Affirmed and Memorandum Opinion filed May 11, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00018-CV
NO. 14-17-00029-CV

IN THE INTEREST OF Q.M., Q.M., Q.J.K., Q.D.K., Q.N.K. AND Q.R.K., CHILDREN

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause Nos. 2015-47516 & 2015-47503

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

Appellants T.N.O. ("Mother") and C.R.M. ("Father") appeal the trial court's final decree terminating their parental rights and appointing the Department of Family and Protective Services ("the Department") as sole managing conservator of Q.M., Q.M., Q.J.K., Q.D.K., Q.N.K. and Q.R.K.. All six children have the same mother, T.N.O. C.R.M. is the father of Q.M. and Q.M. ("the twins"). The father of

Q.J.K., ("Jose") Q.D.K., ("Don") Q.N.K. ("Nadine"), and Q.R.K. ("Rene")[1] did not appeal the termination of his parental rights. Both Father's and Mother's parental rights were terminated on the predicate grounds of endangerment and failure to comply with a family service plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), and (O) (West Supp. 2016). The trial court further found that termination of the parents' rights was in the best interest of the children.

In two issues Mother challenges the legal and factual sufficiency of the evidence to support the trial court's findings that she failed to complete her service plan, and that termination is in the best interest of the children. In four issues Father challenges the legal and factual sufficiency of the evidence to support the predicate termination grounds and the finding that termination is in the best interest of the twins. We affirm because the evidence is legally and factually sufficient to support the trial court's findings that (1) both parents endangered the children; and (2) termination is in the children's best interest.

I. Factual and Procedural Background

A. Pretrial Removal Affidavit

The Department received a referral alleging neglectful supervision of the twins on the day they were born. Mother's drug screen at the time of the twins' birth was positive for benzodiazepines, opiates, cocaine, and PCP. The twins' urine drug screens were negative. Mother admitted taking opiates and benzodiazepines sporadically to relieve pain from a car accident, but denied using cocaine and PCP. The day before the twins were born Mother reported she was in pain and asked a neighbor for aspirin. The neighbor gave Mother two turquoise pills with the letters "LV" printed on them. Mother did not know what the pills were, but took them

[1] Pursuant to Texas Rule of Appellate Procedure 9.8, we use fictitious names to protect the identities of the minors.

anyway. Mother reported that she became "violently ill" and went to the hospital where it was determined she was in labor. The twins were born prematurely at 29 weeks, weighing just over three pounds each.

Due to neglectful supervision, Mother's prior history with the Department, an earlier conviction for child endangerment, and Mother testing positive for multiple illegal drugs at the birth of the twins, Jose, Don, Nadine, Rene, and the twins were removed from Mother. At the time of the removal, Father, the alleged father of the twins, was incarcerated.

After the children were removed, Mother told an investigator that the blue pills could have been Ecstasy. Mother denied having a criminal history, and initially denied having a history with Child Protective Services, but changed her story and admitted she had a CPS case nine months earlier, but the case was closed. Mother reported that the twins' father was in jail because he killed two people. Mother declined her first drug test because she had an appointment to get a tubal ligation.

The investigator interviewed the three older children. Jose, eleven years old at the time, appeared to be developmentally on target for his age. He reported that his brother, two sisters, aunt, grandpa, and grandma live in the same home. He reported that Mother does not really live in the home and he does not know where his father lives. Jose stated that no one in the home fights or argues and that the police had never been to the home. Jose had no marks or bruises and denied any inappropriate touching. Don and Nadine were observed to be of appropriate height and weight with no visible marks or bruises. Both children reported that no one in the home fights or argues, but they did not know whether police have been to the home. At the time of the investigation Rene was three years old. The investigator observed Rene rather than interview her. Rene appeared to be of appropriate height

and weight and was appropriately dressed with no visible marks or bruises.

