

Affirmed and Memorandum Opinion filed October 10, 2017.



In The

Fourteenth Court of Appeals

NO. 14-17-00359-CV

**IN THE INTEREST OF J.J.S., P.L.S., Z.A.S., A.B.S., AND K.L.S.,
CHILDREN**

**On Appeal from the 2nd 25th District Court
Colorado County, Texas
Trial Court Cause No. 24,251**

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

Appellant J.S. (“Father”) appeals the trial court’s final decree terminating his parental rights and appointing the Department of Family and Protective Services (“the Department”) as sole managing conservator of his children J.J.S., P.L.S., Z.A.S., A.B.S., and K.L.S. The trial court terminated Father’s parental rights on the predicate grounds of endangerment, constructive abandonment, and failure to comply with a family service plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), & (O) (West Supp. 2016). The trial court further found that termination of

Father's rights was in the children's best interest. In a single issue Father challenges the legal and factual sufficiency of the evidence to support the jury's finding that termination is in the best interest of the children. Because we conclude the evidence is legally and factually sufficient to support the jury's finding, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

1. The Department Referral

The Department received a referral in reference to S. S. ("Mother") and Father allegedly using methamphetamine, having unsanitary living conditions, and leaving their children unsupervised. Mother and Father have five children ranging in age from twelve years old to nine months old. The referral noted that Mother and Father "go on meth binges for days at a time."

The report noted that Father owns a wrecker and towing company, and the children often are unsupervised outside in or near the wrecker yard where there is broken glass and shards of metal. The children rarely wear shoes, but it is unknown if any of the children have ever been injured in the yard. Recently one of the youngest children was found unsupervised walking on the highway. The family has had previous child services history in Arkansas and one case in Colorado County for physical neglect.

The caseworker, accompanied by officers from the Colorado County Sheriff's Department, made initial contact with Mother. Mother did not allow the caseworker to interview her children. Mother admitted a prior Child Protective Services ("CPS") history and a prior abusive relationship with her ex-husband. Mother admitted drug and alcohol use with the ex-husband, but denied currently using drugs or alcohol. Mother denied leaving any marks or bruises on any of her children. Mother denied

her child was left unsupervised when the child got outside the gate near the highway. Mother agreed to take a drug test.

The caseworker spoke with Father the same day. Father had no prior CPS history, but admitted he had been arrested “and his charges are lengthy.” Father admitted a history of substance abuse, but denied current use. Father occasionally physically disciplines his children, but denied leaving marks or bruises on any of them.

The caseworker interviewed J.J.S. (“Joyce”),¹ the oldest child, who said her home is dirty. Joyce stated she gets enough to eat at home, but there is only a little amount of food in her home. She stated that when she gets in trouble she gets spanked, but she has never had any marks or bruises on her. The caseworker was not given permission to interview the four younger children.

The caseworker observed the four younger children noting that K.L.S. (“Katia”), the nine-month-old, had dirt on her hands, forehead, and cheeks, and was wearing a soiled diaper. A.B.S. (“Arlene”), the two-year-old, was not wearing clothes or shoes, was not clean, had dirt marks on her chest, arms and legs, and had on what appeared to be a soiled diaper. Z.A.S. (“Zia”), the four-year-old, was wearing a shirt without underwear, bottoms, or shoes. P.L.S. (“Patty”), the five-year-old, had on a pink sleeping gown with no shoes.

The caseworker confirmed that Mother and Father appear to be high on methamphetamine at times, but have not been seen ingesting illegal drugs. The caseworker also confirmed the family’s home is “very unsanitary and unsafe for children with trash piled five feet high inside the home, as well as the fact that the children never have on clothes and walk around with no shoes where there are sharp

¹ We use pseudonyms to refer to the children. *See* Tex. R. App. P. 9.8.

objects on the ground.”

