

Affirmed and Memorandum Opinion filed May 2, 2017.



In The
Fourteenth Court of Appeals

NO. 14-16-00921-CV

**IN THE INTEREST OF C.M.-L.G. AKA K.M.G, K.D.D. AND K.D.D.,
CHILDREN**

**On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2015-05863J**

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

Appellant Mother appeals the trial court's final decree terminating her parental rights and appointing the Department of Family and Protective Services as sole managing conservator of her children, Caleb, Kevin, and Keith.¹ Appellant Father also appeals as to his child, Keith.² On appeal, both Mother and Father challenge the legal and factual sufficiency of the evidence to support (1) the

¹ We use pseudonyms to refer to appellants' children in this case. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

² An order adjudicating Father as Keith's father was signed March 29, 2016.

predicate grounds under which their parental rights were terminated, and (2) the finding that termination was in the children's best interest. We affirm.³

FACTUAL AND PROCEDURAL BACKGROUND

I. Pretrial Removal Affidavit

In May 2015, the Department received a referral alleging the neglectful supervision of Caleb, Kevin, and Keith by Mother. According to the referral, Mother was smoking marijuana and using ecstasy pills on a daily basis, while caring for the children. Mother also would leave the children at an aunt's house. At the time of the referral, Mother was living in a hotel room. There was a protective order in place against Father due to a recent domestic disturbance.

Following the referral, Department investigator George Steed attempted to meet with Mother and the children. When he arrived for a visit, he was met by a family friend, Donna, who was watching the children while Mother was at work. Steed observed Kevin and Keith, who did not appear to have any marks or bruises. Steed further noted the home had utilities and beds for the children. According to Donna, the children stay with her "most of the time." After Mother ended her relationship with Father, Mother did not have a place to stay. The children were staying with Donna while Mother stayed in a hotel room near her place of employment because Mother did not have transportation. Donna stated that Mother would visit the children on her days off from work. Donna further noted that Mother was a good mother who cared about her children.

Donna had no history with the Department and had not served any time in jail. Although Donna suffered from high blood pressure, she maintained it with

³ The trial court also terminated the parental rights of Caleb's and Kevin's unknown father during the same proceeding.

medication. Donna told Steed that she had raised Mother and was willing to raise Mother's children. Donna did not know when Mother would retrieve the children.

Subsequently, Steed spoke to Mother on the telephone. Mother reported that she had a new job at a call center and that she was working a double shift in order to save money for a place to live. Mother was shocked that the Department had received a referral and promised to call back after her shift ended.

Approximately a week later, Mother contacted Steed and agreed to meet with him at Donna's home. Mother also informed Steed of a third child, Caleb, who was not present during his initial visit. Subsequently, Steed met Caleb and arranged for Mother to take a drug test. Mother's hair follicle test was positive for both cocaine and marijuana.

Steed attempted to contact Mother multiple times following the drug test. After several weeks without contact, Steed visited Donna. Donna informed Steed that Mother had collected the children several months prior. Although Donna had not seen the children since then, she had spoken with Mother. Steed called in a police welfare check for Donna's residence. The responding officer reported that the children were not at the residence, and there was no contact information for Mother.

Steed then contacted Father's mother, who had not seen Father in a month. Grandmother said she had a good relationship with Mother and would inform Steed if she had any contact with either Mother or Father. Steed eventually reached Mother on the telephone. Mother had the children, and they were living with a friend. Mother agreed to meet with Steed to discuss the results of her drug test.

In late August 2015, Steed received a phone call from Father. Father stated that he was the father of Kevin and Keith.

In September 2015, Steed called Mother and learned that she had fallen at work and was on her way to the hospital. Steed met with Mother at the hospital. Mother agreed to work her services. Mother stated that she had tried to work services in the past, but they had conflicted with her work schedule. Mother named Donna as a possible placement for the children. Steed then met with Donna and completed a parental child safety placement.

Subsequently, Father called Steed and expressed his desire to be involved with the children. According to Father, Mother had brought the children to live with him. Father had gotten a new job and was staying with Grandmother, who could help him care for the children. Father agreed to participate in services and to take a drug test.

In October 2015, a new Department investigator, Uriah Barnaby, was assigned to the case. Barnaby learned that Father's hair follicle test was positive for cocaine and marijuana. Barnaby attempted to visit Donna in order to confirm the parental child safety placement was still in place. However, Donna was in the emergency room and had left the children with Father.