Mother's history with the Department began in 2011. At that time, the Adult Protective Services Department received a referral alleging Mother suffered from mental illness. It was reported that Mother was not stable on her medication. The case was closed because the Department was unable to locate Mother. In September 2014, the Department received a referral alleging physical abuse and neglectful supervision of Jose, Don, Nadine, Rene, and one of Mother's older children who is not the subject of this suit. It was reported that Mother, C.K., the father of Jose, Don, Nadine, and Rene, and her boyfriend at the time had a pattern of substance abuse, domestic violence, and participation in illegal activities. In November 2014, the Department received another referral alleging neglectful supervision of the children. It was reported that Mother and C.K., the older children's father, engaged in a physical altercation with each other while the youngest child was present. The case was "ruled out with risk factors controlled."

Before the birth of the twins in December 2014, the Department received a referral for neglectful supervision of Nadine when she was six years old. Mother left Nadine home alone "in the middle of the night." Mother was eventually convicted of child endangerment as a result of this incident. The pretrial removal affidavit listed prior criminal convictions for Mother including assault causing bodily injury to a family member, criminal mischief, theft, and abandoning or endangering a child.

The only information about Father in the pretrial removal affidavit is Mother's report that he is in jail awaiting trial on capital murder charges.

The trial court signed an order removing the children from the home and naming the Department temporary managing conservator. The trial court ordered both parents to comply with family service plans to obtain the return of their

children. The service plans required the parents to:

- provide financial support for the children;
- maintain stable and sanitary housing and secure employment;
- attend and participate in all meetings, hearings, and visits related to the children and the agency's case;
- participate in a drug and alcohol assessment and complete any services that may result from the assessment;
- participate in a six to eight week parenting course;
- participate in a psychosocial assessment and complete any services that may result from the assessment; and
- report for random drug testing with the understanding that a refusal to test or a no-show will be viewed as an indication of drug use and counted as a positive result.

B. Trial Testimony

The Department called Mother as its first witness. Mother admitted a conviction for burglary, which she committed with C.K., the father of Jose, Don, Nadine, and Rene. Mother further admitted convictions for assault of a family member, criminal mischief, theft, and a deferred adjudication for theft.

On the child endangerment charge, Mother pleaded guilty and received deferred adjudication community supervision. The State subsequently filed a motion to adjudicate guilt on the endangerment charge. In the motion the State alleged that Mother violated the conditions of her community supervision by failing to (1) report to her community supervision officer; (2) participate in community service; (3) pay fees and court costs; (4) submit to an educational skill level evaluation; and (5) provide proof of a high school diploma or General Educational Development certificate. Mother pleaded true to the State's motion and entered into a plea bargain agreement for a sentence of 180 days in State Jail. Mother served her time in jail during the pendency of this termination proceeding.

Mother testified that in addition to the six children in this case, she has a sixteen-year-old daughter who lives with her paternal grandparents and a three-year-old son who lives with his paternal grandmother. Drug tests in August 2015, after the removal of the children, were positive for amphetamine, methamphetamine, hydromorphone, hydrocodone, PCP, cocaine, and marijuana. Mother admitted she had been using “numerous drugs” while pregnant with the twins. Mother is currently working for Meals for You, and receives Social Security disability because she has been diagnosed with bipolar disorder. Mother admitted filing charges against Father for aggravated assault with a deadly weapon, but denied that Father assaulted her.

Mother testified that she completed her service plan except for the requirement that she attend individual counseling. Mother testified she had not used drugs since getting out of jail approximately six months before trial. Mother used alcohol, but did not understand that alcohol use was prohibited. Mother is living in an apartment, paying $250 monthly rent to a family member. Mother took a parenting class while she was incarcerated. Mother testified she had sufficient beds, clothing, and food for the children at her apartment. Mother attended twelve-step meetings, and saved money to support her children.

Sha’Dawnna Handy, the caseworker assigned to all six children, testified that Jose and Don were placed in a foster home where they were adjusting well. The foster home is an adoptive placement where both boys’ emotional and physical needs are being met. They receive counseling and attend school. Both boys were behind in school when they came into care, but the foster mother is meeting with school counselors to help the boys improve through extra homework and extra credit.