Neither parent returned the caseworker’s phone calls to schedule drug tests. Attempts to contact Mother and Father at their residence were unsuccessful. After a court order, Mother and Father submitted hair samples for drug testing. Father’s hair sample tested positive for amphetamine and methamphetamine. Mother’s hair sample tested negative on the substance panel. The Department determined both parents needed to participate in services, including a drug and alcohol assessment and determined that they should follow all recommendations. Mother and Father refused to speak to representatives of the Department until the parents had an attorney. After being appointed an attorney, Mother and Father did not communicate with their attorney or accept Family Based Safety Services.

Although neither parent signed the service plans, the trial court made the plans orders of the court, and required the parents to comply with the service plans. Approximately six months after the Department filed the original petition for termination, the Department filed a report with the court indicating that neither parent had engaged in services because both parents were incarcerated. Prior to trial Father was moved from a penal facility to an inpatient treatment facility.

2. Father’s Criminal History

No criminal history was listed for Mother on the removal affidavit. Father had an arrest record dating from 1996 through 2001. He had convictions in 1996 and 1998 for aggravated assault with a deadly weapon and theft. An evading-arrest charge was listed with an unknown disposition. Father had been arrested for four assaults, two counts of resisting arrest, and one count of terroristic threat. Each of these charges was rejected by the prosecutor.

3. Family Service Plans

Following a show cause hearing, both parents were ordered to comply with a family service plan. The service plan required the parents to:

- maintain stable employment or demonstrate they are enrolled in a vocational or educational training program to make themselves more employable, thus enabling them to meet the children's basic needs;
- acquire and maintain stable housing for more than six months. This housing is to be safe, clean and free of hazards to ensure the children's well-being;
- attend and cooperate fully in counseling sessions at a CPS contracted provider to address the specific issues that led to the removal of the children from the home and to address any additional issues arising from the psychological examinations or from counseling;
- appear at the office of a CPS contracted provider and submit to and cooperate fully in the preparation of the court ordered drug and alcohol dependency assessment;
- execute an authorization or the release of medical and mental health records to the Department and provide the Department with a list of the names and addresses of the physicians and mental health providers who have treated the children;
- submit to and cooperate fully in the preparation of court-ordered psychological or psychiatric evaluation;
- submit urine samples, at times determined by the Department, for analysis by a drug testing laboratory; and
- attend, participate in, and successfully complete parenting classes and submit to the Department or file with the court a certificate of completion.

B. Trial Testimony

1. The Department's Witnesses

Father testified that he had been arrested and placed on community

supervision for assaulting a police officer in 2001. At the time of trial Father was on community supervision for the felony offenses of interfering with custody and retaliation. The first day the Department came to Father's house in response to the referral, Father drove away in his tow truck and went to his nephew's house claiming that he intended to retaliate against his nephew because he had learned that his nephew was the one who reported the family to the Department. Father threatened a Colorado County Sheriff's deputy who accompanied the caseworker to the house. Father admitted testing positive for methamphetamine. Father admitted being at his home the day Mother left the state with the children. Father held off the police while Mother drove the children out of state.

At the time of trial Father was participating in drug addiction treatment at Bay Area Recovery. He was not employed because he had not reached that phase of his recovery. Before entering Bay Area Recovery Father was in an inpatient treatment facility run by the prison system. Since the children came into care Father has not paid child support because he has been in prison. During the two-year pendency of the case Father has been incarcerated for all but one and a half months. Father completed all of his services except parenting classes because the classes are not offered at the recovery center. Father admitted being emotionally abusive to his wife, but not physically abusive.

Father's business is a wrecker and towing yard where damaged cars are stored. He lived on the front portion of the property and the wrecker yard was in the back. The business was not separated from the residence by a fence, but Father thought it was safe for children. Father testified that he supervised the children and they did not play in the wrecker yard where the damaged cars were stored.