Father called Barnaby and confirmed that he had the children. Barnaby expressed his concerns over Father having the children in light of his drug test results. Father admitted he had informed Steed he would test positive for marijuana use, but Father did not know how cocaine got into his system.

Barnaby scheduled an appointment to meet Father and the children at Barnaby's office. After Father failed to arrive at the scheduled time, Barnaby met Father at a different location. The children were not present. Father reiterated that he was the biological father of Kevin and Keith; however, he was not named as the father on their birth certificates and did not pay child support. Father did not know the identity of Caleb's biological father but considered Caleb his child as well.

Father had no information as to Mother's whereabouts and was no longer in a relationship with her.

During the meeting, Father again expressed confusion over his positive test result for cocaine. Father denied using marijuana laced with cocaine, but conceded there might be cocaine in "tabs," which he used as a type of muscle relaxant. Father stated he had been shot in the arm during a drive-by shooting over the summer. Father denied any gang affiliation or criminal history. Father had been employed in his new job for approximately 30 days.

Father was aware of Mother's occasional marijuana use but had not seen her "pop pills." Father denied that the children were always at Donna's house. Father admitted to being involved in a domestic disturbance but declined to share any details. Father confirmed that he had all three children, and his sister was watching them at Grandmother's house. Father stated that he never worked services in the previous cases with the Department, but further noted he could never reach anyone at the Department in regard to services.

Barnaby informed Father that the children would need a new placement in light of the domestic violence and both parents' drug use as well as Donna's admission into the hospital. Father appeared confused by this news and did not seem to understand why he was involved in the case. Barnaby explained that under these circumstances, the children were at risk. Father complained that he had only agreed to a urine test, not a hair follicle test. Father stated he wanted the children placed with Grandmother. However, when Father called her, Grandmother agreed to keep only Kevin and Keith. Barnaby warned Father that if placement was not found for all three children, they might be placed in foster care. Father stated, "[N]one of my kids are going into foster care and that is that."

During his meeting with Father, Barnaby called Mother and informed her that Caleb needed a new placement. Mother believed Donna had been discharged from the hospital and would be able to care for the children. Attempts to reach Donna on the phone were unsuccessful. When Barnaby asked Mother about Caleb's father, Mother stated that Caleb did not have a father and became upset.

Father refused to provide specific information as to the children's whereabouts. Father claimed he was not hiding the children, but they were staying with someone who did not want to be involved in the case. Father promised to bring the children to Grandmother's house the following morning.

Barnaby met Mother at Donna's house a couple of days later, having explained to her that the Department could not locate the children. Mother stated that she used drugs when she was "down" and unemployed. According to Mother, she had stopped using drugs prior to initiation of this case. During their meeting, Father appeared with all three children. Father reiterated that he did not want the children in foster care and that he was willing to work services.

Barnaby interviewed six-year-old Caleb, who said he lived at home with Kevin, Keith, and Donna. Donna slept in the living room, while he and his brothers slept in the bedroom. Caleb stated he also had a sister, Courtney, but she lived with her father.⁴ Caleb denied any arguing or fighting in the home and stated that he had never been left at home by himself. Caleb denied knowing what smoking, drinking, or drugs are. Caleb denied the presence of any guns in the house as well as visits from the police. Caleb stated that he gets spanked on the bottom with a belt when he disobeys his parents. Caleb denied any inappropriate touching of his private parts.

⁴ Mother has a fourth child, Courtney, who is not a subject of the underlying case.

Caleb told Barnaby that Mother left him in a hotel room with the television on while she went to work. Caleb did not know how long Mother was gone, but he was not scared. Caleb stated that his home would be dirty but then it would be clean. Barnaby observed that Caleb did not have any marks or bruises, his hair was combed, and his clothes were clean.

Barnaby reviewed the placement agreement with Mother, Father, and Donna, confirmed that both parents understood all contact with the children must be supervised, and explained that the family must work their services.

Subsequently, Barnaby contacted Courtney's father, A.G., who confirmed that he had been caring for Courtney since she was two months old. A.G. did not allow Mother to have any contact with Courtney due to Mother "being unstable and never having herself together." A.G. also disapproved of Father. Although Mother had been ordered to pay child support for Courtney, she had not paid anything.

