Affirmed and Memorandum Opinion filed October 5, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00302-CV

IN THE INTEREST OF K.K.D.B., CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2016-00933J

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

The trial court terminated the parental rights of S.M.S. (Mother) and C.B.B. (Father) with respect to their daughter, Kelly,[1] and appointed the Texas Department of Family and Protective Services (the Department) to be Kelly's managing conservator. On appeal, both Mother and Father challenge the legal and factual sufficiency of the evidence to support termination. Father also asserts the trial court abused its discretion in appointing the Department as Kelly's managing conservator. We affirm.

[1] Kelly is a pseudonym. *See* Tex. R. App. P. 9.8(b)(2).

BACKGROUND

A. Removal

The following facts come from the affidavit of Department caseworker Tiffany Ray.

Kelly came to the Department's attention in October 2015, when she was nearly two years old. The Department received a referral alleging Mother and Kelly's maternal grandparents were using cocaine in the home. Father was incarcerated at the time for failure to register as a sex offender and was not named in the referral. Mother and Grandfather denied recent drug use but admitted they previously used methamphetamine. Drug test results revealed Mother was positive for cocaine. Grandfather refused to submit to a drug test. Grandmother admitted she used cocaine the previous week. Mother voluntarily placed Kelly with family friends who agreed to serve as a Parental Child Safety Placement (PCSP).

About five weeks later, the case was transferred to the Department's Family Based Safety Services division (FBSS). Father had been released from jail by that time. Both parents were advised to complete a substance abuse assessment and a psycho-social assessment and follow the assessors' recommendations. The Department also asked the parents to submit to random drug tests, complete parenting classes, and allow Kelly to remain in the PCSP. Father additionally was advised to comply with the rules about contact with Kelly and other children due to his status as a convicted sex offender.

Mother and Father submitted to drug tests as requested. Hair follicle tests performed in the first few weeks showed Mother was positive for cocaine and Father was positive for amphetamine and methamphetamine. Urine samples collected contemporaneously with the hair follicles were negative for all substances. Both parents tested negative by hair follicle test and urinalysis in late December.

On January 11, 2016, Mother and Father each completed a substance abuse assessment. The assessor recommended they both complete individual and group therapy to address their problems with addiction.

Just ten days later, the Department received an email from a lawyer, Julie Ketterman, stating she represented both parents and instructing the Department not to contact either parent without Ketterman's approval. Despite their voluntary involvement to date, Mother and Father both stopped participating in FBSS. In an effort to re-engage the parents, the Department attempted to contact Ketterman three times between January 27 and February 2 by phone and email but received no response.

The Department received a text message on February 15, 2016, stating Mother and Father were at the PCSP's home and trying to take Kelly. Ray immediately went to the house and found Ketterman already there. Ketterman said she advised the parents to get Kelly and stop FBSS.

The same day, Ray served removal notices to Mother and Father. She told Ketterman and both parents that the Department would file a lawsuit seeking emergency custody of Kelly.

The Department filed suit the next day and attached Ray's affidavit to the original petition. The trial court signed an emergency order allowing the removal and naming the Department as Kelly's temporary managing conservator.

B. Family service plans

Following a full adversary hearing two weeks later, the trial court signed an order requiring both parents to comply with any family service plan by the Department. Each service plan identified the tasks and services the parent needed to complete before Kelly could be returned to his or her care.

Both parents' plans required them to, among other things: complete parenting classes; obtain and maintain suitable employment and stable housing; complete a substance abuse assessment and follow the assessor's recommendations; submit to random drug testing; complete a psycho-social evaluation and follow the evaluator's recommendations; maintain regular contact with the caseworker; and make reasonable efforts to attend and participate in all hearings, permanency conferences, scheduled visitations, and requested meetings.

