

**Affirmed and Memorandum Opinion filed February 9, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00825-CV**

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**IN THE INTEREST OF B.Z.S AND C.D.S., CHILDREN**

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**On Appeal from the 313th District Court  
Harris County, Texas  
Trial Court Cause No. 2015-00949J**

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

Appellant A.L.S. (“Mother”) appeals the trial court’s final decree terminating her parental rights and appointing the Department of Family and Protective Services (the “Department”) as sole managing conservator of B.Z.S. and C.D.S. (“the children”). Mother challenges the legal and factual sufficiency of the evidence to support the trial court’s finding that termination is in the best interest of the children.<sup>1</sup> We affirm.

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<sup>1</sup> The children’s father, D.D.T., has not appealed the termination of his parental rights.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Pretrial Proceedings**

On December 30, 2014, the Department received a report of neglectful supervision of the children as a result of Mother and the maternal grandmother using methamphetamines in the home where the children were living. The children were living in their maternal grandparents' home at the time. The grandparents did not know where Mother was living. The maternal grandparents had their own children removed from them four times in Alabama and one time in Texas due to alcohol and drug use, domestic violence, and sexual abuse by a family member. The grandparents agreed to submit to a drug test, but later refused at the testing facility after they learned the test would be a hair follicle test instead of a urine analysis. Circumstances required the immediate removal of the children because the mother could not be located to be interviewed until after the children were removed. The alleged father would not accept the children until after taking a DNA test.

When Mother learned the children were in Department custody she contacted the Department caseworker. Mother gave the caseworker the name of a family friend as a potential placement for the children. The friend was not an appropriate placement for the children because she had a history with the Department. Mother agreed that the children could be placed in foster care as long as she could work to get them back.

Mother entered into a family service plan in which she agreed to:

- maintain stable and sanitary housing and provide proof by providing a lease agreement to the caseworker;
- attend all court hearings, meetings, visitations, and other planning sessions regarding her children;

- submit to random drug tests through the Department;
- submit to drug and alcohol assessments and follow all recommendations;
- participate fully in a psychological evaluation and follow up with all recommendations;
- participate in individual therapy in order to discuss her childhood sexual abuse; and
- participate in the completion of parenting classes.

The Department periodically filed progress reports with the trial court to advise the court, among other things, on Mother's progress with the service plan. The last report filed before trial reflected that Mother completed her psycho-social evaluation. As a result of the psycho-social evaluation Mother was asked to participate in a psychiatric evaluation, individual therapy, couples therapy, family therapy, substance abuse therapy, drug assessment, parenting classes, and random drug tests. Mother completed or was participating in the recommended therapy; she completed a drug assessment and was participating in the recommended twelve-step program. Mother had a sponsor who reported Mother was working on the sixth step of the twelve steps.

Random drug tests showed no results for April and May 2015 because Mother's whereabouts were unknown. The only positive results reported were in June 2015 for marijuana. Mother provided financial support for the children through toys and food, and kept in contact with the Department caseworker.

## **B. Trial Testimony**

Prior to the start of testimony, the Department asked the trial court to take judicial notice of all orders in its file. The Department also introduced exhibits, including the children's birth certificates, assessments, therapy notes, and family service plans. The exhibits were admitted without objection.

Mother testified that the children came into the care of the Department because she was using methamphetamines. Mother admitted relapsing using alcohol and admitted a positive test for marijuana. Mother blamed the positive marijuana result on being around her sister while her sister was smoking marijuana. Mother admitted she delayed working services for three months after receiving her family service plan.<sup>2</sup> Mother recently obtained employment at a game room and supplemented that income cleaning houses. Mother had not yet begun working at the game room. Mother was unable to secure housing, but moved in with her parents. Mother moved out of her previous housing because her neighbor was selling drugs. Before that, Mother was living with a boyfriend who was a registered sex offender. Mother testified that the Department performed a background check on the sex offender and required that he attend classes. Before the Department could further pursue this individual, he moved out of Mother's home.

On cross-examination, Mother testified that she completed all her services, but the only reason the Department would not give her children back was that she did not have a stable home. Mother testified that she had completed all of the counseling and drug tests. Mother has not spoken with the children's father and does not know where he is.

