Affirmed and Memorandum Opinion filed August 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00276-CV

IN THE INTEREST OF A.A.Z. AND A.L.Z., CHILDREN

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2016-00656J

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

Appellant M.L.Z. aka M.L.E. ("Mother") appeals the trial court's final decree terminating her parental rights and appointing the Department of Family and Protective Services ("the Department") as sole managing conservator of A.A.Z. ("Arlene") and A.L.Z. ("Lisa").[1] The children's father executed an affidavit of voluntary relinquishment and did not appeal the termination of his parental rights. Mother's parental rights were terminated on the predicate grounds of endangerment

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

and failure to comply with a family service plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), and (O) (West Supp. 2017). The trial court further found that termination of the parents' rights was in the best interest of the children, and named the Department managing conservator of the children.

In five issues Mother challenges the legal and factual sufficiency of the evidence to support the trial court's findings that she endangered the children, failed to complete her service plan, and that termination is in the best interest of the children. Mother also challenges the sufficiency of the evidence to support a finding that appointment of the Department as managing conservator was in the children's best interest. We affirm because the evidence is legally and factually sufficient to support the trial court's findings that (1) Mother endangered the children; and (2) termination is in the children's best interest. We further find the evidence supports appointment of the Department as managing conservator.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

1. The Department Referral

On June 8, 2015, the Department received a referral that the children were constantly being left alone. The landlord went to the home and noticed the children were alone. The neighbors "know this is common practice and they hear the children crying often." The gas was turned off in the house and Mother was in jail on a drug possession charge. Mother does not work and obtains her drugs from Father who has strange people in and out of the house.

The next day, June 9, 2015, someone went to the home to evict the family. Arlene, seven years old at the time, answered the door and stated that Father left to go to the grocery store. Lisa, almost two years old at the time, was also home. Law

enforcement was called. Father was home when law enforcement arrived and admitted he left the children at home to go to the grocery store because the children would not fit in the truck.

On June 21, 2015, the Department received a referral noting that Lisa was left alone for about ten minutes. It was reported that the family was being evicted and the utilities were turned off. Mother went to a nearby friend's house to get a cup of ice leaving Lisa asleep on the bed. Lisa was not harmed and Father was not home at the time.

On November 19, 2015, the Department received another referral stating that Father is a heroin addict and was "kicked out" of his home due to being an addict. Father attempted to pay babysitters with heroin. It was reported that Father was leaving the children with a babysitter who was a known pedophile. This fact was not corroborated at the time of the referral.

2. The Investigation

Following the first two referrals on June 10, 2015, Valery Atkins, a Child Protective Services ("CPS") caseworker, went to the family home and knocked on the door. When no one answered Atkins left a notice on the door for the family to contact the caseworker.

The investigating caseworker met with Mother at the end of June 2015. Mother told the caseworker that she was surprised that she had a new CPS case as she had done nothing wrong. Mother reported pending criminal history for traffic tickets and a prior CPS case history. Mother stated that in the prior CPS case she tested positive for methadone, which she used for eleven years. The prior CPS case was closed when Mother completed Family Based Services. Mother reported abuse by her father, but did not want to share specifics about the abuse. Mother does not

work and stays home to take care of her children. Mother denied using drugs and was willing to take a drug test. Mother denied leaving her child alone, but stated she went around the corner for a cup of ice and was gone for a few minutes. Mother stated her husband left the children at home alone once to get groceries, but he had not left them alone again.

The caseworker also spoke with Father who denied any criminal history, but admitted his involvement in the last CPS case. Father denied using drugs or alcohol. Father works as a painter. The home did not have working utilities because they were in the process of moving. Father admitted leaving the children at home while he went to the grocery store. The landlord called the police, and the police told Father not to leave the children home alone again. Father stated he was willing to take a drug test, but did not "like the idea of random people calling in."

The caseworker interviewed Arlene, who stated she lived with Mother and Father, she eats every day, and her home is usually clean. Arlene was not afraid of anyone at home and she always has food to eat. No one fights in her home, but her parents will argue with words. Arlene did not know what drugs were and described alcohol as "what you put when you have a boo boo." Arlene stated that no one has touched her and that if someone tried she would tell her parents. Arlene said her parents do not leave her home alone. The caseworker also visited with Lisa, who was approximately 19 months old at the time. Lisa was walking around the home. The children had proper sleeping arrangements in the home.