Mother testified that she had five children with Father and five older children with her ex-husband. Mother previously voluntarily relinquished her rights to the

older children. Mother admitted using illegal drugs in her previous marriage. Mother testified that Father was emotionally and physically abusive to her. The weekend before trial Father went to Mother's place of business and broke the window of her truck and then towed it away. Father had been violent before, but Mother would send the children to their grandparents' house when he became angry.

On the day the Department was awarded temporary managing conservatorship of the children Father told Mother to run from the Colorado County authorities. Mother testified she was not only running from the authorities, but was also running from Father. Mother kept the children out of school that day so the Department could not take them directly from school. Mother took the children as far as Arkansas, where she was stopped by a law enforcement officer because of expired registration tags. When the Arkansas officer asked Mother to get out of the vehicle, she fled in the car. A high-speed chase ensued with Mother and all five children in the car. Mother admitted endangering the lives of her children during the chase. Mother eventually stopped because she ran into another car and a police car. She was charged with five counts of endangering the welfare of her children, and with fleeing from the police. Mother served six months in the Arkansas Department of Corrections and, at the time of trial, was on parole for that offense.

Mother is living in La Grange, Texas, working at McDonald's making \$7.45 per hour, and paying rent, but has not paid child support. Mother received substance-abuse treatment while in the Arkansas prison. When the caseworker came to the house Mother did not let her in the house until Mother's attorney was present.

The Department investigator testified that the Department received a referral mentioning that Mother and Father were living with five children in unsanitary conditions with hazards outside that the children could easily access. It was also alleged that both parents were using methamphetamine. The investigator explained

that this was a “priority one” investigation requiring the Department to make contact within 24 hours of receiving the referral. In this priority-one investigation the caseworker decided to take a sheriff’s deputy with her when she visited the home because the Department had experience with the family not being cooperative.

In June 2015, when the Department received the referral that led to the termination of the parents’ rights, the parents again were uncooperative. Mother allowed the caseworker to see the children, but did not allow the caseworker to take photographs. Father was completely uncooperative. Both parents declined a drug test. The Department eventually got a court order to require the parents to submit to a hair follicle drug test. Mother’s drug test was negative; Father’s test was positive for amphetamine and methamphetamine. The Department offered Family Based Safety Services to the parents through their attorney. The attorney reported to the Department that he was unable to get a response from the parents. Following the positive drug tests and the refusal of Family Based Safety Services, the Department got a court order naming the Department temporary managing conservator of the children. The Department sought legal intervention to “at least give the names of services to ensure that the children were safe.” The parents were in the courtroom when the order was issued. The caseworker tried to talk with the parents before they left, but Father became angry and told the caseworker that she could not take his children.

The Department sent one caseworker to the children’s school and another worker to the home. The worker who went to the home took a sheriff’s deputy with her. When they arrived at the home, Father refused to let the caseworker take the children. The investigator described the scene as “kind of like a stand off at their house.” The sheriff’s deputy advised the caseworker to stand down to give Father an opportunity to calm down. Eventually it became apparent that the children were not

at the home. Law enforcement officers went to the home the next day and learned that Mother was also gone. The investigator later learned that Mother had been apprehended in Arkansas with all five children.

The investigator asked Sergeant Jeff Argo of the Colorado County Sheriff's Office to go to the residence where the children were living. Argo explained that the case was "priority one," which required that a law enforcement officer accompany the investigator on a home visit. Argo took another officer with him in a marked unit. When Argo and the investigator arrived at the home, Mother spoke with the investigator. Father came out of the home, got in his wrecker and drove away. As Father drove away he said he intended to harm his nephew who made the report to the Department. Argo chased Father in his patrol car, and Father pulled over about one and a half miles down the road. Father eventually calmed down, drove back home, and briefly talked with the investigator. Argo went back to the home at a later date and expressed his opinion that the children were not safe in the home. His opinion was based on the fact that there was broken glass in the yard and the children were barefoot. Argo further testified that pieces of metal were laying on the ground and there were numerous burned and wrecked cars in the yard that were not fenced off from the home.