Lisa McCartney, who had been working with the children to assist the attorney ad litem, testified that Mother had not demonstrated a pattern of behavior that showed she could provide a safe, stable, or permanent environment for the children. McCartney further testified that Mother continued to make bad choices regarding her own life. Mother is not in recovery and has not been honest with the providers who have assessed her. Mother did not disclose to the drug treatment

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<sup>2</sup> The Department presented evidence that Mother delayed five and a half months.

providers that she was drinking and taking sleeping pills. Mother does not drive and was planning to be supported by a boyfriend with whom she was living. The boyfriend was a registered sex offender and tested positive for cocaine near the time the children were removed. Mother was also not truthful about her prior history with her parents. McCartney testified that she and the ad litem had identified several families, including the current placement, that are potential adoptive parents for the children. The children thrived in both foster placements.

Trisha Goodin, the substitute care worker for the children, testified that Mother delayed five and a half months before beginning to work her services. Mother had not maintained stable and sanitary housing or secured and maintained legal employment. Since the time the children were removed, Mother took nineteen drug tests, four of which were positive. Goodin testified, however, that the clean drug tests did not reflect progress; rather Mother relapsed several times. The Department worked toward family reunification until it discovered the prior aggravated sexual assault conviction of Mother's boyfriend. Goodin testified that the current foster home is safe and the children have bonded with the foster family. The children are thriving in the foster home and the foster parents are willing to adopt the children.

The foster father testified that he is bonding with the children and they are bonding with him and his wife. The foster father and his wife have been together "off and on 20 years." They have lived in their current home for ten years. There are no drugs in the home and no criminal activity around the house. The foster father knows how to access services to help the children and knows their educational needs. He testified he will help the children grow and thrive and become productive citizens.

The children's maternal grandfather testified that the children were living

with him at the time of their removal. His only source of income is disability checks, but he feels this is sufficient income to support the children. The grandfather testified that he briefly lost his children when he lived in Alabama. He lost his job and house, but later obtained employment and his children were returned to him. The grandfather moved to Texas for a job. After moving to Texas, the grandfather's children, including Mother, were teenagers and "kept running away." The grandfather testified that he sought help from law enforcement who called "CPS" and took his children. The children were later returned.

At the conclusion of the bench trial, the trial court found clear and convincing evidence that Mother's parental rights should be terminated under Family Code section 161.001(b)(1)(D), (E)(endangerment); (N) (constructive abandonment); and (O) (compliance with service plan). The trial court further found that termination of the parents' rights was in the best interest of the children.

## II. ANALYSIS

Mother challenges the legal and factual sufficiency of the evidence to support the trial court's findings that termination is in the best interest of the children.<sup>3</sup>

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re D.R.A.*, 374 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Although parental rights are of constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002) ("Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child

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<sup>3</sup> Mother concedes the preliminary findings as discussed *infra*.

not be sacrificed merely to preserve that right.”).

Due to the severity and permanency of the termination of parental rights, the burden of proof is heightened to the clear and convincing evidence standard. *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; *In re J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *In re C.M.C.*, 273 S.W.3d 862, 873 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

In reviewing legal sufficiency of the evidence in a parental termination case, we must consider all 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. *In re J.O.A.*, 283 S.W.3d at 336. We assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence that a reasonable fact finder could have disbelieved. *Id.*; *In re G.M.G.*, 444 S.W.3d 46, 52 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence, including disputed or conflicting evidence. *In re 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.” *Id.* 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).

## **A. Predicate Termination Grounds**

Termination under section 161.001(b)(1)(D) requires a finding that the 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.” Tex. Fam. Code Ann. § 161.001(b)(1)(D). Termination under subsection E requires a finding 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). Termination under subsection N requires a finding that the parent “constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and: (i) the department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment.” Tex. Fam. Code Ann. § 161.001(b)(1)(N). Termination under subsection O requires a finding that the parent “failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of 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 Chapter 262 for the abuse or neglect of the child.” Tex. Fam. Code Ann. § 161.001(b)(1)(O).

Mother concedes legally and factually sufficient evidence to support the above predicate termination grounds. The evidence recited above supports a finding that Mother failed to comply with her service plan after the children were removed for abuse or neglect. The evidence also supports that Mother endangered



the children by continuing to use illegal drugs and associating with people who used illegal drugs. Accordingly, the first requirement for termination—a predicate statutory ground—is satisfied. *See* Tex. Fam. Code Ann. § 161.001(b)(1).