C. Trial

Trial was held on February 23, 2017. The Department presented testimony from caseworker Sylvanna Johnson and Court Appointed Special Advocate (CASA) Barbra Grimmer. The Department's documentary evidence included Ray's removal affidavit, the parents' service plans, judgments of criminal convictions for both parents, drug test results for both parents, and the CASA report. The trial court overruled Mother's and Father's relevance objections to their criminal records. The rest of the Department's evidence was admitted without objection.

Mother and Father each testified on their own behalf. Neither parent offered documentary evidence. Kelly's attorney ad litem did not call witnesses or offer evidence.

1. Evidence about Mother and Father

Before Kelly was born. As a child, Mother was in Department custody herself. She testified she was removed from her parents' care when she was a toddler and placed with her grandmother. Mother said her grandmother later "put [her] out on the streets." Mother came into Department care again when she was thirteen years old. She ran away from her placement and says the Department did not report her missing. According to Grimmer, Mother began using methamphetamine at age fourteen.

Mother said she lived on the streets until she was seventeen, when she was arrested for possession of cocaine in August 2008. She pleaded guilty and was sentenced to forty-five days' confinement in county jail. Over the next three years, Mother was convicted of four misdemeanors: criminal trespass in September 2008 (very soon after her release on the drug charge), possession of a prohibited weapon in July 2009, and prostitution and resisting arrest in April 2011.

Much of the evidence about Father concerned his juvenile conviction for indecency with a child. Father committed the offense in 2003, when he was sixteen years old. The victim was an eight-year-old male relative. Father pleaded guilty in 2004 and was sentenced to six years' imprisonment, but the sentence was probated.

Father was convicted three times over the next ten years for failure to comply with the sex offender registry requirements. In November 2006, he was sentenced to serve three years in prison. Additionally, his probation for the indecency conviction was revoked at that time, and he was sentenced to a concurrent three years' imprisonment. The second conviction was in August 2010; he was sentenced to serve two years in prison. The third conviction was in May 2015. Under a plea-bargain agreement, he was convicted of a lesser charge and sentenced to seven months' confinement in state jail. That is the sentence he was serving when the Department began its investigation in October 2015.

According to Father, as a child himself he did not understand or take responsibility for his actions, but as an adult he accepts responsibility:

> I did not accept responsibility when I was still a child, myself. I stand here today and tell you I did what I did, but I didn't know what I was doing. I went through group. I took counseling. I got my life together.

Father acknowledged he did "a wrong and horrible thing" and said he does not place any blame on his eight-year-old victim.

Grimmer, however, believed Father had not truly accepted responsibility for his crime. She said that at points during the pendency of this case, Father minimized his culpability by contending the victim consented to Father's actions.

Father committed additional crimes before Kelly was born. In 2013, he was convicted of theft and sentenced to confinement in state jail for 180 days. The following year, he was convicted of driving without a valid license.

Age thirty at the time of trial, Father testified he began using methamphetamine when he was twenty-three years old.

Kelly's first two years. Mother met Father in 2012, and Kelly was born in November 2013. The record does not indicate at what point Mother learned Father was a convicted sex offender and a drug user. At some point not specified in the record, Mother and Kelly began living with Mother's parents. Father did not live with them.

Mother said she learned Grandmother was using drugs when the Department came to their house in October 2015 and Grandmother admitted using cocaine the previous week. Though Mother tested positive for cocaine at that time, she testified she "did not knowingly or willingly ingest cocaine in 2015." She said the cocaine was in her system because "apparently everyone in that home was using cocaine."

On cross-examination, Mother acknowledged that if she tested positive due to mere exposure to cocaine, then Kelly, who was not yet two years old, was in danger of being harmed by cocaine exposure. Mother admitted she endangered Kelly by having her in a house full of cocaine users. She pointed out, however, that she never left Kelly alone with Grandmother. Instead, Kelly stayed with her paternal grandmother while Mother was at work.