Throughout the month of July 2015, the caseworker scheduled drug tests for Mother and Father, which they did not attend. Father told the caseworker that Mother took the children to Austin to visit her father who was ill. In August Father admitted that he and Mother got into an argument in July and that is why Mother left. Father

expressed concern that he had not heard from Mother and that Arlene should start school soon.

The caseworker completed a school search in Houston, Pasadena, Klein, Alief, Pleasanton, Deer Park, and Conroe school districts, but Arlene was not enrolled in any schools in those districts. The caseworker requested a Texas Education Agency school search, which showed that Arlene was registered at Geisenger Elementary School in Conroe on October 13, 2015. On October 15, 2015, the caseworker called Geisenger Elementary and was told Arlene was no longer registered and no forwarding address had been given.

The caseworker later received a call from a Montgomery County caseworker who was assigned a case that involved Mother. Mother was living with her cousin and had agreed to take a drug test, but had "gone missing." The caseworker made several trips to the cousin's apartment, but was unsuccessful in making contact with the family.

On November 30, 2015, the caseworker met with Arlene at Wainwright Elementary School. Arlene told the caseworker that she lived with her father and her sister. Arlene said that her father or "John" watches her. She denied being touched by John in her private areas. In response to the allegation that Father paid the babysitter with heroin, Arlene denied seeing her father trying to give the babysitter anything and did not see any needles.

The caseworker called Father and explained that there was a "new intake" and the caseworker needed to meet with him to address the allegations. Father told the caseworker that he was tired of people calling cases in and "kept saying that we needed to look into the reporters." Father told the caseworker Mother was in jail for a previous charge from two years earlier and she would be out in a couple of months.

The caseworker visited Father in late January 2016 at a local hotel. He was living in the hotel with the children until he could find a better place to live. Father believed that Mother would get out of jail at the end of February or beginning of March. Father moved to the hotel because John was stealing his personal belongings. Father denied trying to pay the babysitter with heroin and denied using heroin. Father stated the babysitter was mad at him because he would not allow her or her boyfriend to stay in his home.[2] Father stated that John was good with the girls and was not a sexual predator. John no longer watches the children, but Mother's cousin from California is watching them until Mother gets out of jail.

When asked whether he would take a drug test, Father said he would think about it, but he had nothing to prove because his children were cared for. Father stated he felt like CPS was bullying him into taking a drug test. The caseworker called Father a few days later to discuss a drug test, but Father refused a drug test. When the caseworker tried to arrange a meeting with Father, he said "he is not going to meet with CPS until they have a court order or the CPS attorney can call his attorney." The caseworker went to the hotel room where she had previously met with Father. The room was empty and the manager informed the caseworker that Father was no longer there.

3. Criminal and CPS History

Mother has arrests for theft and possession of a controlled substance. She received two years' probation for possession of a controlled substance. When her probation was revoked she was sentenced to seven months' confinement.

Mother's CPS history began October 2, 2013, when the Department received

[2] A female babysitter is not named in the investigator's affidavit. It appears from the record that the children were alternatively watched by an unnamed female babysitter and a man named John.

a referral for physical abuse of Lisa and neglectful supervision of Arlene. The referral stated that Lisa tested positive for methadone and opiates at birth and was experiencing withdrawal symptoms. Mother admitted using methadone to get off of hydrocodone. Mother admitted taking two Lorcet[3] pills three days before giving birth. Father tested positive for opiates and benzoids and had no prescription for either drug. Mother had a history of abusing Lorcet.

On November 3, 2013, Family Based Services was opened, and closed on March 4, 2014, due to Mother completing inpatient treatment and starting outpatient treatment.

4. Family Service Plans

On April 12, 2016, the trial court ordered both parents to comply with Family Service Plans. Mother's service plan required her to:

- maintain safe and stable housing and pay all necessary bills in order to maintain utilities;
- actively participate in a six to eight week parenting class;
- complete a substance abuse assessment and follow all recommendations;
- complete a psychosocial assessment and follow all recommendations;
- participate in individual counseling and follow all recommendations to address her past which has impacted her current involvement with the agency;
- participate in random drug testing; and
- attend all court hearings, CPS meetings, visitations, and assessments pertaining to the case.

[3] Lorcet is described in the affidavit as an opiate.

Before trial, Father filed an affidavit of voluntary relinquishment of his parental rights.

