Affirmed and Memorandum Opinion filed December 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00506-CV

IN THE INTEREST OF M.R.D.W., CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2016-03574J

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 Mother and Father (appellant R.W.) with respect to their son, Michael,[1] and appointed the Texas Department of Family and Protective Services (the Department) to be Michael's managing conservator. On appeal, Father challenges the sufficiency of the evidence to support termination. We conclude legally and factually sufficient evidence supports the trial court's findings that Father endangered Michael and that termination of the parent-child relationship is in Michael's best interest. Therefore, we affirm the trial court's judgment.

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

BACKGROUND

A. Removal

The following facts come from the affidavit of Department investigative caseworker Samantha Nix.

The Department received a referral about newborn Michael in June 2016. The reporter said Mother tested positive for marijuana, benzodiazepine, amphetamine, and opiates at the time Michael was born. The results of Michael's drug tests were not available at the time, but it was later determined that Michael was born with marijuana, benzodiazepine, and opioids in his system.

Nix visited Mother in a Houston hospital the day after Michael's birth. Mother identified Father as Michael's biological father and said he was working in Galveston. Understanding Michael would be removed from her care, Mother told Nix she wanted the baby to be with Father. Mother left the hospital against medical advice later that day.

Nix was not able to contact Father. She learned during her investigation that he had several convictions for drug-related activity.

Unable to locate a suitable placement for Michael, the Department removed Michael and filed this suit, attaching Nix's affidavit to the original petition. The trial court signed an emergency order allowing the removal and naming the Department as Michael's temporary managing conservator.

B. Family service plan

Following a full adversary hearing, the trial court signed an order requiring Father to comply with any family service plan by the Department. The service plan would identify the goals he needed to achieve and tasks and services he needed to complete before Michael could be returned to his care.

The service plan's goals for Father included: (1) his willingness and ability to protect Michael from harm and to provide basic necessities such as food, clothing, shelter, and medical care for him; (2) his active participation in therapy to understand how substance abuse may impact his current parenting style; (3) his provision of safe and stable housing for Michael; and (4) his understanding of the serious situation that placed Michael in harm's way.

So that he could accomplish those goals, the Department's service plan for Father required him to, among other things: (1) complete parenting classes; (2) complete a substance abuse assessment and follow the assessor's recommendations; (3) submit to random drug testing and test negative at all times; (4) complete a psychosocial evaluation and follow the evaluator's recommendations; (5) obtain and maintain suitable employment and stable housing; (6) refrain from criminal activity; (7) maintain regular contact with the caseworker; and (8) make his best effort to attend all hearings, meetings, and scheduled visitations with Michael.

C. Trial

Trial was held in May 2017. The Department presented testimony from caseworker Keverlyn Walker; Bruce Jefferies, an employee of a drug testing facility; and Father. The Department's documentary evidence included the parents' service plans, drug test results, and judgments of criminal convictions, as well as Michael's medical records. Neither Mother, Father, nor Michael's attorney ad litem called witnesses or offered evidence. Mother did not attend trial personally; she was incarcerated in Mississippi at the time.

1. Evidence about Michael

Michael was positive at birth for benzodiazepines, opioids, and cannabinoids. Diagnosed with neonatal abstinence syndrome, he spent the first three months of his

life in the hospital, where he was treated for withdrawal.

Early in the case, Michael's paternal grandmother asked that he be placed with her. The Department declined to conduct a home study on her, however, because she tested positive for cocaine and withheld information about some of the people living in her house.

Once released, Michael was placed with a foster family, and he remained in that home through the time of trial. Walker testified the foster parents were meeting all of Michael's physical and emotional needs. She reported Michael was well-bonded to his foster parents and foster siblings. The foster parents were willing to adopt Michael.

Father testified he was ready to care for Michael, and his family would help as well:

> I'm willing for it. I'm ready to be able to take care of my son, you know. I have family that's willing to help me, know what I'm saying, everything that went through the family plan that want to get the placement, you know, they had records over 20 years ago, you know. So she was saying just cause it was 20 years ago, that the family — my baby couldn't be placed in that and they doing good for theyself. She never did the home study for them and —
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> . . .
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> My uncle and my brother been at least ten years ago. My brother and his wife, [J.W.] and [R.W.], they've been over ten years cases. He's been convicted but it's been over ten years. But I know it's a good person that my family would be involved with the placement at that time.
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> . . .
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> My brother . . . got a company, got a nice home off 1960 and he doing very good for hisself right now. You know he take care of a bunch of kids, you know, she just never did the home study.