Nadine and Rene are also placed in a foster home, which is not an adoptive

placement. The girls also receive regular counseling. Nadine has negative behaviors at home and school, but is being counseled to redirect those behaviors in a positive manner. The foster mother is willing to keep the girls until an adoptive home can be found.

The twins are in a third foster home, which is an adoptive placement. They were born with health issues, but those issues have been addressed by their foster parents. The twins are seen regularly by a pediatrician and are current on their immunizations. The twins' emotional and physical needs are being met by their foster parents.

Handy reviewed the family service plan with Father. Father was incarcerated, but Handy instructed him to engage in the services that the jail offered. Father did not provide any information for any service completed while in jail. Father contacted Handy several times to inquire about the welfare of his children and ask for pictures. He did not have any relatives for potential placement of the twins.

Handy also reviewed the family service plan with Mother. Mother signed the plan before she was incarcerated. Between August 2015, when the children came into the Department's care, and June 2016 the only service completed by Mother was the parenting class taken in jail. Before going to jail Mother did not participate in any services. After getting out of jail a few months before trial Mother completed the majority of her services. Despite completing most of her services, the Department does not believe Mother sufficiently completed the services to obtain the return of her children. Handy testified that there has not been enough time since Mother got out of jail for Mother to demonstrate stability. She has not visited the children since getting out of jail and did not start any services before going to jail. Mother has not been permitted to visit the children by order of the

trial court. Mother completed all of her services except individual counseling. Mother completed ten of the required twelve individual counseling sessions. Mother tested negative for all substances except alcohol after being released from jail. The Department recognizes that Mother is earning an income, but does not characterize her part-time job as stable employment.

Handy testified that it would be in the best interest of the children for their parents' rights to be terminated so that the children could grow up in a stable, drug-free, and safe environment. Four out of the six children are in adoptive homes. The girls are at an age where finding adoptive homes for them is reasonable. The twins cannot be placed with Father because he is currently in jail awaiting trial on charges of aggravated assault with a deadly weapon and capital murder. The complainant in the pending aggravated assault charge is Mother. The only service Father has completed is DNA testing.

Handy testified that over the course of the children's lives Mother endangered the children by engaging in criminal activities and using illegal drugs. Mother had a conviction for child endangerment that arose when she left one of the children home alone. Handy further testified that Mother's drug use puts the children at risk.

Mother's counselor, Glenda Alexander, testified that she provided substance abuse and codependency counseling to Mother as a contractor under referral from the Department. As part of Mother's service plan, Alexander conducted twelve individual sessions with Mother, and Mother attended 24 group sessions. Alexander testified that Mother was accountable for her actions, and developed skills to address certain issues. Mother talked a lot about her children and her family, and had the desire to improve. Alexander believes that Mother has demonstrated a commitment to sobriety. Alexander recommended that Mother be

allowed to visit her children and rejoin with her children based on her maintaining recovery and sobriety. Alexander recommended supervised visitation rather than termination.

Father testified that he was advised to invoke his Fifth Amendment right against self-incrimination if asked about the pending charges of aggravated assault and capital murder. Father maintained contact with his caseworker by sending letters to her and asking how the children were doing. The caseworker responded and told Father the children were doing well. Father requested information to help him complete his services while he was incarcerated, but he did not receive any information.

Father is an air conditioning technician, and if he is not convicted on the pending charges, he plans to return to that work. Father asked that his parental rights not be terminated so he could have access to his children when he was released from prison. The trial court admitted evidence of Father's judgment of conviction for driving while intoxicated in 2010. The trial court further admitted evidence of pending indictments against Father for capital murder and aggravated assault with a deadly weapon. Mother was the named complainant in the aggravated assault charge. Father testified that his relationship with Mother lasted seven months. Father was in jail at the time the twins were born.

The children's maternal grandmother ("Grandmother") testified on behalf of Mother. Grandmother cared for the children several times in the past. Grandmother was unaware of Mother's drug use until she was told by the Department caseworker. Grandmother has consistently asked that the children be placed with her. Grandmother testified that the children had a bond with Mother. Grandmother acknowledged that she had to care for the children while Mother was incarcerated, and that one of Mother's convictions was for child endangerment. Mother reported

to Grandmother that Father threatened Mother with a gun at the time Mother was pregnant with the twins. The children were removed from Grandmother because she allowed Mother unsupervised visitation.