B. Trial Testimony

The first witness the Department called to testify was its caseworker, Marilyn Scott. Scott testified that Arlene and Lisa came to the Department's attention when they were two and seven years old. She reported that Father was caring for the children at the time and Mother "was incarcerated for drugs." The children were left without adult supervision on several occasions, the family was evicted from their home, and the children were not being cared for in that they were "way behind in school, medical, dental, everything." Scott testified that the children were behind on their immunizations, suffered from speech difficulties, and Arlene, the oldest child, had a problem with her left eye that was untreated. When Arlene came into the Department's care, an eye doctor told the Department that she needed to wear glasses and should use an eye patch to strengthen her left eye, both of which the Department provided to the child. Arlene was not academically on target when she came into care.

Scott testified that the two children were living in a foster home, which she described as safe and stable, with foster parents who wanted to adopt them. Both children bonded with their foster parents and made significant progress while being cared for by them. Lisa, the youngest child, was speaking in complete sentences at the time of trial when, at two years old, when she was placed in the Department's care, she could only speak four words. At the time she was removed, her two front teeth had begun to decay, but she is now receiving regular dental care. With regard to Arlene, who was in first grade, Scott recounted that before the Department's intervention she had missed so many days of school that she was "far behind in her academics."

Scott testified that Mother tested positive for illegal drugs three times during the pendency of the suit, the most recent positive test having occurred on October 19, 2016. The trial court admitted drug test results showing positive results for amphetamine and methamphetamine on April 12, 2016 and August 9, 2016. Scott reviewed Mother's criminal history, including Mother's deferred adjudication probation for possession of methamphetamine. In January of 2014, Mother violated the terms of her probation by testing positive for methamphetamine on March 5, 2014 and February 6, 2015, and was subsequently sentenced to serve seven months in jail. Scott testified that this type of illegal drug use and criminal activity creates a dangerous environment for the children.

Regarding Mother's participation in the services required by her Family Service Plan, Scott testified, as reflected in the positive drug tests, that Mother failed to refrain from using illegal drugs, did not have a safe or stable living arrangement at the time of trial, and had not verified her income as required. Scott believed that terminating the parents' rights was in the children's best interest because neither parent had shown the ability to care for the children given their continued involvement with illegal drugs. At the same time, the children had been progressing in their foster home and their educational and medical needs were being met. Scott testified, "[t]hey are finally flourishing in school." The children were behind in school at the time they were taken into care because they were left alone and not cared for by their parents. The children reported to the therapist that they were afraid to return to their parents because, "they're afraid to be left alone again."

On cross-examination, Scott admitted that Mother participated in many of the services in her family plan, including inpatient drug treatment, parenting classes, and individual therapy. Mother indicated to Scott that she was employed, but Scott had not received proof of employment. Scott testified that Mother continued to test

positive for illegal drugs even after she completed the drug treatment program.

Scott testified that Mother visited with her children, engaged with them, had a bond with them, and brought things for them "on occasion." Mother was on time to the visits and maintained contact with the Department during the course of the case. Mother came to all meetings and attended all court hearings. Regarding Arlene's medical issue with her eye, Mother told Scott that she took the child to a doctor who told the family to have her checked yearly and that eventually Arlene would need surgery.

Father's attorney questioned Scott about the children's paternal grandmother. According to Scott's testimony, the grandmother spoke only French and Farsi and could not speak English. Father asked the grandmother to come for a visit with the children. The grandmother traveled from Paris in January of 2016 and visited with the children on one occasion. Scott believed that the grandmother was not aware of the conditions the children were in before her visit. The grandmother was similarly unaware of the parents' behavior, and "she's still not aware." Father asked Scott not to tell the grandmother about the termination proceedings. Scott described the visit as awkward because Lisa did not know her grandmother. Arlene remembered her, but had problems communicating with her. The grandmother was making attempts at the time to establish a home to be considered as a possible placement for the children. The home, according to Scott, was under construction, needed, "a lot of cosmetic work," and had some other "significant" issues that needed to be addressed. If all the cosmetic issues were addressed with the home, it could be appropriate for placement. The Department had other concerns with placing the children with their grandmother, including the language barrier and the impact on the children of removing them from their foster parents with whom the children had bonded. Another issue with placement with the grandmother was the grandmother's passport

and visa authorizing her to be in the United States for only ten years. In addition, the grandmother told Scott that she could only stay in the United States for two months.

The next witness called by the Department was Bruce Jefferies, who was employed at National Screening Center, National Assessment Center, and Alliance DNA laboratory. He testified regarding the results of Mother's drug test performed on October 19, 2016. The test examined a sample of Mother's hair taken from her head. The test covered a period of 90 days before the testing date, and the results showed Mother tested positive for methamphetamine. Jefferies testified that the test showed Mother had used drugs within the last three months.