2. Evidence about Father

a. Ability to provide for Michael

Father testified he is a rapper and music producer. According to Walker, Father's mother is the CEO of his music company. Father said he also works for a family grocery business. He estimated he earns somewhere between $1,000 and $5,000 per month from rapping and producing. That money is in addition to his income from the family business.

He brought clothes and wipes for Michael at one visit. He did not give him anything else. He testified he brought a trunkful of items for Michael with him to trial, and those items were still in his car.

Father did not pay child support for Michael during the pendency of this case. He does not pay child support for his other children, either.

b. Service plan

Walker testified Father satisfied some but not all of his service plan's requirements. He visited Michael regularly, missing perhaps only two scheduled visits. He started but did not finish his substance abuse treatment or individual counseling. Walker admitted miscommunication between her and the therapist may have contributed to the delay in Father's completing his counseling sessions. By contrast, she attributed his failure to complete his substance abuse treatment to Father's continued drug use, which caused the treatment period to be extended. Walker said Father did not submit proof of stable employment and housing.

Father disputed Walker's testimony about his non-compliance with the service plan. He testified:

I completed everything. I completed my last therapy. I guess you [sic]

> never looked it up but I just completed it. She can call and verify it. Only thing I'm doing right now is my substance abuse right now. I have like two weeks left. Everything I did on the assessments, I did. Everything she asked me to do I did.

He said Walker verified his employment by calling his supervisor at the grocery business.

Walker did not go to Father's home. She testified Father told her he did not want Michael to return to his home because "he didn't want the individuals that was [sic] in the house to test positive."

c. Criminal history

Father pleaded guilty in 2001 to failure to identify himself to a peace officer, a class B misdemeanor. He was sentenced to three days' confinement in jail. In 2003, a jury found him guilty of delivery of less than one gram of cocaine, a state jail felony, and assessed punishment at 330 days in jail. Finally, Father pleaded guilty in 2009 to manufacture and delivery of one to four grams cocaine. The trial court deferred an adjudication of guilt and placed him on community supervision for five years.

d. Drug use

Characterizing himself as an "occasional" marijuana user, Father admitted to smoking marijuana once and taking one ecstasy pill after he found out Mother was pregnant. He testified somebody slipped cocaine into the ecstasy. Father also confirmed he has been and may continue to be exposed to marijuana use through his business as a rapper and music producer. He said such exposure would not endanger Michael because Michael would not be present when marijuana was used.

Father submitted to a drug test on June 23, 2016, two weeks after this case began. The results showed him to be positive for marijuana, marijuana metabolites,

cocaine, and benzoylecgonine, a cocaine metabolite. Though he sporadically tested negative throughout the case, Father was positive, generally at increased levels, for each of those substances several more times before trial began eleven months later.

Father was recommended to attend Narcotics Anonymous / Alcoholics Anonymous (NA/AA) meetings, be he declined to attend. He suggested those meetings would have been duplicative of his substance abuse treatment. Father did not have an NA/AA sponsor.

Bruce Jefferies testified about Father's drug test results. Jefferies works for National Screening Center, a company that collects biological material for testing by an outside laboratory. His company itself does not test the material. Jefferies has worked in the industry for twenty-five years. He speaks at least two or three times a day to scientists in the lab that conducts the tests.

Jefferies explained that the presence of particular marijuana metabolites and cocaine metabolites resulted from Father's ingestion of marijuana and cocaine, rather than mere exposure to those substances. He said Father's cocaine levels were not consistent with Father's account that he ingested, several months earlier, a single ecstasy pill allegedly laced with cocaine. According to Jefferies, the very high levels of marijuana and marijuana metabolites in Father's system indicated chronic, heavy use of marijuana.

3. Trial court's findings

The trial court found Father engaged in the conduct described in subsections E (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. The court additionally found termination of Father's parental rights was in Michael's best interest. The trial court appointed the Department to be Michael's managing conservator. Father 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 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

Father challenges the legal and factual sufficiency of the evidence to support the trial court's finding regarding subsection E of section 161.001(b)(1) of the Family Code. We conclude the evidence is legally and sufficient to support that finding. Accordingly, we do not review the finding regarding subsection 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 subsection E inquiry. *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. Substance abuse

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 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).

C. Application

Father insisted at trial that he used drugs only once after he found out Mother was pregnant: he smoked marijuana and took a hit of ecstasy as part of his birthday celebration. He also contended the ecstasy was laced with cocaine.