Colorado County Sheriff's Deputy Kami Orsak was asked to accompany the caseworker, Child Advocates worker, and a child advocacy lawyer on a visit to the home. When Orsak arrived at the home two of the children were there with Mother. Father was not at home, and three children were in school. Mother told Orsak that Father had moved out. Orsak testified that the house looked "very barren." There were no personal effects; the children's beds were dismantled with "mattresses all over the place." There were mattresses laying on the floor and leaning against walls, but no beds in which the children could sleep. There was an intact bed in the master

bedroom, but it was “completely covered in effects of the house.” It appeared that everything had been cleaned up in the house and placed in the master bedroom.

Constable Richard LaCourse was the bailiff at a pretrial hearing at which the Department was awarded temporary managing conservatorship. LaCourse testified that after the trial court announced its decision, both parents left the courtroom angry and began yelling and screaming at each other. Both parents ignored the caseworker’s questions about whether a family member was available for placement of the children. Mother immediately left the courthouse grounds. Father stayed on the grounds and began yelling at law enforcement officers including LaCourse that they could not take his children. Father said to LaCourse, “You will have to kill me before you take my children.”

Brad Austin of the Resource Education Center Company testified about drug test results. Despite Mother’s negative drug test results Austin spoke with Mother and recommended substance abuse counseling in addition to parenting skill training. Mother came to some counseling sessions and parenting classes, but failed to complete the program.

Colorado County Sheriff’s Deputy Jacob Gorman assisted the Department in attempting to pick up the children after the Department had been granted temporary managing conservatorship. When the caseworker and Gorman arrived at the gate to the home, Father came out of the house holding what appeared to be a subcompact assault rifle. Gorman asked the caseworker to move back on the road and called for back-up.

Colorado County Sheriff R.H. Weid testified that when he learned of the confrontation with Deputy Gorman he called Father on Father’s cell phone. Father told Weid, “[T]oday is the day I picked to die. No one is going to take my kids from me.” From Father’s demeanor, Weid believed that Father was capable of harming

someone that day. Weid instructed the deputies to leave the house while they maintained surveillance. Later, the children's grandfather, who lived on the same property as Father, Mother, and the children, called Weid and told him that Mother had left with the children.

Father's community supervision officer, Mike Booker, testified that he supervised Father on two cases, which were obstruction, retaliation, and interfering with child custody. While on supervision, which was while this termination case was pending, Father tested positive for methamphetamine. Father's community supervision was revoked and he was placed into custody after testing positive. At that time Father's conditions of supervision were modified and he was placed in a Substance Abuse Felony Punishment ("SAFP") facility.

There were two caseworkers who worked with the children at various times during the pendency of this case.

The conservatorship caseworker testified that when the children were placed into temporary custody both parents were incarcerated. After Father was released, the Department arranged supervised visitation at the Department's office. In visiting their Father the youngest children were initially hesitant, but warmed up to him and became playful. The grandparents were also present at the visit. At one point in the visit the caseworker noticed that Father was playing a tickle game with Patty, the five-year-old. The caseworker noted that the tickle game appeared to go on longer than Patty wanted, and, for the rest of the visit, Patty avoided Father.

The caseworker created a service plan for both parents and went over it with each of them. Both parents understood that they needed to complete the services to obtain the return of their children. Mother signed a waiver for the children to enter school without immunizations because they were not current on vaccinations. The Department enrolled Patty and Arlene in speech therapy. Joyce, the oldest child, was

diagnosed with a learning disability and was placed in a program to help her. At the time of trial all five children were together in the same foster home. Once in their current placement, “[t]heir demeanor completely changed.” The children were happy, settled, and stabilized. The caseworker contrasted this demeanor with the children’s demeanor when they first were brought back from Arkansas. At that time they were nervous and apprehensive; Zia cried in her sleep, and Joyce expressed anxiety caused by fear for their safety during the high-speed chase. The caseworker attributed the children’s happiness and stability to the fact that they had a schedule and predictability in their daily activities.