Father was released from jail in November 2015 after serving his seven-month

sentence for failure to comply with the sex offender registry requirements. Upon his release, Father tested positive for amphetamine and methamphetamine. He testified he used those drugs before he began his sentence.

A year of progress. Following their positive drug tests in October and November 2015, respectively, Mother and Father made progress for about a year. The Department gave them their service plans in March 2016. Both parents completed most of the requirements of the plan. Johnson testified Father did not finish his drug treatment. Grimmer's CASA report, admitted without objection, states Mother was unemployed until October 2016, at which time she began working part-time at a fast-food restaurant. Both parents consistently tested negative for drugs and alcohol. Father testified he was "completely registered" as a sex offender. The Department's goal was family reunification.

Father's relapses and a changed goal. In October 2016, Father tested positive for cocaine and marijuana. He tested positive for cocaine again in January 2017.[2] Father explained he did not knowingly take cocaine in January (though he did not discuss his October drug use). Instead, he said, an enemy put cocaine in his alcoholic drink at a New Year's Eve party as revenge for Father causing him to go to jail in the past. Despite his substance abuse struggles, Father did not see a problem having "a couple of drinks" at the party. Both Mother and Father testified he did not use drugs in front of her and she did not know he relapsed.

Following Father's positive drug tests, the Department changed the goal from family reunification to unrelated adoption. The change occurred in late January 2017, a couple of weeks before the original trial date of February 7, 2017. Mother

[2] Part of the record suggests Father was tested on January 3 and the results came back on January 20. Another part of the record suggests he was tested twice, on January 3 and January 20, and both results were positive.

testified she learned of the positive results on January 20 and moved out on January 25. Father agreed Mother left him as soon as she discovered he had tested positive. Both parents testified they had not gotten back together as of February 23, the time of trial.

Concern about Mother's and Father's relationship. Johnson and Grimmer testified they were troubled that Mother, a recovering addict, had not learned to separate herself from Father. They believed her unwillingness to leave Father endangered Kelly, because a parent who uses drugs endangers his child. Early in the case, Mother was encouraged to separate from Father in order to protect Kelly and herself. Nevertheless, Mother stayed with Father after he tested positive for amphetamine and methamphetamine in November 2015 and after he tested positive for cocaine and marijuana in October 2016. Given Mother's history of staying with Father, Johnson and Grimmer were not convinced Mother had in fact ended her relationship with Father following his January 2017 positive result. Johnson believed Mother moved out solely to avoid having her parental rights terminated, which was the Department's new goal.

Grimmer was also disturbed by Mother's apparent nonchalance that Father committed a sexual offense against a young child. Despite his history, Mother had no problem leaving Kelly alone with him. Grimmer believed Mother's not taking Father's history as a sex offender seriously enough endangered Kelly.

Status at time of trial. Neither Mother nor Father had stable housing at the time of trial. Mother was staying with a friend, and Father was staying with his aunt. Neither parent had a job. Mother was employed from October 2016 to a few weeks before trial; she said she lost her previous job when she left Father and moved to a different area. Mother planned to get her own house and enroll in school; she had already taken a required pre-enrollment test. Father intended to get a part-time job

to pay his aunt "what little bit of rent" he could while he attended a 12-week electronics training program. The program was scheduled to begin two weeks after trial.

2. Evidence about Kelly

All witnesses agreed Mother and Father loved Kelly, had strong bonds with her, and visited her regularly. Kelly seemed to enjoy the visits and did not suffer any adverse reactions following her time with her parents.

Grimmer testified Kelly was "wasn't super outgoing at first." There is no other evidence about Kelly's condition or needs at the time the investigation began in October 2015 or when she was removed in February 2016.

Since being in foster care, Grimmer said, Kelly was "really coming into herself" and was very talkative, proud, and well-adjusted. Kelly liked to sing people songs and show them her toys. Grimmer testified Kelly seemed very comfortable where she is and did not ask much about Mother and Father.