A.G. denied being Caleb's biological father, but noted that his name was on Caleb's birth certificate and he had not taken a paternity test. According to A.G., during a rocky period in their previous relationship, Mother had called him to announce that she had given birth to Caleb. Believing Caleb was his, A.G. signed the birth certificate. However, Mother later told A.G. that he was not the father. A.G. agreed to take a paternity test as to Caleb if necessary.

In October 2015, the Department filed its original petition for termination of Mother's and Father's parental rights to Caleb, Kevin, and Keith.

II. Trial

Trial to the court commenced on October 20, 2016. Before any witness testimony, the Department introduced the following into evidence without

objection: each child's birth certificate; certificates of paternity registry search to establish that no notice of intent to claim paternity had been filed as to Caleb and Kevin; search results from the Court of Continuing Jurisdiction Registry, demonstrating that none of the children had been the subject of a suit affecting the parent-child relationship in which a judgment was entered on or after January 1, 1974; Mother's and Father's family service plans; a status hearing order; records from the Children's Crisis Center; drug tests results for both parents; and Father's criminal history.

A. Bruce Jefferies

The Department called Bruce Jefferies as its first witness. Jefferies owns National Screening Company, which provides drug and DNA testing services. In January 2016, Father passed his urine test but failed the hair test for drug use. Subsequently, in March 2016, Father tested negative for illegal drug use.

In September 2016, Father's urine tested positive for Xanax, marijuana, and alcohol. A hair follicle test performed at the same time revealed Father was positive for cocaine, cocaethylene (cocaine mixed with alcohol), and marijuana. The test results further showed that the cocaine had metabolized in Father's system and, thus, was the result of ingesting cocaine and not due to mere exposure. Jefferies was unaware of any prescription drug that would cause an individual to test positive for cocaine. While it was possible that Father's drug use could have occurred six months prior to the September test, Jefferies testified there was only a "remote possibility" or "very small chance" that the drug use was not more recent.

B. Mother

Mother recalled that the allegation initiating the instant case was that Mother was using marijuana and ecstasy. At the time of the allegation, the children were

living with Donna. Mother acknowledged that, subsequent to the referral, she “probably” tested positive for cocaine and marijuana.

After the children came into the Department’s care, the court told Mother she would need to do some services in order to have the children returned to her. Although she did not have proof of completion, Mother participated in her court-ordered anger management class. Mother also provided the Department with verification of her income. Mother testified she had consistently maintained employment. However, Mother had stopped working recently because she was diagnosed with chemical pneumonia.

At the time of trial, Mother had been living with her sister for a month. Prior to living with her sister, Mother had resided in her own house for a year. When the instant case began, however, the children were living with Donna while Mother lived in a hotel near her place of employment.

Mother completed her court-ordered psychosocial assessment but had not completed her parenting class. Mother conceded that she failed to refrain from drug use. Mother also participated in a drug assessment and met with a counselor a few times. Mother last used drugs “[w]ay more than two months ago,” at which time she smoked “kush.” When asked how frequently she uses drugs, Mother stated, “I don’t. It’s just occasional. Maybe once a month, not even. Once every three months.” Mother further testified that her drug use does not have a negative impact on the children because “[t]hey are very smart and well taken care of” and they are perfectly safe and healthy despite her drug use.

Mother believes the children should be at home with their parents instead of in foster care. Even though the children were placed in foster care due to Mother’s drug use, Mother does not equate her drug use with having a negative impact on the children because “everyone does drugs.” Mother acknowledged that she was

using drugs prior to the Department's involvement. Mother stated that stress triggers her drug use. Mother has "a lot of stressors in [her] life," including the Department, an ill father, and finding a place to live. However, Mother believes her anger management class will eliminate any stress moving forward.

On cross-examination, Mother reiterated that at the time of removal, the children were safe, happy, clean, and well-fed. Mother had been employed, and Donna, her godmother, was helping to care for the children. During her anger management class, Mother learned how to "calm down" and "deal with life as it comes to you." Mother participated in some of her parenting classes during which she learned how to discipline children and how to communicate with them in a healthy environment.

Mother testified that her sister's house has room for the children to come live with her. Mother assured the court the children would be safe if returned to her care because her son had reported that he was not in any danger, had never seen Mother use drugs, and was happy. Mother further stated her son wants to come home. Mother believes she has been a good parent to the children and would like to continue being a good mother to them.

