Affirmed and Memorandum Opinion filed April 25, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00900-CV

IN THE INTEREST OF S.R.G., J.A.G., AND C.J.G., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2015-05307J

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 J.M.J. ("Mother") and A.G.G. ("Father") with respect to their children, Sarah, Julia, and Charlie,[1] and appointed the Texas Department of Family and Protective Services ("the Department") to be the children's managing conservator. On appeal, Mother challenges the factual sufficiency of the evidence to support the trial court's finding that termination of her parental rights is in the children's best interest. Father challenges the factual and legal sufficiency of the evidence to support the trial court's findings on the predicate grounds for termination and the best-interest

[1] Sarah, Julia, and Charlie are pseudonyms. *See* Tex. R. App. P. 9.8(b)(2).

finding. Neither parent challenges the Department's appointment as managing conservator. We affirm.

BACKGROUND

A. Removal

On July 20, 2015, the Department received a report alleging then four-month-old Charlie had bruising around his eyes. Mother said the bruising occurred two nights earlier, while she was out for the evening and Charlie was in Father's care at Mother's home. When she returned home the next morning and saw the bruises, Mother said, she instructed Father to leave. Father gave a different account. He said Charlie's eyes were fine the night before. Father said he woke up around 6:00 a.m. and saw Mother taking Charlie into the living room. An hour or two later, hearing Charlie crying, Father went to the living room and found Charlie's head stuck between the couch and the ottoman. Father believed Charlie "scooted his way" into that space.

Department caseworker Cierra Davis observed all three children to be clean and well-nourished. Davis interviewed Sarah and Julia, then ages six and four, respectively. Both girls said they were afraid when Father stayed in their home. Sarah also said Father hit Mother. The girls reported Father disciplined them by spanking them. Sarah said nobody in the home used drugs or alcohol; Julia did not know what drugs or alcohol were.

Due to the conflicting accounts of how Charlie was injured and the parents' history with the Department (discussed below), the children were placed with Mother's parents a few days later as part of a Parental Child Safety Placement while the Department continued its investigation. The trial court appointed the Department to be the children's temporary managing conservator at the end of September 2015. The children remained with their maternal grandparents.

B. History of domestic violence

In May 2014, the Department received a report of neglectful supervision and physical abuse of Sarah and Julia. The report arose from an argument between Mother and Father that turned physically violent. Father punched Mother in the face and choked her until she scratched his face and neck in self-defense. Father then put a knife to Mother's throat. He was still holding the knife when police officers arrived. Mother told investigators Father had previously threatened her at gunpoint and told her not to leave him. The case was referred to the Department's Family Based Safety Services section.

Father has a long history of arrests for domestic violence. He has been convicted at least three times for assaulting Mother. Father said the assaults were "mutual."

C. Family service plans

Upon appointing the Department as the children's temporary managing conservator, the trial court signed an order requiring both parents to comply with any family service plan by the Department. Each service plan identified the tasks and services the parent needed to complete before the children could be returned to his or her care.

Both parents' plans required them to:

- complete a parenting class;
- obtain and maintain suitable employment and stable housing;
- complete a substance abuse assessment and follow the assessor's recommendations;
- submit to random drug testing;

- complete a psychosocial evaluation and follow the evaluator's recommendations;
- maintain regular contact with the caseworker; and
- make reasonable efforts to attend and participate in all hearings, permanency conferences, scheduled visitations, and requested meetings.

Both parents were required to complete individual or group counseling regarding domestic violence—Mother for victims and Father for perpetrators. Father's plan additionally required him to complete an anger-management class.

D. Trial

Trial was held in October 2016. The Department presented testimony from Mother, Father, and caseworker Jennifer Lombardi. Its documentary evidence included the parents' service plans, judgments of criminal convictions for Father, and drug test results for Mother, Father, and the children's maternal grandparents. Mother presented testimony from Tom Austin of Santa Maria Hostel, a residential substance abuse treatment facility. Father did not call witnesses.

1. Mother

Mother testified at length about her 13-year relationship with Father. He first assaulted her early in their relationship. Despite his violence toward her, Mother stayed with Father and had three children with him. She saw him physically discipline the children but never saw him act violently toward them. She said she was not thinking rationally during her time with Father. Mother and Father were not dating at the time of trial; she said she finally "put her foot down" and broke up with him after the incident with Charlie's eyes.

Mother admitted she did not satisfy all the requirements of her service plan.

She did not complete counseling geared toward domestic violence victims. She did not have a stable home or job at the time of trial, though she had an apartment and a job earlier in the case and had recently completed a work-training program.

Mother began using drugs in the ninth grade. Despite that admission, she said she did not take drugs before her children were removed. On the day the Department was named the children's temporary managing conservator, Mother tested positive by hair follicle for amphetamine, methamphetamine, cocaine, and marijuana.