At the time of trial, Kelly was in a foster home Johnson and Grimmer agreed was meeting all of Kelly's physical and emotional needs, but the foster home was not adoptive. Johnson testified Kelly had not been placed in an adoptive foster home because the Department's goal up until recently was family reunification, not adoption. The Department planned to "broadcast" Kelly, which means they would search a much larger pool for an adoptive home. Grimmer had spoken with the foster mother recently and believed she might be interested in adopting Kelly. In any event, Grimmer was confident a broadcast would generate immediate interest and an adoptive family would be found.

Johnson and Grimmer believed termination of Mother's and Father's parental rights was in Kelly's best interest. Johnson's belief was based on the parents'

substance abuse history, criminal history, and lack of ability to provide Kelly with shelter, medical care, and a drug-free environment. Grimmer echoed Johnson's bases and added many more: (1) Kelly is too young to protect herself and speak up for herself; (2) Mother and Father stopped FBSS; (3) both parents have a history of relapse; (4) Father sexually abused a young child and, despite treatment, still contends his acts were consensual; and (5) Mother is in denial about the gravity of Father's sexual offense. Grimmer summarized her concerns in her report to the court:

> One of the biggest concerns for safety in this case is the failure to effect positive personal changes in this case; primarily with regards to the sexual assault of a child, but also with regards to the role that substance abuse has played in both parents' lives. [Father] reportedly completed sexual offender treatment as a condition of his initial confinement; but still during this case has stated that the sexual contact between him, a 16 year old, and the victim, an 8 year old, was consensual. This indicates that [Father] has NOT made the personal change needed to demonstrate that he fully understands the significance of his actions.
>
> There are concerns . . . that neither parent has demonstrated the ability to be protective of a child and keep a child safe from future abuse. Both parents have minimized the sexual assault of a child incident, which gives cause for concern about their ability to protect against such an incident in the future. Additionally, both parents minimize the impact of substance abuse in their lives as individuals and as parents.

3. Trial court's findings

The trial court found Mother had engaged in the conduct described in subsections D and E (both concerning endangerment of a child) and O (failure to comply with a court-ordered service plan) of section 161.001(b)(1) of the Family Code, and Father had engaged in the conduct described in subsections E and O. The court additionally found termination of Mother's and Father's parental rights was in Kelly's best interest. The trial court appointed the Department to be Kelly's

managing conservator. Both parents timely appealed.

ANALYSIS

I. Burden of proof and standards of review

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *See In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980); *In re S.R.*, 452 S.W.3d 351, 357 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Although parental rights are of constitutional magnitude, they are not absolute. The child's emotional and physical interests must not be sacrificed merely to preserve the parent's rights. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002).

Due to the severity and permanency of the termination of parental rights, the burden of proof is heightened to clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001 (West 2014 & Supp. 2016); *In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007 (West 2014); *accord J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *S.R.*, 452 S.W.3d at 358.

Parental rights can be terminated upon clear and convincing evidence that (1) the parent has committed an act described in section 161.001(b)(1) of the Family Code, and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b). Only one predicate finding under section 161.001(b)(1) is necessary to support a decree of termination when there is also a finding that termination is in the child's best interest. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

In reviewing the legal sufficiency of the evidence in a termination case, we must consider all the evidence in the light most favorable to the finding to determine

whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. *See In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *J.F.C.*, 96 S.W.3d at 266; *C.H.*, 89 S.W.3d at 25. We assume the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence a reasonable fact finder could disbelieve. *J.O.A.*, 283 S.W.3d at 344; *J.F.C.*, 96 S.W.3d at 266.

In reviewing the factual sufficiency of the evidence, we consider and weigh all the evidence, including disputed or conflicting evidence. *See J.O.A.*, 283 S.W.3d at 345. "If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266. We give due deference to the fact finder's findings, and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam). The fact finder is the sole arbiter when assessing the credibility and demeanor of witnesses. *Id.* at 109. We are not to "second-guess the trial court's resolution of a factual dispute by relying on evidence that is either disputed, or that the court could easily have rejected as not credible." *In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003).