At the conclusion of the bench trial, the trial court terminated Mother's and Father's parental rights under Family Code sections 161.001(b)(1)(D) and (E) (endangerment); and (O) (compliance with service plan). *See* Tex. Fam. Code Ann. § 161.001(b)(1). The trial court further found that termination of Mother's and Father's parental rights was in the children's best interest.

Mother and Father have appealed challenging the legal and factual sufficiency of the evidence to support the termination of their parental rights.

II. ANALYSIS

A. Standards of Review

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

Due to the severity and permanency of terminating the parental relationship, Texas requires clear and convincing evidence to support such an order. *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.). However, this does not mean that we must disregard all evidence that does not support the finding. *In re D.R.A.*, 374 S.W.3d at 531. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id*.

In reviewing the factual sufficiency of the evidence under the clear and convincing burden, 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).

In a proceeding to terminate the parent-child relationship brought under

section 161.001 of the Texas Family Code, the petitioner must establish, by clear and convincing evidence, one or more acts or omissions enumerated under subsection (1) of 161.001 and that termination is in the best interest of the child under subsection (2). Tex. Fam. Code § 161.001; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

B. Predicate Grounds

1. Mother's Appeal

The trial court made predicate termination findings that Mother had committed acts establishing the grounds set out in subsections D, E, and O, which provide that termination of parental rights is warranted if the fact finder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has:

> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
>
> (E) 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; [or]
>
> (O) 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)(D), (E), and (O).

Mother concedes that evidence of her criminal history and drug usage is sufficient to support the predicate termination finding under section 161.001(b)(1)(E). *See In re A.M.M.*, 464 S.W.3d 421, 426 (Tex. App.—Houston

[1st Dist.] 2015, no pet.) ("Drug use and the imprisonments relating to it harm the physical and emotional well-being of a child."). Unchallenged predicate findings are binding on the appellate court. *See In re E.A.F.*, 424 S.W.3d 742, 750 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Therefore, we are bound by the trial court's endangerment findings, which along with the best-interest finding is sufficient to support termination of Mother's parental rights. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

In her first issue Mother asks this court to review the legal and factual sufficiency of the evidence to support the trial court's finding under subsection O because unchallenged predicate findings can support the best-interest finding. *See In re C.H.*, 89 S.W.3d at 28 (holding that the same evidence may be probative of both section 161.001(b)(1) predicate grounds and best interest).

The record reflects that the court approved Mother's service plan and ordered compliance with its terms. *See* Tex. Fam. Code Ann. §§ 161.001(b)(1)(O); 263.101–106. Mother's family service plan was admitted into evidence at trial.

Mother does not challenge the fact that the children were removed under Chapter 262 for abuse or neglect, or that they were in the Department's conservatorship for the requisite period of time. Mother argues that the evidence is insufficient to show that she did not comply with the family service plan. Specifically, Mother points to Handy's testimony that the only service Mother did not complete was individual counseling. Specifically, Handy testified that Mother had completed ten out of twelve individual counseling sessions. Mother's therapist, however, testified that Mother completed all twelve individual therapy sessions.

Whether a parent has complied with subsection O is a fact question. *In re S.M.R.*, 434 S.W.3d 576, 584 (Tex. 2014). While parents have generally had little success arguing substantial compliance to reverse a termination judgment under

subsection O, *see, e.g., In re M.C.G.*, 329 S.W.3d 674, 675–76 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), here the argument simply suggests a factual dispute. Handy testified Mother did not complete individual counseling and Alexander testified that she did complete counseling.