Two months later, in November 2015, she refused to submit to a drug test; her refusal was considered a positive result under Department policy. In February 2016, nearly five months after her children were removed, Mother was positive for methamphetamine and cocaine. She refused to submit to a drug test in June 2016 but admitted she would have again been positive for methamphetamine and cocaine. Mother said she abused drugs after her children were removed because she was depressed from being without her children and was trying to self-medicate to numb her sadness.

Mother entered substance abuse treatment at Santa Maria Hostel on June 13, 2016, more than eight months after the case began. She was discharged in mid-September 2016. She was scheduled to begin outpatient treatment the day after trial.

At the time of trial, Mother was living with her parents. A few months earlier, the trial court ordered the children removed from that home because the grandparents were not protecting the children from Father. The grandfather was positive for marijuana at that time, and the grandmother was positive for methadone, for which she had a prescription. Mother said her stay with her parents would be temporary.

2. Father

Father had been incarcerated since February 2016 at the time of trial. Initially he was in jail for four months for "evading a felony," a charge that was dismissed. Five hours after his release, he was arrested and re-jailed for assault, reportedly of Mother's father.

Like Mother, Father admitted he failed to complete the requirements of his family service plan. He did not complete anger management classes or counseling for perpetrators of domestic violence. He underwent a substance abuse assessment, but did not follow the assessor's recommendations to take drug classes.

Father denied "beating up" Mother. At least once, he said, he was defending himself from her.

3. Other witnesses

Caseworker Jennifer Lombardi testified the Department was in the process of evaluating Father's out-of-state uncle as a possible placement for the children. If approved, the uncle was willing to adopt the children. Lombardi saw no reason the uncle would not be approved. The Department was also scheduled to conduct a home study on the children's paternal grandmother shortly after trial. The children's foster parents were also willing to adopt. Lombardi believed Mother's recent sobriety was not sufficient to warrant returning the children to Mother's care.

Tom Austin testified that Mother completed three months of inpatient substance abuse treatment at Santa Maria Hostel. He believed she was on the path to recovery and staying sober. He saw no danger for the children to be in Mother's presence or her home.

4. Trial court's findings

The trial court found termination of Mother's and Father's parental rights was in the children's best interest and was justified under several subsections of section 161.001(b)(1) of the Family Code: D and E (both concerning endangerment), N (constructive abandonment), and O (failure to comply with a court-ordered service plan). The trial court appointed the Department to be the children's managing conservator. Mother and Father timely appealed.

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 (West 2014); *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). Only one predicate finding under section 161.001(b)(1) is necessary 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 disbelieve. *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: Endangerment (subsection E)

Mother does not challenge the trial court's findings on subsections D, E, N, and O of section 161.001(b)(1) of the Family Code. Father challenges them all.

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 subsection 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).

We conclude the record supports the finding that termination is proper under subsection E as to both Mother and Father. Accordingly, we do not review the findings regarding subsections D, N, or O. *See A.V.*, 113 S.W.3d at 362.

A. Legal standards

Subsection E of Family Code section 161.001(b)(1) 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). "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. "Conduct" includes acts and failures to act. *See In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.).

A finding of endangerment under subsection E requires evidence the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *Id.* 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).

The parent's conduct both before and after the Department removed the child from the home is relevant to a finding under subsection E. *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 criminal behavior and imprisonment through trial).

B. Mother

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; *In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *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). 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. *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).

Mother admitted she had used drugs since she was in ninth grade—more than half her life. Even after her children were removed and she was at risk of losing custody of them, she continued to abuse drugs. She repeatedly tested positive for methamphetamine and cocaine. She did not seek substance abuse treatment for eight months after her children were removed.

Conclusion. The evidence of Mother's drug use supports the trial court's unchallenged finding of endangerment under subsection E. Accordingly, we are bound by that finding. *E.C.R.*, 402 S.W.3d at 249; *McGalliard*, 722 S.W.2d at 696.

C. Father

Domestic violence. "Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment." *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *accord S.R.*, 452 S.W.3d at 361.

Mother's and Father's 13-year-old relationship was marred by domestic violence. Father first assaulted Mother a year or two after they began dating. He abused her both before and after their children were born. The evidence shows he punched her, choked her, held a knife to her throat, and pointed a gun at her while telling her not to leave him. He was convicted three times for assaulting Mother.

Criminal activity. Evidence of criminal conduct, convictions, or imprisonment is relevant to a review of whether a parent engaged in a course of conduct that endangered the well-being of the child. *S.R.*, 452 S.W.3d at 360–61; *A.S. v. Tex. Dep't of Family & Protective Servs.*, 394 S.W.3d 703, 712–13 (Tex. App.—El Paso 2012, no pet.). Imprisonment alone does not constitute an endangering course of conduct but is a fact properly considered on the endangerment issue. *Boyd*, 727 S.W.2d at 533–34. Routinely subjecting a child to the probability that she will be left alone because her parent is in jail, endangers the child's physical and emotional well-being. *S.M.*, 389 S.W.3d at 492.