II. Predicate ground for termination: Endangerment (subsection E)

In their first and second issues, Mother and Father challenge the legal and factual sufficiency of the evidence to support the trial court's findings under subsections D, E, and O of section 161.001(b)(1) of the Family Code. We conclude the evidence is legally and factually sufficient to support the trial court's finding on subsection E. Accordingly, we do not review the findings regarding subsections D or O. *See A.V.*, 113 S.W.3d at 362.

A. Legal standards

Subsection E of Family Code section 161.001(b)(1) requires clear and convincing evidence that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Tex. Fam. Code Ann. § 161.001(b)(1)(E). "To endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996); *S.R.*, 452 S.W.3d at 360. "Conduct" includes acts and failures to act. *See In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.).

A finding of endangerment under subsection E requires evidence the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *Id.* Termination under subsection E must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id.* A court properly may consider actions and inactions occurring both before and after a child's birth to establish a "course of conduct." *In re S.M.*, 389 S.W.3d 483, 491–92 (Tex. App.—El Paso 2012, no pet.). While endangerment often involves physical endangerment, the statute does not require that conduct be directed at a child or that the child actually suffer injury. Rather, the specific danger to the child's well-being may be inferred from the parent's misconduct alone. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738–39 (Tex. App.—Fort Worth 2004, pet. denied). A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re A.B.*, 412 S.W.3d 588, 599 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014).

The parent's conduct both before and after the Department removed the child from the home is relevant to a finding under subsection E. *See Avery v. State*, 963

S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ) (considering persistence of endangering conduct up to time of trial); *In re A.R.M.*, No. 14-13-01039-CV, 2014 WL 1390285, at *7 (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.) (considering criminal behavior and imprisonment through trial).

B. Father

Sexual offense to a young child. Sexual abuse of a child obviously endangers that child. Moreover, previous sexual abuse of a child endangers any children the abuser has or may have in the future. *In re Baby Boy R.*, 191 S.W.3d 916, 925 (Tex. App.—Dallas 2006, pet. denied). The father in *Baby Boy R.* had pleaded guilty to aggravated sexual assault of his stepdaughter. The court of appeals concluded the previous sexual abuse of another child supported an inference that the father endangered his own child:

> We may infer from Gidney's plea of guilty to aggravated sexual assault of his stepdaughter that Gidney engaged in conduct that will endanger or jeopardize the physical or emotional well-being of other children in the home who may discover the abuse or be abused themselves. [citations] We conclude that a reasonable trier of fact could have formed a firm belief or conviction that Gidney, having pleaded guilty to aggravated sexual assault of his stepchild, engaged in conduct which had the effect of endangering the child's physical or emotional well-being.

Id. at 925.

Father pleaded guilty to committing a sexual offense against an eight-year-old boy. Just as in *Baby Boy R.*, the trial court could reasonably find Father's admitted sexual offense endangered Kelly. There was evidence that Father, even as an adult, minimizes his crime and blames his victim by contending the encounter was consensual. As sole fact finder, the trial court was free to reject Father's self-serving

testimony that he accepts responsibility for his behavior. *See S.R.*, 452 S.W.3d at 365.

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

In addition to his underlying sexual offense, Father committed three more crimes by failing to comply with the requirements of the sex offender registry. The third failure was after Kelly was born. Those convictions, coupled with his convictions for theft and driving without a valid license, support the trial court's finding that Father endangered Kelly.

Drug use. A parent's continuing substance abuse can qualify as a voluntary, deliberate, and conscious course of conduct endangering the child's well-being. *See J.O.A.*, 283 S.W.3d at 345; *In re L.G.R.*, 498 S.W.3d 195, 204 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *S.R.*, 452 S.W.3d at 361–62. By using drugs, the parent exposes the child to the possibility that the parent may be impaired or imprisoned and, therefore, unable to take care of the child. *See Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617–18 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Continued illegal drug use after a child's removal is conduct that jeopardizes parental rights and establishes 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).