On cross-examination, Jefferies testified that the test results only cover the previous 90 days unless the test is a dissection test. The label on the test results did not show that it was a dissection test. In that case, the test results would not show drugs used before the previous 90-day period.

The Department next called Quana Smith, a representative of Child Advocates. Smith testified that a member of Child Advocates had visited the children during the case and reported that Child Advocates agreed with the agency's goal of adoption by the foster parents. Both children were doing very well in the foster home. Smith believed that termination of the parents' rights was in the children's best interest because Mother had not shown that she could "provide the children with a safe and stable environment and she tested positive after completing a drug rehab program." The foster home was meeting all of the children's needs and they could be negatively impacted if they were removed from that home.

On cross-examination Smith acknowledged that she was "standing in" on the case and that she had never personally visited the children. Smith spoke with the person at Child Advocates who had visited the children and was aware that Child Advocates had previously advocated against terminating Mother's parental rights at

the second permanency hearing. At that time Mother had tested positive for methamphetamine in October of 2016. Smith testified, though, that since advocating that Mother's rights not be terminated Child Advocates had seen no proof showing Mother had stable housing or employment, and had revised its recommendation.

After the Department rested its case, Mother testified that she was working 40 hours per week at a deli, and was living at Well Springs, a transitional living facility. Mother had taken multiple drug tests since October of 2016, and tested negative on each of them. Mother had completed all of the "classes and everything that CPS has asked" her to do. Mother thought she would be able to leave Well Springs within a few weeks at which point she would rent a two-bedroom apartment. Mother testified that she had enough money to pay a deposit and the first month's rent. Mother visited with the children throughout the case, attending every visit on time. Mother asked the court not to terminate her parental rights, but instead to give her more time to complete her time at Well Springs. Mother asked that the children be placed with the paternal grandmother until Mother could "get out of the transitional living facility."

Mother was aware of her children's medical needs when they were in her care, including Arlene's vision problems. Mother took Arlene to a doctor when she was four years old. According to her testimony, the eye doctor told her that Arlene would need surgery when she was older, but to use an eye patch until then. Mother said, "she didn't always keep it on but we were aware." Mother's ultimate goal was to provide for her children and have them placed with her. Mother agreed to continue taking drug tests and agreed to complete more services if CPS required them.

The last witness to testify was the children's paternal grandmother. She stated she wanted the children to be placed in her home, and admitted that Father was living there with her at the time. The grandmother explained that Father would only be in

her home until the repairs to her home were finished, at which point he would move out. The grandmother also testified that she was willing to take the children to her home in Paris, and was aware of the circumstances that led to the children being placed in the Department's care.

The trial court terminated Mother's parental rights on the predicate grounds of endangerment and failure to comply with the Family Service Plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), & (O). Father's rights were terminated based on the affidavit of voluntary relinquishment. Mother appeals the trial court's findings on the predicate grounds and the finding that termination is in the best interest of the children in addition to the conservatorship finding.

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(b) 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

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).

In her first and second issues Mother argues the evidence is legally and factually insufficient to support the trial court's findings under subsections D and E of section 161.001(b)(1).

Both subsections D and E of section 161.001(1) use the term "endanger." "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 D requires a finding that the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." Tex. Fam. Code Ann. § 161.001(b)(1)(D). 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." *Id.* § 161.001(b)(1)(E).

Endangerment under subsection D may be established by evidence related to the child's environment. *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). "Environment" refers to the acceptability of living conditions, as well as a parent's conduct in the home. *In re W.S.*, 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no writ). A child is endangered when the environment creates a potential for danger that the parent is aware of but consciously disregards. *See In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.); *In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Inappropriate, abusive, or unlawful conduct by a parent or other persons who live in the child's home can create an environment that endangers the physical and emotional well-being of a child as required for termination under subsection D. *In re M.R.J.M.*, 280 S.W.3d at 502.

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.

In evaluating endangerment under subsection D, we consider the child's environment before the Department obtained custody of the child. *See In re J.R.*, 171 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Under subsection E, however, courts may consider conduct both before and after the Department removed the child from the home. *See In re S.R.*, 452 S.W.3d at 361 (considering pattern of criminal behavior and imprisonment before and after removal).

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).

Mother argues that at the time the children came into care, the children's father was their caregiver and Mother was incarcerated. Mother argues that due to her incarceration she did not have the ability or control to place her children in dangerous conditions. Mother further argues that she took sufficient measures to provide for the well-being of her children while she was incarcerated. Mother argues she arranged for her cousin from California to babysit while she was in jail. Even though Mother was incarcerated she argues she took care of her children by placing them with someone who could provide for their well-being.