However, Father tested positive for marijuana, marijuana metabolites, cocaine, and cocaine metabolites several times throughout the case. Bruce Jefferies explained that the presence of metabolites indicated Father ingested the drugs, rather than merely being exposed to them. He said the cocaine levels were not consistent with Father's claim of a single, accidental ingestion. Jefferies testified the high levels of marijuana and marijuana metabolites resulted from chronic, heavy use.

As the sole judge of credibility, the trial court could have chosen to believe the test results and Jefferies' interpretation of those results and disbelieve Father's account. *See In re A.J.E.M.-B.*, Nos. 14-14-00424-CV, 14-14-00444-CV, 2014 WL 5795484, at *14 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (mem. op.)

("We acknowledge the Mother's testimony that she inadvertently used marijuana one time when she tested positive . . . . However, as the factfinder, the trial court was entitled to disbelieve the Mother's testimony and rely on the drug test results and other evidence.").

On appeal, Father asserts Jefferies was not qualified to interpret drug-test results. At trial, though, he merely declined to stipulate to Jefferies' expertise. After the Department established Jefferies' expertise, Father did not object to the testimony. Accordingly, Father has not preserved this complaint for appeal. *See* Tex. R. App. P. 33.1; *In re A.C.*, 394 S.W.3d 633, 645 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (holding mother who did not object to expert's testimony failed to preserve error regarding that testimony). In any event, the Department had no burden to provide expert testimony about Father's test results. *See L.G.R.*, 498 S.W.3d at 203 ("Mother does not cite, nor have we found, any legal authority supporting her argument that the Department was required to present expert testimony as to causation."); *In re C.M.-L.G.*, No. 14-16-00921-CV, 2017 WL 1719133, at *10 (Tex. App.—Houston [14th Dist.] May 2, 2017, pet. denied) (mem. op.) ("Mother cites no authority, and we know of none, requiring expert testimony about drug test results in parental termination cases.").

4. Conclusion on endangerment

The evidence supports a finding of heavy, chronic drug use by Father. 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 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

Michael. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding regarding subsection E. We overrule Father's first issue.

III. Best interest

Father's second issue challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination of his parental rights is in Michael'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.). The Family Code

also sets out factors to be considered in evaluating a parent's willingness and ability to provide the child with a safe environment. *See* Tex. Fam. Code Ann. § 263.307(b).

B. Application

1. Michael

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.).

Despite suffering from drug withdrawal in the first months of his life, by the time of trial Michael was doing very well and had no special needs. His foster parents were meeting all of his needs. He was bonded to them and the other children in the home. The foster parents were willing to adopt Michael.

Father contends the scant evidence about Michael's current placement is insufficient to support the best-interest finding. For example, he says, rather than state facts about Michael's needs and his foster family, Walker merely answered "yes" to leading questions such as, "is that placement meeting all the child's physical and emotional needs?". Further, Walker testified only that the foster parents were "willing to adopt" Michael, not that they intended to adopt him.

On this record, however, we cannot say more was required. The evidence was undisputed that Father and each of his relatives discussed at trial as a possible placement for Michael (Father's mother, brother and sister-in-law, and uncle) tested positive for drugs and/or have criminal history. Such drug use and criminal history is relevant to the "the stability of the home or proposed placement," a *Holley* factor. In light of that evidence, the fact finder could reasonably place weight on Walker's affirmation that Michael was doing well and was bonded with his foster parents.

Further, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. *C.H.*, 89 S.W.3d at 28. "Instead, the inquiry is whether, on the entire record, a fact finder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest—even if the agency is unable to identify with precision the child's future home environment." *Id.*

2. Father

Substance abuse. The evidence of Father's substance abuse, discussed above, is important to the best-interest analysis. *See S.R.*, 452 S.W.3d at 366.

Stability. Father testified he held a steady job with his family's grocery business and had a stable place to live. Walker testified she was not able to verify either fact. Father also said he earned between $1,000 and $5,000 each month as a rapper and music producer, on top of his income from the grocery business, yet he never paid child support.

Failure to complete service plan. The evidence is disputed as to whether Father fulfilled his service plan. Walker testified he did not complete his individual therapy or substance abuse treatment. Father testified he had just finished therapy and was nearly finished with drug treatment.

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 Father's parental rights was in Michael'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 Father's rights was in Michael's best interest. Accordingly, the evidence is legally and factually sufficient to support the trial court's finding that termination is in Michael's best interest. We overrule Father's second issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.