Father had been struggling with addiction for several years at the time of trial. He admitted using methamphetamine before he began his jail sentence in May 2015, when Kelly was eighteen months old. After a good deal of progress in his recovery, Father relapsed, evidenced by his testing positive for cocaine and marijuana in October 2016. He also tested positive for cocaine in January 2017. Though he claimed that ingestion of cocaine was involuntary because someone put it in his drink, the trial court was free not to believe him. The trial court was also free to consider Father's testimony that he thought having "a couple of drinks" was not a big deal despite his problems with addiction.

Conclusion. The evidence of Father's sexual offense against a young child, criminal activity, and substance abuse amply supports the trial court's finding of endangerment under subsection E. Considering all the evidence in the light most favorable to that finding, we conclude the trial court reasonably could have formed a firm belief or conviction that Father engaged in conduct described in subsection E. Further, in light of the entire record, we conclude the disputed evidence the trial court could not reasonably have credited in favor of its endangerment finding is not so significant that the court could not reasonably have formed a firm belief or conviction that Father endangered Kelly. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding under subsection E. We overrule Father's first and second issues.

C. Mother

Acceptance of endangering conduct. A parent endangers her child by accepting endangering conduct of other people. For example, courts have held that a parent's allowing the child to have contact with a person convicted of a sexual

offense is endangering conduct by the parent. *E.g.*, *Green v. Tex. Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 213, 221 (Tex. App.—El Paso 2000, no pet.) (mother allowed child to spend time with convicted child molester); *In re J.S.G.*, No. 14-08-00754-CV, 2009 WL 1311986, at *11 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.) (mem. op.) (mother allowed children to live with a person on probation for a sexual offense against an eleven-year-old child); *In re D.S.*, No. 11-09-00033-CV, 2009 WL 2470501, at *2 (Tex. App.—Eastland Aug. 13, 2009, no pet.) (mem. op.) (children lived with drug abuser who was a registered sex offender). Another example is permitting a child to be around drugs and/or drug users. *E.g.*, *In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.) (a parent endangers a child by allowing the child to have "continued exposure to the other parent's uncontrolled drug habit"); *In re G.V.*, No. 14-02-00604-CV, 2003 WL 21230176, at *4 (Tex. App.—Houston [14th Dist.] May 29, 2003, pet. denied) (mem. op.) ("Appellant left his child in a very dangerous situation, within easy reach of loaded weapons and narcotics.").

Mother testified she has left Kelly alone with Father, a convicted sex offender and known drug user. Mother and Kelly lived for some period of time with Mother's parents, who admittedly used cocaine and methamphetamine. Grimmer's report detailed her concerns with Mother's minimization both of Father's sexual offense against a child as well as Mother's, Father's, and Grandparents' history of substance abuse.

The trial court reasonably could find that Mother's denial regarding the severity of Father's history of sexual offense itself endangered Kelly. Though Mother denied knowing Father or her parents were using drugs, the trial court was free to disbelieve that testimony, particularly given that she tested positive for cocaine at the time of her professed ignorance.

Drug use. The evidence was undisputed that Mother tested negative for all substances after her initial positive result in October 2015. The evidence is also undisputed that Mother began using methamphetamine when she was fourteen years old. Further, Grimmer's CASA report states Mother lied about her drug use during her substance abuse assessment by saying she had been sober for three years despite her positive result in October 2015.

Criminal activity. The record shows Mother had not been convicted of any crime since 2011. The record also reveals Mother was convicted of five crimes before the age of twenty-one: possession of cocaine, criminal trespass, possession of an unlawful weapon, prostitution, and resisting arrest. Mother's abstention from criminal activity is commendable, but the trial court was not required to ignore her previous convictions.