Mother tested positive for illegal drug use throughout the pendency of the case including after her children had been removed and she knew she was to remain drug-free to obtain their return. The results of her drug tests were admitted into evidence without objection. The record reflects that Mother had a history of dependence on illegal drugs, which began before her children were born, continued during her pregnancies, throughout the two children's young lives, and while she was subject to the conditions of probation and the terms of the Department's Family Service Plan. The record demonstrates that Mother continued to use illegal drugs even in the knowledge that by doing so she was risking her own incarceration and inability to care for her children, as well as the termination of her parental rights.

The result of Mother's use of illegal drugs was that her children were repeatedly exposed to instability, including Mother's absence from their lives and

inability to provide for their care, and Lisa's exposure to Mother's drug use during Mother's pregnancy with the child. *See In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied) ("As a general rule, conduct that subjects . . . child[ren] to a life of uncertainty and instability endangers the physical and emotional well-being of [the] child[ren]."). A parent's drug use qualifies as a voluntary, deliberate, and conscious course of conduct endangering the child's well-being. *See In re C.A.B.*, 289 S.W.3d 874, 885 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Continued illegal drug use after a child's removal is conduct that jeopardizes parental rights and may be considered as establishing an endangering course of conduct. *Cervantes–Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 253–54 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc).

Reviewing all the evidence—including the evidence summarized above—in the light most favorable to the termination findings under subsections D and E, we conclude that a reasonable fact finder could have formed a firm belief or conviction as to the truth of the findings that Mother engaged in endangering conduct and left the children in endangering conditions. *See In re J.O.A.*, 283 S.W.3d at 344. In light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of these termination findings is not so significant that a fact finder could not reasonably have formed a firm belief or conviction as to the truth of these termination findings. *See In re H.R.M.*, 209 S.W.3d at 108. As the finder of fact and sole judge of the credibility of the witnesses, the trial court was free to disregard any or all of Mother's self-serving testimony. *See In re S.A.H.*, 420 S.W.3d 911, 927 (Tex. App.—Houston [14th Dist.] 2014, no pet.). We hold the evidence is legally and factually sufficient to support the predicate termination findings under subsections D and E.

Because there is legally and factually sufficient evidence to support the trial

court's finding under subsections D and E, we need not address Mother's argument that the evidence is insufficient to support the trial court's findings under subsection O. *See In re A.V.*, 113 S.W.3d at 362 ("Only one predicate finding under section 161.001[(b)](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 Mother's first and second issues.

C. Best Interest of the Children

In her fourth issue Mother challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination is in the children's best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(2).

The factors the trier of fact may use to determine the best interest of the child include: (1) the desires of the child; and (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) (West 2014) (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 (1) the record indicates that she can provide for the children's present and future physical and emotional needs; (2) she acted in her children's best interest by taking her child to the doctor, by obtaining a relative as a babysitter, and by complying with the provisions of the Family Service Plan.

Multiple factors support the trial court's determination that termination of Mother's rights was in the children's best interest.

1. *Desires of the children*

At the time of trial Arlene was eight years old and Lisa was three years old. The only evidence in the record reflecting their desires is the statement reported by Scott that the children reported to the therapist that they were afraid to return to their parents because, "they're afraid to be left alone again." The fact that the children were afraid to be left alone if they were returned to their parents weighs in favor of the trial court's best-interest finding.

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

The record reflects that Mother's drug use and consistent incarceration affected the physical and emotional needs of the children. The children were repeatedly left unsupervised in the home. Arlene had missed so many days in the first grade she was far behind in her academics. Arlene suffered from a medical issue with her eye that was going untreated. Both children were behind in their immunizations and suffered from difficulties in their speech. Lisa had decaying teeth and did not speak more than four words when she came into care.

Mother's incarceration for drug offenses also presents 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 at 366 (evidence of father's criminal activity supported trial court's best interest finding). Given Mother's continued use of drugs despite participation in rehabilitative services, the trial court's finding that Mother could not provide for the present and future physical and emotional needs of the children is supported by the evidence.