The Department argues, however, that simply checking off all the boxes on the service plan does not demonstrate Mother's complete compliance. The record evidence demonstrates that despite Mother's efforts, the Department did not believe there was enough time since her release from jail to show that she was sufficiently stable to care for the children. Handy testified that the Department expects to see not only that a parent has completed services, but also evidence of long term changes in the parent's ability to make better judgments about her children. Moreover, there is some dispute that the therapy Mother completed with Alexander was substance abuse therapy, not the individual counseling required of the family service plan. The record further reflects that Mother violated the terms of her community supervision both before and after the service plan was ordered, indicating that Mother failed to cease behaviors that endanger the family.

The fact finder's role is to resolve disputed issues. *See In re C.H.*, 89 S.W.3d at 26. In this case, the trial court resolved this dispute in favor of the Department. Reviewing all of the evidence in the light most favorable to the finding that Mother did not fully comply with the service plan, we conclude that the trial court could have formed a firm belief or conviction that termination of Mother's rights was warranted under section 161.001(b)(1)(O). In light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the trial court's finding is not so significant that a fact finder could not reasonably have formed a firm belief or conviction as to the truth of the termination finding. We overrule Mother's first issue.

2. Father's Appeal

As to Father, the trial court also made predicate termination findings that Father had committed acts establishing the grounds set out in sections 161.001(b)(1)(D), (E), and (O) of the Texas Family Code. In four issues Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings on each predicate ground, as well as the best-interest finding.

In his second issue Father argues the Department failed to provide sufficient evidence under subsection E because appellant was unable to control the twins' environment. Appellant was incarcerated at the time the twins were born and argues he had no control over Mother's actions during pregnancy.

"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) (per curiam). 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).

Under subsection E, the evidence must show the endangerment was the result of the parent's conduct, including acts, omissions, or failure 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 suffers injury; rather, the specific danger to the

child's well-being may be inferred from parents' 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 relevant conduct includes not only the parents' conduct as evidenced by the parents' acts, but also the parents' omissions or failures to act. Endangerment can also include knowledge that a child's mother abused drugs. *In re M.J.M.L.*, 31 S.W.3d 347, 351–52 (Tex. App.—San Antonio 2000, pet. denied) (finding evidence legally sufficient for endangerment where father knew mother was a drug addict and that she abused drugs while pregnant, even though father attempted to get mother to stop taking drugs). Mere imprisonment will not, standing alone, constitute engaging in conduct that endangers the physical or emotional well-being of the child. *Boyd*, 727 S.W.2d at 533. However, if all the evidence, including imprisonment, shows a course of conduct that has the effect of endangering the physical or emotional well-being of the child, a finding under section 161.001(b)(1)(E) is supportable. *See id*. at 533–34.

Father testified that he has been incarcerated since the twins were born. Father had contact with his caseworker who provided a copy of the family service plan. Father had not met the twins, but had seen pictures of them. Father had a relationship with Mother for approximately seven months, but never lived with Mother. Father met Mother in October 2014, and was around her other children "all the time." Father testified he did not know that Mother was using illegal drugs. When Father learned Mother was pregnant he suggested she see a doctor, but did not help her find a doctor. Father explained that he was too busy with family

matters to help Mother. Father gave Mother money when she asked for it, but could not remember how much money he had given her. When asked whether he has given her more than one hundred dollars, he responded, "over time, yes."

Father did not ask the Department to place the twins with a relative because he did not have a relative with whom to place the children. Mother visited Father while he was in jail. Father did not inquire about Mother's prenatal care or her finances. After the twins were born Father learned that Mother had been using drugs while pregnant. Mother's testimony contradicted Father's in that Mother testified that she did not have a relationship with Father after the birth of the twins. Although Father testified he did not know Mother was using drugs, Mother testified she used drugs "off and on" throughout her pregnancy.

The Department introduced evidence of Father's prior 2010 convictions for driving while intoxicated and unlawfully carrying a weapon. Also admitted into evidence is an indictment for aggravated assault with a deadly weapon in which it is alleged that Father threatened Mother with a gun at the time Mother was pregnant with the twins.

Handy testified that Father had no connection or relationship with the twins. Handy further testified that Mother and Father had a history of arguments including the allegation that Father assaulted Mother. The trial court admitted a copy of a protective order issued against Father, which required Father to refrain from committing an act of violence or stalking against Mother. The order further required Father to refrain from communicating directly with Mother or a member of her family or household. Father was further prohibited from going to or near Mother's residence or Mother's place of employment.