Mother testified she was looking for employment and recently had a job interview. Mother was not in a relationship with Father at that time, but she could not predict what their future relationship might be. Mother believes Father is an "excellent father." Mother further testified that Grandmother lives in a "very nice home" and that she has bonded with all three children. If she did not regain custody, Mother wanted the children to live with Grandmother. Mother believes Grandmother loves the children and would provide a safe and stable environment for them.

On redirect examination, Mother testified that Father had been incarcerated at some point during the pendency of the case because he had assaulted her. Mother only remembered that Father hit her and stated it was the only incidence of domestic violence between the two of them. Mother recalled, however, that a visit with the children ended prematurely because she and Father had an altercation during the visit.

C. Father

Father testified that he submitted to a drug test in September 2015, which revealed he was positive for both cocaine and marijuana. Father acknowledged his use of marijuana. However, Father continued to maintain he had never used cocaine. A subsequent urine test revealed that Father was positive again for marijuana one month before trial. Despite this result, Father maintained he had not smoked marijuana in at least a year. When asked to explain the result, Father responded: “There’s no explanation for it at all. I’m wrong. I know that. There’s no explanation for it and no excuses either.”

At the time of trial, Father was living with Grandmother. Father understood that he would have to move out of Grandmother’s house if the children were placed with her. Father further testified that prior to his altercation with Mother in April 2015, he had been convicted of assault of a family member in a separate case and was incarcerated after violating the terms of his probation. According to Father, he and Mother had a couple of disagreements and he struck her one time. Father stated this was the only time he ever struck Mother during their relationship. Both Kevin and Keith witnessed the incident.

Father recalled the court ordering him to perform services in order to obtain reunification with the children. The court ordered Father to remain drug-free, and Father originally testified that he passed all of his drug tests. However, Father later

acknowledged that he tested positive for illegal drug use during the pendency of the case. Father did not take any parenting classes but had participated in a psychosocial assessment and submitted to DNA testing. With the exception of two hearings — the first one, of which Father was unaware, and a second one, which occurred while Father was incarcerated — Father believed he had attended all court hearings.

Father testified that he moved in with Grandmother approximately six months ago after he and Mother separated due to a disagreement. Father was employed by a temp service and also had his own business as a professional photographer.

The children were present when Father and Mother got into an altercation during a visit with the children, and Father conceded it was not healthy for the children. Father further acknowledged that his drug use was not safe for the children. However, Father believed his parental rights should remain intact because he is a “great father” and the case was initiated against Mother, not him. Father stated he could provide a safe and stable environment for the children but agreed that a home where both parents are using drugs is not safe and stable. Father was not providing financial support for Keith while he was in foster care.

Father testified that he and Mother visited the children every week. Even though he is not the biological father of all three children, Father wants custody of them all. The children call him “daddy.” According to Father, Mother is a “great” parent who loves her children and the children are bonded to her.

D. Department caseworker

Department caseworker Adwoa Yeboah testified that the children were in foster care and doing very well. The placement was meeting all of the children’s

physical and emotional needs. Although a home study was being conducted for potential placement of the children with Grandmother, the study had not been completed at the time of trial. Yeboah recommended the children remain in their current placement.

Yeboah did not believe it was in the children's best interest to have parents who continue to use drugs. Yeboah stated it is in the children's best interest to have a safe and stable environment, a place where the parents are always home to care for the children and do not use drugs in front of them. Such an environment is also free of violence and meets all of the children's needs. At the time of trial, Mother and Father had not demonstrated they could provide the children with a safe and stable environment.

Yeboah further testified termination of Mother's and Father's parental rights was in the children's best interest. All three children were very young⁵ and needed parents who were willing to protect them. According to Yeboah, the children "need to be with people who are willing to help them go to school, educate them, and meet all of their basic needs." Yeboah confirmed that neither parent had completed court-ordered services. Yeboah further confirmed that Father was not the biological parent of either Caleb or Kevin, but she did not know the identity of their biological father.

Yeboah had not witnessed Father's interactions with the children. According to the previous caseworker, Father brought birthday gifts and snacks during his visits. Yeboah had not witnessed any of Mother's supervised visits with the children either. However, Yeboah believed termination of Mother's parental rights was warranted because Mother had not completed her services, despite multiple opportunities to do so, and she continued to test positive for drugs.

⁵ The children were aged 7, 3, and 2 at the time of trial.

