test, Mother stopped appearing for drug tests. The Department considers failures to appear for drug testing as positive results.

Mother concedes the evidence regarding her substance abuse is legally sufficient but asserts it is not factually sufficient to support the trial court's finding under subsection E.

She first contends the endangerment finding cannot stand because she tested positive after Sean was removed, which means she did not take drugs in Sean's presence. We reject that contention because the endangering conduct does not have to occur in the child's presence. *See Walker*, 312 S.W.3d at 617. Continued illegal drug use after a child's removal jeopardizes parental rights and may be considered as establishing an endangering course of conduct and that termination is in the best interest of the child. *Cervantes–Peterson v. Tex. Dep't of Family & Protective*

Servs., 221 S.W.3d 244, 253–54 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc); *S.R.*, 452 S.W.3d at 361–62.

Second, Mother discounts the weight of the drug test results due to the lack of expert testimony to interpret the results. Mother cites no authority, and we know of none, requiring expert testimony about drug test results in parental termination cases. Caseworker Davis testified Mother had "very high levels" of marijuana, amphetamine, and methamphetamine in her body when first tested after Sean was removed. On cross-examination, Davis admitted she is not a medical expert and does not have medical training. Having reviewed the entire record, we conclude any dispute about the results of Mother's drug tests is not so significant that the trial court, as fact finder, could not have formed a firm belief or conviction that Mother's drug use endangered Sean. Accordingly, the evidence is factually sufficient to support that finding.

Medical neglect. Neglect of a child's medical needs endangers a child. *See In re D.V.*, 480 S.W.3d 591, 601 (Tex. App.—El Paso 2015, no pet.); *In re P.E.W.*, 105 S.W.3d 771, 777 (Tex. App.—Amarillo 2003, no pet.) The record contains evidence that Mother medically neglected Sean. Mother told R.W. she saw symptoms in Sean as a baby that would later be diagnosed as focal seizures. Mother did not tell R.W. about those symptoms until R.W. asked about them, several months after Sean moved in with R.W. and her husband. The symptoms are not mentioned in Mother's service plan; their omission supports an inference that Mother did not tell the Department about them.

Conclusion on subsection E. Mother does not dispute that she used drugs after Sean was removed. Substance abuse after removal, when the parent is at risk for losing his or her child, is endangering conduct. Mother also does not dispute R.W.'s testimony that Mother observed but was silent about symptoms in Sean as a

baby that were later diagnosed as focal seizures. Based on Mother's drug abuse and medical neglect, we conclude the evidence is legally and factually sufficient to support the trial court's finding under subsection E.

Due to our conclusion regarding the trial court's subsection E finding, we need not review the sufficiency of the evidence to support the subsection D finding. *See A.V.*, 113 S.W.3d at 362. We overrule Mother's first issue.

IV. Best interest

In her second issue, Mother contends the evidence is factually insufficient to support the trial court's finding that termination of her parental rights is in Sean's best interest.

Termination must be in the child's best interest. Tex. Fam. Code Ann. § 161.001(b)(2). There is a strong presumption that the best interest of a child is served by keeping the child with the child's parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). Prompt, permanent placement of the child in a safe environment is also presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a).

Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best-interest finding: the desires of the child; the physical and emotional needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). As noted, this

list of factors is not exhaustive, and evidence is not required on all the factors to support a finding that termination is in the child's best interest. *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

In addition, the Family Code sets out thirteen factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment. *See* Tex. Fam. Code Ann. § 263.307(b). Those factors are: (1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of harm to the child; (4) whether the child has been the victim of repeated harm after the initial report and intervention by the Department; (5) whether the child is fearful of living in or returning to the child's home; (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home; (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (9) whether the perpetrator of the harm to the child is identified; (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the child's family demonstrates adequate parenting skills, including providing the child with: (a) minimally adequate health and nutritional care; (b) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development; (c) guidance and supervision consistent with the child's safety; (d) a safe physical home environment; (e) protection from repeated

exposure to violence even though the violence may not be directed at the child; and (f) an understanding of the child's needs and capabilities; and (13) whether an adequate social support system consisting of an extended family and friends is available to the child. *Id.*; *R.R.*, 209 S.W.3d at 116.

A. Sean and his foster parents

Sean undisputedly thrived in his aunt's and uncle's care. When he came to them at age three and a half, his aunt said, he was a "wild child" with no social skills. Ten months later, Sean had blossomed into "a very smart, bright, happy child." Sean had bonded with his aunt, uncle, and 16-year-old cousin. R.W. and her husband planned to adopt him if Mother's and Father's parental rights were terminated.

Davis testified R.W. and her husband were satisfying Sean's physical, medical, and emotional needs. The evidence shows Sean had medical conditions that required treatment: focal seizures and a lazy eye. He took medication for the seizures and wore a patch to correct his eye. Sean had also undergone a psychological evaluation due to recent aggression at daycare. He participated in play and occupational therapy.

B. Mother

As discussed, Mother endangered Sean by abusing drugs and medically neglecting him. She also failed to complete the court-ordered tasks and services in her service plan, including treatment for drug addiction. Evidence relevant to statutory bases for termination is also relevant to the child's best interest. *See S.R.*, 452 S.W.3d at 366.

Mother has history with the Department. She was referred to the Department for possible abuse and neglect of Sean when he was two and a half years old. The

Department ruled out the allegations. However, the "dilute negative" result of Mother's urinalysis during that investigation may imply she was attempting to hide her drug use.

Perhaps most importantly, the record reflects Mother is unwilling to parent Sean. By the time of trial, she had been absent for much of four-year-old Sean's life. She stopped visiting him four months before trial. She stopped checking in with the Department despite knowing her parental rights were at risk of being terminated. Pretrial mediation would have given her an opportunity to craft a custody arrangement for Sean, but she did not attend. And Mother failed to appear at trial, again knowing she could lose Sean.

We conclude any dispute about Sean's best interest is not so significant that the trial could not have formed a firm belief or conviction that termination of Mother's parental rights was in Sean's best interest. Therefore, the evidence is factually sufficient to support the trial court's best-interest finding. We overrule Mother's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.