Although the grandparents attended all visits, the caseworker testified that the grandparents would not be able to help Mother and Father parent the children. The caseworker testified that the grandparents saw the children daily before they came into care. It was the opinion of the Department that the grandparents would not be able to help with the children after the children came into care because the grandparents did not have a history of helping before the Department became involved. An aunt also was considered as a possible family member that could help, but the caseworker has been unable to rely on the aunt and her ability to help.

The current caseworker testified that she has visited the children eight times, but has not seen Mother interact with the children. The Department has a prospective adoptive home, which is willing to take all five children. The family is in the process of becoming a licensed foster home, which requires a criminal background check, proof of income, attendance at classes, and a rigorous home inspection. The caseworker has been to the family’s home and testified that they have enough room for all five children. Two other families are interested in adoption, but are not willing to take all five children.

The current caregiver for the children testified that when the children first

came into her care, Patty threw temper tantrums, and Katia was biting. The other three children did not exhibit any adverse behaviors. Neither parent has provided monetary support for the children since they have been with the caregiver. Mother visited the children, but was not consistent in her visitation. Father visited two times before he was incarcerated. Mother brought birthday and Christmas gifts, and Father brought school supplies and something for Easter.

The Court Appointed Special Advocate (“CASA”) volunteer testified that she supervised two of Mother’s visits with the children. Mother interacted well with the children during these visits. The CASA volunteer observed that all of the children have improved since they came into care. Joyce initially behaved as a parental figure to the younger children. Since Joyce went into foster care, her foster parents have been working with her to help her learn to be a sibling rather than fulfill a parental role. Mother told the CASA volunteer she was unable to support all five children on her own. The CASA volunteer had no contact with Father because of his incarceration.

Although the grandparents live next door to Mother and Father, the Department does not believe they would be an appropriate placement for the children due to the grandmother’s ill health, and the fact that the grandparents have always lived next door and did not intervene to keep the children safe before their removal. Two other relatives were considered, but rejected by the Department. One of the paternal aunts was considered, but rejected by Mother and Father because her son was the one who made the report to the Department. Another relative was rejected due to negative criminal background checks. The CASA volunteer has observed the children in their current placement. She testified that the children were well adjusted, got along well with the family’s other children, and enjoyed structured family time.

Based on her involvement and observations directly during this case, the

CASA volunteer expressed the opinion that it would be in the best interest of the children to terminate the parents' rights. The CASA volunteer testified that her opinion was based on looking at the entire case from start to finish. She took into consideration the means by which the parents have to care for the children long term. She explained that she did not question the love the parents had for their children, but based her opinion on the condition of the home, the environment in which the children were being raised, and the admitted drug use by the parents. Joyce expressed to the CASA volunteer that she wanted to live with Mother and that Father "gets angry a lot."

2. Father's Witnesses

After the Department rested, Father testified on his own behalf. Father testified that he first tried methamphetamine when he was 21 years old. The SAFP treatment is the first treatment he has had for substance abuse. Over the course of seven months Father completed all the programs in SAFP. At the time of trial Father had been discharged from SAFP and was living in a halfway house called Bay Area Recovery. Father is meeting all requirements in the halfway house program and has reached step six of a twelve-step program.

Father believes that his nephew made the report to the Department in retaliation for Mother asking the nephew to remove a video from Facebook. Father testified that he completed all the services on the family service plan except the parenting classes. Father admitted damaging Mother's car while she was at work. Father testified that he never used drugs around the children. Father denied that the wrecker yard posed a danger to the children. Father believes that the Department had a plan for his children and never intended to give the children back to him. Father plans to live with his parents when he is discharged from the halfway house. He plans to get a job with more regular hours than his wrecker business.