Father has been arrested more than twenty times since 1998. In addition to the domestic violence charges, he was charged multiple times for possession of a controlled substance. He was also accused of theft, burglary of a habitation, and making a terroristic threat, among other things. He was jailed for the eight months leading up to trial, half of which was for allegedly assaulting Mother's father.

Conclusion. Considering all the evidence in the light most favorable to the best-interest finding, we conclude the trial court reasonably could have formed a firm belief or conviction that Father engaged in conduct that endangered the children. *See J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266; *C.H.*, 89 S.W.3d at 25. Further, in light of the entire record, we conclude the disputed evidence the trial court could not reasonably have credited in favor of its endangerment finding is not so significant that the court could not reasonably have formed a firm belief or conviction that Father endangered the children. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding that termination is warranted under section 161.001(b)(1)(E) of the Family Code. We overrule Father's issues one through four.

III. Best interest

Mother's sole issue challenges only the factual sufficiency of the evidence to support the trial court's finding that termination of her parental rights is in the children's best interest. In his fifth issue, Father contends the evidence is legally and factually insufficient to support the best-interest finding.

A. Legal standards

Termination must be in the child's best interest. Tex. Fam. Code Ann. § 161.001(b)(2). Prompt, permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *Id.* § 263.307(a). 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).

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.). *See also* Tex. Fam. Code Ann. § 263.307(b) (setting out factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment).

B. Application

1. The children

Desires and needs. No evidence was presented about the children's desires or needs. When a child is too young to express his desires, the fact finder may consider that the child has bonded with the foster family, is well cared for by them, and has spent minimal time with a parent. *L.G.R.*, 498 S.W.3d at 205; *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.). However, no evidence was presented regarding the children's relationship with their foster parents.

Department's plan for the children. As of the time of trial, the Department was assessing a paternal great-uncle as a possible placement for the children. The great-uncle was willing to adopt the children. The Department was also due to evaluate the children's paternal grandmother as a placement. The children were in a foster-to-adopt home, so adoption by the foster parents was a possibility if placement did not work out with the great-uncle or the grandmother.

2. Mother

Endangerment. Mother endangered the children by abusing drugs both before and after they were removed from her custody. That endangerment is relevant to the children's best interest. *See S.R.*, 452 S.W.3d at 366.

Mother points to the progress she made toward sobriety and her intent to continue with substance abuse treatment as evidence that undermines the trial court's best-interest finding. As fact finder, the trial court was free to discredit her self-serving testimony. *See H.R.M.*, 209 S.W.3d at 109 (fact finder is sole arbiter when assessing credibility and demeanor of witnesses). Moreover, abuse of drugs is "hard to escape," and the fact finder is "not required to ignore a long history of

dependency . . . merely because it abates as trial approaches." *In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The trial court may reasonably determine that a parent's changes shortly before trial are too late to impact the best-interest decision. *See In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied).

Although a reasonable fact finder could look at Mother's progress and decide it justified the risk of keeping her as a parent, we cannot say the trial court acted unreasonably in finding the children's best interest lay elsewhere. *M.G.D.*, 108 S.W.3d at 514. It is not our role to reweigh the evidence on appeal, and we may not substitute our judgment of the children's best interest for the considered judgment of the fact finder. *See id.* at 531 (Frost, J., concurring in judgment).

Failure to comply with court-ordered services. The evidence is undisputed that Mother did not complete all of her court-ordered services. Her failure to do so is also relevant to the best-interest analysis. *See E.C.R.*, 402 S.W.3d at 249.

3. Father

Endangerment. As discussed, Father endangered the children by regularly committing crimes and assaulting Mother. Evidence relevant to statutory bases for termination is also relevant to the children's best interest. *See S.R.*, 452 S.W.3d at 366.

Father's abuse of Mother is relevant to the best-interest analysis even though Mother and Father were no longer a couple at the time of trial. Mother testified that their relationship was always "on again, off again." She continued to take him back despite the danger Father posed to her and their children. A fact finder may infer from past conduct endangering the child's well-being that similar conduct will recur if the child is returned to the parent. *Id.* at 367. The trial court reasonably could have considered that Mother and Father might reunite and Father would

again abuse her. *See id.* at 366–67.

Failure to complete court-ordered services. As with Mother, Father's failure to complete the requirements of his service plan is relevant to the best-interest analysis.

4. Conclusion on best interest

Considering all the evidence in the light most favorable to the best-interest finding, we conclude the trial court reasonably could have formed a firm belief or conviction that termination of Mother's and Father's parental rights was in the best interest of the children. *See J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266; *C.H.*, 89 S.W.3d at 25. Further, in light of the entire record, we conclude the disputed evidence the trial court could not reasonably have credited in favor of its best-interest finding is not so significant that the court could not reasonably have formed a firm belief or conviction that termination of both parents' rights was in the children's best interest. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding that termination is in the best interest of the children. We overrule Father's fifth issue and Mother's sole issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Busby, and Jewell.