Evidence of criminal conduct, convictions, and imprisonment and its effect on a parent's life and ability to parent may establish an endangering course of

conduct. *In re S.M.*, 389 S.W.3d at 492. Routinely subjecting children to the probability that they will be left alone because their parent is in jail endangers the children's physical and emotional well-being. *See In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied).

In this case, there is evidence of multiple criminal convictions plus a charge of aggravated assault with a deadly weapon alleging domestic violence against Mother while she was pregnant with the twins. At the time of trial, Father was incarcerated awaiting trial on aggravated assault and capital murder charges. Abusive and violent criminal conduct by a parent can produce an environment that endangers the well-being of his children. *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment.").

Father denied the aggravated assault charge and Mother said she tried to recant her allegation after the indictment was filed. Grandmother, however, testified that at the time of the offense Mother reported that Father threatened her with a gun. A protective order was put in place to protect Mother from Father. Both Grandmother and Father denied knowing Mother was using drugs during pregnancy despite Mother's testimony that she was using drugs "off and on" during pregnancy. The trial court, as fact finder, could have believed that domestic abuse occurred in the relationship and that Father had knowledge of Mother's drug use. *See In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) (appellate court must provide due deference to the decisions of the fact finder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing credibility and demeanor of witnesses).

Father failed to arrange medical care for Mother during her pregnancy with

the twins, provided no emotional or financial assistance after the twins' birth, and had no concrete plan to provide emotional or physical care for the twins. This evidence supports the trial court's finding of endangerment. *See In re C.H.*, 89 S.W.3d at 28 (holding that evidence that father could not care for child from prison, did not provide emotional or financial assistance after birth of child, and has extensive criminal history involving drugs and assaults was sufficient proof of acts or omissions under section 161.001(b)(1)).

Reviewing all of the evidence in the light most favorable to the finding that Father engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children, we conclude that the trial court could have formed a firm belief or conviction that termination of Father's rights was warranted under section 161.001(b)(1)(E). In light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the trial court's finding is not so significant that a fact finder could not reasonably have formed a firm belief or conviction as to the truth of the termination finding. Because there is legally and factually sufficient evidence to support the trial court's finding under this section, we need not address his arguments that the evidence is insufficient to support the trial court's findings under sections 161.001(b)(1)(D) and (O). *See In re A.V.*, 113 S.W.3d at 362 ("Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."). Accordingly, we overrule Father's second issue.

C. Best Interest of the Children

Both parents challenge 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 parents, 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 of keeping the children with their natural parent is not rebutted because Mother completed almost all of her services including remaining drug-free, Mother has strong family support, and permanency and stability can be achieved by placing the children with Mother or Grandmother.

Father contends the presumption is not rebutted because despite his incarceration, Father has showed significant interest in the well-being of the twins and is ready to provide financially for the children if he is not incarcerated on the pending charges.

Multiple factors support the trial court's determination that termination of

the parents' rights was in the children's best interest.

1. *Desires of the children*

At the time of trial the four older children were ages five, seven, eight, and thirteen. The Department's permanency report notes that Jose, age thirteen, expressed to his foster mother that he wants to be adopted by his foster parents, although Jose admitted he sometimes finds it difficult to choose between Mother and his foster mother. Don, age eight, also expressed the desire to be adopted by his foster parents. There is no evidence as to Nadine's and Rene's desires. They were seven and five years old at the time of trial. The twins were approximately eight months old at the time of trial. 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 L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

Handy, the Department caseworker, testified that the oldest boys, Jose and Don, were placed in an adoptive foster home where they were adjusting well. The boys' foster mother was working with school counselors to help the boys improve in school. The oldest girls, Nadine and Rene, were placed in a foster home, but not an adoptive home. Both girls were receiving regular counseling. The foster mother was willing to keep the girls until they could be adopted.