On cross-examination Father admitted that he was a daily methamphetamine user at the time the children were removed. Father does not believe that his daily methamphetamine use affected the children. Father further admitted that if he used again he would most likely be arrested and his children removed.

Father then called three witnesses who were employees or former employees of the wrecking business. Each of them testified that in their opinion the children were not in danger and Mother and Father were good parents.

Father's sister testified that the children's living environment was not dangerous and the children seemed to be well supervised. Father's sister testified that before the children's removal they were well cared for, and that if they were returned to their parents they would be in a safe environment. The sister testified that she wanted the children placed with her, but she was rejected by the Department because, "They used my kids' past and my ex-husband and all that against me."

Father's oldest sister testified that she did not believe the wrecker yard was inherently dangerous. She admitted that one of the children cut her foot, but does not know if the cut was caused by playing in the wrecker yard or another part of the yard or house. She testified that the living situation was safe, especially since the children spent most of their time with the grandparents. The oldest sister also testified that Mother and Father could provide a safe living environment for the children. The oldest sister's son made the initial report to the Department. The oldest sister was aware of an incident of domestic violence between Father and Mother.

3. Mother's Witnesses

Mother began her testimony explaining the circumstances that led to her executing a voluntary affidavit of relinquishment to her oldest children from a previous marriage. Mother explained that her ex-husband forced her to take

methamphetamine, but she has not used drugs since Joyce was three years old.

In explaining her flight to Arkansas, Mother testified that Father told her to pick up the children, buy a new cell phone, and drive the children to Oklahoma. Mother explained that they were trying to determine if the children qualified for American Indian Tribal Funding. On her way to Oklahoma, Mother was stopped by a police officer in Arkansas. When the officer told Mother to get out of her car, Mother fled from the officer leading officers from several counties in a high-speed chase. Mother described the decision to flee as “the biggest mistake of my life.” Mother went to prison in Arkansas, and the child protection agency in Arkansas returned the children to Texas.

Father’s mother (“Grandmother”) testified that she would like to take care of the children. Grandmother’s doctor has advised against caring for children because of Grandmother’s ill health. Grandmother is 74 years old and still cleans her own house. She believes Mother and Father are good parents and the children should be returned to them. She is capable of helping them care for the children. Grandmother admitted that the youngest child was playing and ended up at the end of the driveway close to the road. Most of the time the gate to the road was closed, but not locked.

Father’s father (“Grandfather”) testified that he believed Mother and Father were good parents. The parents and children lived in a mobile home behind the grandparents’ house. Grandfather did not remember any of the children being injured while playing in the wrecker yard.

4. Child Witness

Joyce testified that she currently lives with her four younger sisters and attends Columbus Junior High School. In her current placement she shares a room with one of the caregiver’s daughters. She and her sisters feel safe in their current home. She

also testified that she and her sisters felt safe at home with their parents before coming into the Department's care.

C. Jury Charge and Verdict

The jury charge submitted grounds for termination of Father's rights under Texas Family Code sections 161.001(b)(1)(D), (E) (endangerment), (N) (constructive abandonment), and (O) (failure to comply with the service plan). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), (O) (West Supp. 2016).

The jury was further instructed:

In addition, it must also be proven by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child. The same evidence may be probative of both the acts or omissions stated and the best interest of the child. Some factors to consider in determining the best interest of the child are:

1. the desires of the child;
2. the emotional or physical needs of the child now and in the future;
3. any emotional and physical danger to the child now and in the future;
4. the parenting abilities of the individuals seeking custody;
5. the programs available to assist those individuals or by the agency seeking custody;
6. the plans by those individuals or by the agency seeking custody;
7. the stability of the home or proposed placement;
8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and
9. any excuse for the acts or omissions of the parent.

Based on these instructions, the jury was asked whether the parent-child relationship between Father and the five children should be terminated. The jury answered "yes."