### **B. Best Interest of the Children**

Mother challenges the legal and factual sufficiency of the evidence to support the trial court’s finding that termination is in the children’s best interest.

The factors the trier of fact may use to determine the best interest of the child include: (1) the desires of the child; (2) the present and future physical and emotional needs of the child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the persons seeking custody; (5) the programs available to assist those persons seeking custody in promoting the best interest of the child; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and (9) any excuse for the parents’ acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also* Tex. Fam. Code Ann. § 263.307(b) (listing factors to consider in evaluating parents’ willingness and ability to provide the child with a safe environment).

A strong presumption exists that the best interest of the children is served by keeping the children with their natural parent, and the burden is on the Department to rebut that presumption. *In re U.P.*, 105 S.W.3d at 230. Prompt and permanent placement of the children in a safe environment also is presumed to be in the children’s best interest. Tex. Fam. Code Ann. § 263.307(a). Mother contends that the presumption in her favor is not rebutted because the Department originally sought family reunification until a few months before trial, and the children are

being placed with a single foster parent.

Initially, we note that Mother's claim that the children are being placed with a single foster parent is refuted by the record. The foster father testified that he and his wife had lived in the same home for ten years and had been together for 20 years. Both the foster father and his wife are caring for the children. Despite the fact that only one foster parent testified at trial, there is no evidence to support Mother's claim that the children are being placed with a single foster parent.

**1. Present and Future Physical and Emotional Danger to the Children**

Evidence supporting termination under the grounds listed in section 161.001(b)(1) also can be considered in support of a finding that termination is in the best interest of the children. *See In re C.H.*, 89 S.W.3d at 27 (holding the same evidence may be probative of both section 161.001(b)(1) grounds and best interest).

Courts consider whether a parent demonstrates adequate parenting skills, including providing the child with "protection from repeated exposure to violence even though the violence may not be directed at the child." Tex. Fam. Code Ann. § 263.307(b)(12)(E). The unchallenged predicate finding that Mother engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the children is binding, as are the findings that Mother did not complete the family service plan and constructively abandoned her children. *See In re E.A.F.*, 424 S.W.3d 742, 750 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

The Texas Supreme Court has recognized that a parent's use of narcotics and its effect on her ability to parent may qualify as an endangering course of conduct. *In re J.O.A.*, 283 S.W.3d at 345; *see also Edwards v. Tex. Dep't of*

*Protective Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997, no writ) (stating a parent’s drug use is a condition that can endanger a child’s physical or emotional well-being and indicate instability in home environment). A parent’s drug use also supports a finding that termination of parental rights is in the best interest of the child. *See In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.); *see also In re M.S.L.*, No. 14–14–00382–CV, 2014 WL 5148157, at \*6 (Tex. App.—Houston [14th Dist.] Oct. 14, 2014, no. pet.) (mem. op.). The fact finder can give “great weight” to the “significant factor” of drug-related conduct. *In re K.C.*, 219 S.W.3d 924, 927 (Tex. App.—Dallas 2007, no pet.); *see also In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at \*4 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (mem. op.) (considering a parent’s drug history in affirming a trial court’s decision that termination was in the best interest of the child).

Although Mother had negative drug tests, she did not demonstrate that she was in recovery, and she was not honest with treatment professionals after receiving her service plan. Continued illegal drug use after a child’s removal is conduct that 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.). Mother’s behavior evinces a course of conduct from which a fact finder reasonably could conclude that termination is in the best interest of the children.

## **2. Stability and Compliance with Services**

In determining the best interest of the children in proceedings for termination of parental rights, the trial court may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child.

*See In re E.C.R.*, 402 S.W.3d at 249. The record reflects that Mother did not comply with the family service plan in that she failed to maintain stable, sanitary housing, and failed to obtain or maintain legal employment. Mother failed to demonstrate the ability to provide the children with safety or stability, as is presumed by the Family Code to be in the children's best interest. *See* Tex. Fam. Code Ann. § 263.307(a) (West 2015).

At approximately five and six years old, the children were very young and dependent on their caregivers to meet their needs. Mother argues that she loved her children and the Department "did not care about reunification or the best interest of the children." The substitute care worker explained, however, that the Department's goal of reunification changed when they learned Mother was associating with a convicted sex offender and was continuing to use illegal drugs. Mother told the Department that her plan to support the children involved allowing this boyfriend to support them.