E. Trial court's termination of parental rights

Following argument by counsel, the trial court orally found terminating the parental rights of Mother and Father was in the children'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 the children'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. Mother's Predicate Grounds for Termination

A. Mother concedes she did not comply with her 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, the children had been in the Department's managing conservatorship for approximately one year at the time of trial. Third, there is

undisputed evidence that the children were removed due to Mother's illegal drug use.

The evidence is undisputed as well that Mother did not complete the requirements of her service plan. Most notably, Mother failed to refrain from using illegal drugs during the pendency of this suit. 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.

B. 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 a decision 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 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. *Id.* 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.⁶

⁶ By doing so we are not concluding that this review is always necessary. *See In re A.A.L.A.*, No. 14–15–00265–CV, 2015 WL 5437100, *4 (Tex. App.—Houston [14th Dist.] Sept.

1. Legal standards

Both subsections D and E of section 161.001(b)(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 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

15, 2015, no pet.) (mem. op.).

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).

2. Subsection E

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.

As a general rule, subjecting a child to a life of uncertainty and instability endangers the child’s physical and emotional well-being. *See J.O.A.*, 283 S.W.3d at 345. Although incarceration alone will not support termination, evidence of criminal conduct, convictions, and imprisonment may support a finding of endangerment under subsection E. *See A.R.M.*, 2014 WL 1390285, at *8; *In re C.A.B.*, 289 S.W.3d 874, 886 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Likewise, illegal drug use may support termination under subsection 161.001(b)(1)(E) because “it exposes the child to the possibility that the parent may be impaired or imprisoned.” *Walker v. Tex. Dep’t of Family & Protective*

Servs., 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). This court also has held that a parent’s decision to engage in illegal drug use during the pendency of a termination suit, when the parent is at risk of losing a child, may support a finding that the parent engaged in conduct that endangered the child’s physical or emotional well-being. *In re A.H.A.*, No. 14–12–00022–CV, 2012 WL 1474414 (Tex. App.—Houston [14th Dist.] Apr. 26, 2012, no pet.) (mem. op.). Finally, “[d]omestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment.” *S.R.*, 452 S.W.3d at 357 (citing *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.)).

Mother tested positive for illegal drug use throughout the pendency of the case and admits she failed to comply with her family service plan in this regard. The results of her drug tests were admitted into evidence without objection. Mother further acknowledged on the record that the children were removed because of her drug use.

Mother concedes the evidence supporting a finding under subsection E is legally sufficient but asserts it is not factually sufficient to support the trial court’s finding under subsection E. Mother first contends the endangerment finding cannot stand due to the lack of expert testimony to interpret the results of her drug tests. Mother cites no authority, and we know of none, requiring expert testimony about drug test results in parental termination cases. Mother further contends there was no evidence that her drug use exposed the children to danger, especially in light of her testimony that she never used drugs in the children’s presence. Contrary to Mother’s contention, a parent’s drug use need not occur in the child’s presence to constitute endangerment. *See In re A.M.*, 495 S.W.3d 573, 579–80 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (noting that “[b]ecause it significantly harms

the parenting relationship, drug activity can constitute endangerment even if it transpires outside the child's presence"). Having reviewed the entire record, we conclude the disputed evidence is not so significant that the trial court, as fact finder, could not have formed a firm belief or conviction that Mother's conduct endangered the children. Accordingly, the evidence is factually sufficient to support that finding.

Having concluded the evidence is legally and factually sufficient to support the trial court's finding under subsection E, 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.

III. Father's Predicate Ground for Termination: Endangerment

Father contends the Department failed to provide sufficient evidence to prove endangerment pursuant to subsection E because although he "did engage in activities, such as assaulting the mother of his children and testing positive for drugs, [they] were limited in scope." We disagree.

Father's drug test results, which included several positive results for illegal drug use, were admitted into evidence without objection and supported by expert testimony from Jefferies. The evidence showed that Father continued to abuse illegal drugs after the children were removed and he was subject to the terms of his family service plan. The judgments of conviction from Father's prior assault cases were also admitted without objection. Father admitted to these offenses on the record and was incarcerated for a time during the pendency of this case. Although Father asserted he hit Mother only one time, Father testified both Kevin and Keith witnessed the incident.