Conclusion. The evidence shows Mother endangered Kelly by leaving her alone with Father, a convicted sex offender and known drug user. Mother also endangered Kelly by having her live in a home "full of cocaine users." Though Mother unquestionably made progress towards sobriety, the evidence is undisputed that she has struggled with addiction since she was a young teenager and was positive for cocaine when Kelly was not yet two years old. Considering all the evidence in the light most favorable to the endangerment finding, we conclude the trial court reasonably could have formed a firm belief or conviction that Mother engaged in conduct described in subsection E. Further, in light of the entire record, we conclude the disputed evidence the trial court could not reasonably have credited in favor of its endangerment finding is not so significant that the court could not reasonably have formed a firm belief or conviction that Mother endangered Kelly. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding under subsection E. We overrule Mother's first and second issues.

III. Best interest

Mother's and Father's third issues challenge the legal and factual sufficiency of the evidence to support the trial court's finding that termination of their parental rights is in Kelly's best interest.

A. Legal standards

Termination must be in the child's best interest. Tex. Fam. Code Ann. § 161.001(b)(2). Prompt, permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *Id.* § 263.307(a) (West 2014 & Supp. 2016). There is a strong presumption that the best interest of a child is served by keeping the child with the child's parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam).

Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best-interest finding: the desires of the child; the physical and emotional needs of the child now and in the future; the physical and emotional danger to the child now and in the future; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). As noted, this list of factors is not exhaustive, and evidence is not required on all the factors to support a finding that termination is in the child's best interest. *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). *See also* Tex. Fam. Code Ann. § 263.307(b) (setting out factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment).

B. Application

1. Kelly

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

The evidence was undisputed that Kelly was doing very well in her foster home, and all of her physical and emotional needs were being met.

Department's plan for Kelly. Kelly was not in an adoptive foster home because the Department's goal for the majority of the case was family reunification. After the goal changed, Grimmer spoke with the foster mother, who expressed interest in adopting Kelly. The Department planned to broadcast Kelly to a larger pool of potential adoptive parents. Grimmer was confident the broadcast would result in a permanent home for Kelly.

2. Mother and Father

Endangerment. The evidence of Mother's and Father's endangerment of Kelly discussed above is important to the best-interest analysis. *See S.R.*, 452 S.W.3d at 366.

Lack of stable housing or employment. Neither Mother nor Father had stable housing or a job at the time of trial. Neither parent explained how they intended to care for Kelly without housing or a job. There is also no explanation in the record of why Mother was unemployed until October 2016.

3. Conclusion on best interest

Considering all the evidence in the light most favorable to the best-interest

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

IV. Managing conservatorship

In his fourth issue, Father argues the trial court erred in naming the Department as Kelly's managing conservator. 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.

If the trial 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) (West 2014 & Supp. 2016). In this case, upon termination of both parents' parental rights, the Department was appointed Kelly's sole managing conservator.

Termination of parental rights and 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.

Unlike the standard of proof for termination of parental rights, the findings necessary to appoint a non-parent as sole managing conservator need be established by a mere preponderance of the evidence. *See* Tex. Fam. Code Ann. § 105.005 (West 2014); *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. *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 the appointment is arbitrary or unreasonable. *Id.*

Having made termination findings on the predicate grounds and best interest, the trial court was required under section 161.207 of the Family Code to appoint the Department, or another permissible adult or agency, as managing conservator. *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.).

As discussed, the evidence is legally and factually sufficient to support the trial court's termination findings. Father provides no authority for the proposition that the presumption in section 153.131(a) applies to a parent whose parental rights

have been terminated. *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.). Nor did he prove he is a "suitable, competent adult" as contemplated by section 161.207(a). *See id.* Accordingly, Father's challenge to the trial court's appointment of the Department as Kelly's sole managing conservator, rather than him, is without merit. We overrule his fourth issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Christopher, and Wise.