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*

Mother's history of drug abuse and its attendant unstable lifestyle, plus her continuing narcotics use while this case was pending, not only support the trial court's endangerment finding, it also supports the best-interest determination. *See In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.) (explaining that parent's history of drug use is relevant to trial court's best-interest finding); *See In re C.A.J.*, 122 S.W.3d 888, 894 (Tex. App.—Fort Worth 2003, no pet.) (concluding that a parent's continuous drug use, unstable lifestyle, and criminal record supported best-interest determination); *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86–87 (Tex. App.—Dallas 1995, no writ) (allowing fact finder to give significant weight to parent's drug-related conduct in making a best-interest finding); *see also* Tex. Fam. Code Ann. § 263.307(b)(8) (providing that, in determining best interest, courts may consider history of substance abuse by child's family or others who have access to the child's home). The record contains evidence of Mother's drug use including evidence that Lisa was

born dependent on illegal drugs and spent two weeks in neonatal intensive care withdrawing from those drugs.

Moreover, 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. *See 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).

Therefore, this factor weighs in favor of termination.

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.). Scott testified that the children were in a safe, stable home with foster parents who wanted to adopt them. She further testified that the children had bonded with their foster parents and had made significant progress while in the foster home. Lisa was speaking in complete sentences, and Arlene was "flourishing" in school. Both children's medical and dental needs were being met by the foster parents.

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 Mother's rights was in the children's best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(2). We overrule Mother's fourth issue.

D. Conservatorship

In her fifth issue Mother argues the trial court erred in naming the Department as managing conservator of the children. The Texas Family Code creates a rebuttable presumption that a parent will be named a child's managing conservator unless the court finds that such appointment would not be in the child's best interest "because the appointment would significantly impair the child's physical health or emotional development." Tex. Fam. Code Ann. § 153.131(a) (West 2014). The trial court made this finding in this case.

Family Code section 161.207 provides: "If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child." Tex. Fam. Code Ann. § 161.207(a). In this case, upon termination of both parents'

parental rights, the Department was appointed sole managing conservator of the children.

The termination of parental rights and the appointment of a non-parent as sole managing conservator are two distinct issues, requiring different elements, different standards of proof, and different standards of review. Compare Tex. Fam. Code Ann. § 161.001 with Tex. Fam. Code Ann. § 153.131(a); *see also In re J.A.J.*, 243 S.W.3d 611, 615–17 (Tex. 2007). Additionally, "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship[.]" Tex. Fam. Code Ann. § 153.002 (West 2014).

Unlike the standard of proof for termination of parental rights, the findings necessary to appoint a non-parent as sole managing conservator need only be established by a preponderance of the evidence. *See* Tex. Fam. Code Ann. § 105.005 (West 2014); *In re J.A.J.*, 243 S.W.3d at 616. Likewise, the standard of review for the appointment of a non-parent as sole managing conservator is less stringent than the standard of review for termination of parental rights. *In re J.A.J.*, 243 S.W.3d at 616. We review a trial court's appointment of a non-parent as sole managing conservator for abuse of discretion only. *Id*. Therefore, we reverse the trial court's appointment of a non-parent as sole managing conservator only if we determine that it is arbitrary or unreasonable. *Id*.

Having made termination findings on the predicate grounds and best interest, the trial court was required to appoint the Department, or another permissible adult or agency, as managing conservator pursuant to Family Code section 161.207. *See In re C.N.S.*, No. 14-14-00301-CV, 2014 WL 3887722, at *13 (Tex. App.—Houston [14th Dist.] Aug. 7, 2014, no pet.) (mem. op.). We previously have stated the appointment may be considered a "consequence of the termination." *In re J.R.W.*,

No. 14-12-00850-CV, 2013 WL 507325, at *12 (Tex. App.—Houston [14th Dist.] Feb. 12, 2013, pet. denied) (mem. op.).

We have reviewed the evidence supporting the trial court's termination findings and found the evidence to be legally and factually sufficient. Mother provides no authority for the proposition that she is a "suitable, competent adult" as contemplated by section 161.207(a) or that the presumption in section 153.131(a) applies to a parent whose parental rights have been terminated under Chapter 161. *See In re A.W.B.*, No. 14–11–00926–CV, 2012 WL 1048640, at *7 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012, no pet.) (mem. op.). Accordingly, Mother's challenge to the trial court's appointment of the Department as sole managing conservator, rather than Mother, is without merit. We overrule Mother's fifth issue.

III. CONCLUSION

Based on the evidence presented, the trial court could have reasonably formed a firm belief or conviction that Mother engaged in conduct that endangers the physical or emotional well-being of the children and that terminating her 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 parental rights and naming the Department managing conservator.

/s/ Marc W. Brown
Justice

Panel consists of Justices Christopher, Brown, and Wise.