We conclude the evidence presented with respect to Father's criminal history and subsequent imprisonment for violence against family members combined with his drug use, demonstrates a deliberate course of conduct from which a reasonable trier of fact could have found that Father endangered Keith's emotional and physical well-being. Considered in the light most favorable to the trial court's finding, the evidence is legally sufficient to support the trial court's determination that termination of Father's parental rights was justified under section 161.001(b)(1)(E) of the Family Code. Further, in view of the entire record, we conclude the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination was warranted under section 161.001(b)(1)(E). Accordingly, we conclude the evidence is factually sufficient to support the 161.001(b)(1)(E) finding.

Having concluded the evidence is legally and factually sufficient to support the trial court's finding under subsection E, we need not review the sufficiency of the evidence to support the subsection D and O findings. *See A.V.*, 113 S.W.3d at 362. We overrule Father's second issue.

IV. Best interest

In their remaining issues, Mother and Father challenge the sufficiency of the evidence to support the trial court's finding that termination of their parental rights is in the children's best interest. Mother concedes the evidence is legally sufficient but contends there is factually insufficient evidence. Father asserts the evidence is both legally and factually insufficient. We review the entire record in deciding a challenge to the court's best-interest finding. *E.C.R.*, 402 S.W.3d at 250.

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 presumed to be in the child's best interest. *See* 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. Mother

Failure to complete court-ordered services. Evidence supporting termination under one of 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. *S.R.*, 452 S.W.3d at 366. Thus, the evidence that Mother did not complete her court-ordered family service plan is relevant to the best-interest analysis.

Department history. The Department investigated Mother two times before this case began. In March 2010, the Department received a referral of neglectful supervision, physical abuse, and physical neglect of Caleb by Mother. The latter

allegations were ruled out or unable to be determined, but the Department made of a finding of “reason to believe” the allegation of neglectful supervision. The case was later closed without completion of services because the Department was unable to locate the family. In November 2012, the Department received a second referral, this time alleging physical abuse of newborn Kevin after Mother and Kevin both tested positive for marijuana. The Department determined there was “reason to believe” the physical abuse allegation. The case was later closed after services were completed and the family could no longer be located.

Employment. Mother testified she had maintained regular employment during the pendency of the case but had recently stopped working due to a diagnosis of chemical pneumonia. Mother stated she was looking for a new job, but she was not employed at the time of trial.

Emotional and physical danger. A parent’s drug use supports a finding that termination 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.). The factfinder 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 re B.G.*, No. 14–14–00729–CV, 2015 WL 393044, at *7 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.) (mem. op.) (considering a parent’s criminal and drug histories in affirming the decision that termination was in the best interest of a child). Mother’s longstanding history of illegal drug use evinces a course of conduct that a factfinder reasonably could conclude endangers the children’s well-being. The record reflects Mother continued to abuse drugs after the instant case was initiated. Despite acknowledging the children were removed because of her drug use, Mother maintained her drug use does not endanger the children because she does not use

drugs in front of them and they are happy, healthy children. In other words, Mother denies any correlation between a parent's drug use and a child's safety.

Willingness to parent. At trial, Mother was unequivocal in her statements that she wanted to be a good parent to the children.

B. Father

Endangerment. The evidence that Father endangered the children is relevant to the best-interest analysis. *S.R.*, 452 S.W.3d at 366. The trial court reasonably could have inferred Father's previous actions, particularly his acts of domestic violence and substance abuse, will recur if Keith is returned to him.

Court-ordered services. Father testified that he did not attend any of the court-ordered parenting classes. Father further failed to abstain from illegal drug use, as ordered, during the pendency of this case. Father also missed two court hearings, one of which was due to incarceration.

Employment. Father testified he was employed by a temp agency and owned his own business as a professional photographer.

Willingness to parent. At trial, Father was unequivocal in his statements that he wanted to be a good parent to his children.

C. Conclusion on best interest

Father has a history of endangering the children through substance abuse and violent behavior. Mother also has a history of endangering the children through substance abuse. Both parents testified they want to be good parents to the children, but continued to use illegal drugs after the children were removed. It is undisputed that neither Mother nor Father completed their court-ordered services.

Considering all the evidence, we conclude the evidence is legally and factually sufficient to support the trial court's finding that termination of Mother's

and Father's parental rights is in the children's best interest. We overrule Mother's second and Father's fourth issues.

CONCLUSION

We affirm the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Boyce, Jamison, and Brown.