The trial court signed a decree of termination finding that Father's parental

rights should be terminated based on the predicate findings under Family Code sections 161.001(b)(1)(D), (E), (N), and (O), and that termination of Father’s rights was in the best interest of the children.

II. ANALYSIS

In a single issue Father challenges the legal and factual sufficiency of the evidence to support the jury’s finding that termination of his parental rights is in the children’s best interest.²

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 the termination of parental rights, the burden of proof is heightened to the clear and convincing evidence standard. *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.).

² Mother has not appealed the termination of her parental rights.

In reviewing legal sufficiency of the evidence in a parental 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. *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.).

In reviewing the factual sufficiency of the evidence, 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).

A. Predicate Termination Grounds

Father does not challenge the sufficiency of the evidence to support the jury’s findings that termination was proper under section 161.001(b)(1)(D), (E), (N), and (O) of the Texas Family Code. As relevant to these proceedings, section 161.001(b)(1) provides termination 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;

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:

(i) the department has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and

(iii) the parent has demonstrated an inability to provide the child with a safe environment; [and]

(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.

An unchallenged fact finding is binding on us “unless the contrary is established as a matter of law, or if there is no evidence to support the finding.” *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *see In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013) (unchallenged findings of fact supported termination under section 161.001(1)(O) because record supported those findings); *In re C.M.-L.G.*, 14-16-00921-CV, 2017 WL 1719133, at *8 (Tex. App.—Houston [14th Dist.] May 2, 2017, no pet. h.) (mem. op.) (same). We have reviewed the record and determined that the record supports the unchallenged findings. Because the record supports the jury's findings, we treat them as conclusively established.

B. Best Interest of the Children

Having conceded the predicate grounds for termination, Father challenges the legal and factual sufficiency of the evidence to support the jury's finding that termination is in the best interest of the children.

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).

Courts apply a strong presumption 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 in a safe environment also is presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a). Father contends that the presumption in his favor is not rebutted because (1) notwithstanding the unkept house, the children were not adversely affected; and (2) Father's drug problem never endangered the children.

Multiple factors support the jury's finding that termination of Father's rights was in the children's best interest.

1. *Desires of the children*

The record reflects that Joyce, who was fourteen years old at the time of trial, told the CASA volunteer that she wanted to live with her mother. In her testimony,

Joyce said she feels safe living with her foster family and enjoys living with her sisters. Joyce did not express a desire to live with her father, and admitted he can be angry at times. The other children's desires were not reflected. The other children ranged in age from three to seven years old.

A child's love for her natural parent is an important consideration in the best-interest determination. *In re W.S.M.*, 107 S.W.3d 772, 773 (Tex. App.—Texarkana 2003, no pet.). Even when a child is attached to a parent, however, the child's desire to be returned to the parent will not be dispositive of the best-interest analysis if the parent has engaged in conduct dangerous to the child's well-being. *B.B. v. Tex. Dep't of Family & Protective Servs.*, 445 S.W.3d 832, 838 (Tex. App.—El Paso 2014, no pet.). 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 the foster family, 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).

In this case, the record reflects that all of the children, including Joyce, improved dramatically while in foster care. The children were able to bond with their foster family and were doing well in school. Zia, who had been having nightmares, no longer had nightmares while in foster care.

The paramount consideration in a best-interest determination is the children's need for permanence through the establishment of a "stable, permanent home." *See In re C.H.*, 89 S.W.3d at 28. Therefore, evidence about placement plans, including a potential adoption, are relevant to the best-interest determination. *Id.* The record reflects that one of the families interested in adopting the children is willing to adopt all five children. The record reflects that the children are very happy to be living together and bonding with the foster family. This factor weighs in favor of the jury's best-interest finding.

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

Evidence supporting termination under the grounds listed in section 161.001(b)(1) can also be considered in support of a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d at 27 (holding the same evidence may be probative of both section 161.001(b)(1) grounds and best interest); *In re L.G.R.*, 498 S.W.3d at 204.