Mother acknowledged that she had been provided a family service plan to obtain the return of her children. Mother knew that one of the requirements of her plan was to maintain safe, sanitary housing and obtain and maintain stable employment in order to support the children. The record reflects that Mother was unable to maintain stable housing or stable employment to support her children.

Mother also knew of the requirements was that she abstain from using illegal drugs. The record reflects, however, that Mother did not complete the services in her plan and did not remain drug-free knowing it was necessary to obtain the return of her children. A report from the Bay Area Council on Drugs shows that Mother reported an extensive history with alcohol and drugs. Mother reported beginning to use marijuana at age seven, and from there moved on to trying opiates such as Oxycontin, Dilaudid, methadone, Vicodin, and codeine. Mother reported daily use

of methamphetamines for five years prior to the report, roughly from 2010 to 2015. The children were born in 2010 and 2011. Therefore, Mother admitted to daily drug use at the time her first child was born and for five years thereafter.

The record further reflects that Mother's drug use caused her to be absent from the children for long periods of time. The Department's removal affidavit reflects that its investigator was unable to contact or locate Mother after the children were removed from the grandparents' home. The grandparents did not know where Mother was living, nor did the children's father.

Mother also failed to demonstrate the ability to obtain stable legal employment or stable housing. Mother expressed that she planned to support her children by living with her boyfriend. When the Department learned the boyfriend was a registered sex offender with a conviction for aggravated sexual assault, the Department abandoned its family reunification plan. Mother's failure to comply with court-ordered tasks and drug use during the termination proceedings supports the trial court's finding that termination is in the best interest of the children.

### **3. Children's Desires and Proposed Placement**

The children were very young at the time of trial and there is no evidence of their desires. When children are too young to express their desires, the fact finder may consider that the children have bonded with the foster family, are well cared for by them, and have spent minimal time with a parent. *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Although the children were five and six years old at the time of trial, the record reflects they had spent minimal time with Mother. The stability of the proposed home environment is an important consideration in determining whether termination of parental rights is in the children's best interest. *See id.* at 119–20. A

child's need for permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in a best-interest determination. *Id.* ("Stability and permanence are paramount in the upbringing of children."). Therefore, evidence about the present and future placement of the children is relevant to the fact finder's best-interest determination. *See In re C.H.*, 89 S.W.3d at 28.

Both the foster father and Goodin testified that the children had bonded with their foster parents. Mother alleges that it is not in the children's best interest to be placed with a single foster parent. The record reflects, however, that the foster father and his wife are both caring for the children, and have been together for 20 years and have lived in the same home for 10 years. Goodin concluded that it was in the best interest of the children to be placed in a permanent stable home.

#### **4. Parenting Abilities and Family Support**

The evidence showed that Mother did not have experience with parenting her children. Mother's parents had cared for the children prior to their removal, but the grandparents had a history of removal of their own children and a history of drug abuse. The Department noted concern about Mother's dependence on her mother. An evaluation admitted into evidence noted that Mother could not recall several significant facts about events in her life as well as some of her health history. Mother told the evaluator that her mother would know. The evaluator noted that Mother "has a very dependent relationship with her mother." The evaluator noted that Mother discussed knowing she would not have adequate coping skills to face life without her mother. Mother's dependence on her mother and lacking of coping skills to parent her children on her own support the trial court's finding that termination of Mother's parental rights is in the best interest of the children.

## CONCLUSION

The record contains evidence supporting the best interest finding based on Mother's drug use, inability to provide stable housing, and inability to obtain and maintain stable employment. Based on the evidence presented, the trial court could have reasonably formed a firm belief or conviction that terminating Mother's parental rights was in the children's best interest so that they could promptly achieve permanency through adoption. *See In re T.G.R.-M.*, 404 S.W.3d 7, 17 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Applying the applicable *Holley* factors to the evidence, we conclude that there was legally and factually sufficient evidence to reasonably establish a firm belief or conviction that termination of Mother's parental rights is in the children's best interest. *See* Tex. Fam. Code Ann. § 106.001(2). We overrule Mother's issues on appeal.

We affirm the decree terminating appellant's rights.

/s/ Marc W. Brown  
Justice

Panel consists of Justices Boyce, Jamison, and Brown.