The twins were removed at birth and had not established a bond with either of their parents. As a result of their premature birth, the twins were born with health issues, which are being addressed by their foster parents. The twins' foster parents want to adopt them.

Mother had not visited any of her children from the time of their removal to

the time of trial. The court ordered that visits were not to take place until Mother tested negative for illegal drugs. The court did not restore Mother's visitation rights after she was released from prison. Handy concluded that the lack of visits reduced the bond between Mother and child. Father has been in jail since the twins were born, and has been unable to bond with them due to his incarceration. This factor weighs in favor of the best interest finding.

2. *Present and future physical and emotional needs of the children*

The Supreme Court of Texas has recognized that parents' use of narcotics and its effect on their 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 L.G.R.*, 498 S.W.3d at 204. The fact finder can afford great weight to the significant factor of drug-related conduct. *Id.*; *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).

The record contains evidence of Mother's drug use including evidence that when the twins were born Mother tested positive for benzodiazepines, opiates, cocaine, and PCP. Mother argues that she has taken steps toward rehabilitation that have yielded positive results. Handy noted, however, that Mother did not participate in services prior to going to jail. 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. *In re 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).

Mother was incarcerated because she violated the conditions of her community supervision. The record further contains evidence of Mother’s conviction for child endangerment and Father’s criminal record. The record also reflects a charge of domestic violence.

The parents’ criminal activity, including a conviction for child endangerment, present a risk to the children’s physical and emotional well-being. *See In re A.W.T.*, 61 S.W.3d 87, 89 (Tex. App.—Amarillo 2001, no pet.) (“[I]ntentional criminal activity which exposed the parent to incarceration is relevant evidence tending to establish a course of conduct endangering the emotional and physical well-being of the child.”); *see also In re S.R.*, 452 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (evidence of father’s criminal activity supported trial court’s best interest finding). Therefore, this factor weighs in favor of termination.

3. *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

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 Father has been in jail for the pendency of the termination proceedings and has failed to comply with most of the requirements of his family service plan. Although Father has a plan to work as an air conditioner technician, his plan depends on not being convicted on the pending charges of aggravated assault and capital murder.

To be sure, Mother completed most of her services. However, the Department was concerned about the stability of Mother's housing because she was leasing at a reduced rate from a family member, and her lease was set to expire at the end of the month. Mother did not testify to another plan for housing after expiration of her lease. The Department was also concerned that since Mother did not start services before going to jail she did not have enough time to demonstrate sobriety and stability after being released.

4. *Parental abilities of those seeking custody, stability of the home or proposed placement, and plans for the children by the individuals or agency seeking custody*

These factors compare the Department's plans and proposed placement of the children with the plans and home of the parents seeking to avoid termination. *See In re D.R.A.*, 374 S.W.3d 528, 535 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Four out of the six children are placed in adoptive foster homes. The foster parents are working with the school-age children to ensure their success in school. The foster parents of the twins are ensuring that the twins' healthcare needs are met. The foster parents of the girls are willing to keep the girls and care for them until an adoptive home can be found. By contrast, Mother is living at a reduced

rent in a family member's apartment, but does not know if she will need to find another place to live when her lease expires. Father is incarcerated awaiting trial on two felony offenses.

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 In re J.D.*, 436 S.W.3d 105, 119–20 (Tex. App.—Houston [14th Dist.] 2014, no pet.). 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.* at 120. ("Stability and permanence are paramount in the upbringing of children.").

Viewing the evidence in the light most favorable to the judgment for our legal sufficiency analysis and all of the evidence equally for our factual sufficiency analysis, we conclude that a reasonable fact finder could have formed a firm belief or conviction that termination of both parents' rights was in the children's best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(2). We overrule Mother's second issue and Father's fourth issue on appeal.

III. CONCLUSION

Based on the evidence presented, the trial court could have reasonably formed a firm belief or conviction that Mother and Father engaged in conduct that endangers the physical or emotional well-being of the children and that terminating their parental rights was in the children's best interest so 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 at 513–14.

We affirm the decree terminating Mother's and Father's parental rights.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.