The record contains evidence that Father admitted substance abuse while caring for his children, though Father claimed that his use did not affect his parenting. While this termination case was pending, Father continued to use drugs resulting in revocation of community supervision and sentencing to the SAFFP program. A parent's drug use supports a finding that termination is in the best interest of the children. *In re L.E.R.*, 14-15-00205-CV, 2015 WL 3918062, at *8 (Tex. App.—Houston [14th Dist.] June 25, 2015, no pet.) (mem. op.).

We acknowledge that Father testified he was in recovery for substance abuse and had remained sober while in the SAFFP program and at the halfway house. The jury, however, is not required to ignore a long history of dependency and abusive behavior merely because it abates as trial approaches. *See In re J.F.C.*, 96 S.W.3d at 272 (holding parents' extensive history of substance abuse and violence was not rendered legally insufficient by improvements that appeared to render their home safe and loving five months before trial); *see also In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Evidence of a recent turnaround should be determinative only if it is reasonable to conclude that rehabilitation, once begun, will surely continue. The jury could hold a firm conviction that, in circumstances like those presented here, that is not the case.

In addition, Father's criminal records were admitted at trial. Father's criminal

history showed criminal convictions both before and after his children were born including a suspended sentence for interference with child custody and revocation of his community supervision for using methamphetamine. Testimony at trial showed Father had threatened law enforcement officers and engaged in domestic violence. Records admitted at trial show that before marrying Mother, Father physically assaulted his girlfriend and girlfriend's daughter.

Evidence of continued criminal conduct, including periods of incarceration, supports the fact finder's best-interest determination. *See In re D.M.*, 58 S.W.3d 801, 814 (Tex. App.—Fort Worth 2001, no pet); *In re M.D.S.*, 1 S.W.3d 190, 199–200 (Tex. App.—Amarillo 1999, no pet.) (incarceration standing alone does not amount to endangering conduct, but it is relevant to the child's need for current and future stability and permanence). The jury reasonably could have considered that Father's repeated acts of violence would continue in the future. *See Walker*, 312 S.W.3d at 617.

This evidence of Father's drug use and criminal history, including domestic abuse, supports the jury's best-interest finding that Father poses a physical and emotional danger to the children.

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*

As with the previous factor, Father's history of drug abuse and its attendant unstable lifestyle, plus his continuing narcotics use while this case was pending, not only supports the jury's endangerment finding, but 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); *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).

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 parent seeking to avoid termination of the parent-child relationship. *See In re D.R.A.*, 374 S.W.3d at 535.

One of the caseworkers testified that when the children first came into care “they were very nervous and apprehensive,” Zia had “little night terrors for a while” where she would cry out in her sleep and would call out saying “No, mommy, no; why, daddy, why?” Another child was “unsettled” and the oldest child stated that she was “afraid, a little anxious.” The CASA volunteer testified that when Joyce first entered care she was withdrawn and not as talkative as the younger children. She was also behaving as a parental figure to the younger children. Patty was having difficulties with multiple tantrums, throwing herself on the floor at the foster home and engaging in attention-seeking behavior. The children had to learn to follow directions, and how to pick up after themselves.

In contrast, after acclimating to their current home, the children's demeanor completely changed in that they are “very happy, very settled, stabilized.” The

CASA volunteer related that the children are “very well adjusted,” and are doing well in their current placement, and she had not seen any of the children have a tantrum in “quite some time.” Joyce learned, with the aid of her foster parents, to just be a sibling, and not feel the need to parent the younger children. The children have spent time with the prospective adoptive family and get along well with the parents and other children in the home.

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

III. CONCLUSION

Based on the evidence presented, the jury reasonably could have formed a firm belief or conviction that terminating Father’s parental rights was in the children’s best interest so that the children 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 Father’s parental rights and naming the Department managing conservator.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Jewell.