

Affirmed and Memorandum Opinion filed November 30, 2017.



In The

Fourteenth Court of Appeals

NO. 14-17-00507-CV

IN THE INTEREST OF C.M., JR., J.M., I.M., I.M., AND C.M., CHILDREN

**On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2016-03784J**

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

Appellants S.A. (“Mother”) and C.M., Sr. (“Father”) appeal the trial court’s final decree terminating their parental rights and appointing the Department of Family and Protective Services as sole managing conservator of their children C.M., Jr., J.M., I.M., I.M., and C.M. The trial court terminated both parents’ rights on the predicate grounds of endangerment, constructive abandonment, failure to comply with a family service plan, and use of a controlled substance in a manner that endangered the health or safety of the children. *See* Tex. Fam. Code Ann.

§ 161.001(b)(1)(D), (E), (N), (O), & (P) (West Supp. 2017).¹ The trial court further found that termination of the parents' rights was in the children's best interest, and named the Department managing conservator of the children.

In a single issue Mother challenges the factual sufficiency of the evidence to support the trial court's finding that termination is in the best interest of the children. In seven issues Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings on the predicate grounds for termination, and that termination is in the best interest of the children. Father also challenges the sufficiency of the evidence to support a finding that appointment of the Department as managing conservator was in the children's best interest. Because we conclude the evidence is legally and factually sufficient to support the trial court's findings, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

1. The Department Referral

The Department received a referral alleging neglectful supervision and physical abuse, which arose out of an incident in which Father was shooting a gun at several men who also shot at the home where the parents and five children lived. At the time of the alleged shooting, the children ranged in age from four months to five years old. The report stated that Father associates with men who have threatened him and shot at his house. Father started shooting toward these men approximately a month before the referral, and since then the men had been coming to the house to

¹ The numbering of section 161.001 changed effective April 2, 2015. Section 161.001(1) is now section 161.001(b)(1). Although the trial court's judgment cites the previous version, the current version applies because the termination proceeding began after April 2, 2015. We refer to the current version in this opinion.

shoot at Father in apparent retaliation. The children were reported to be at home during one of the shootings directed toward their home. It was reported that Father keeps loaded guns inside the house including an automatic weapon. At the time of the referral Mother was incarcerated due to holding a gun behind her back when law enforcement officers came to the home.

It was also reported that Mother and Father take Xanax and use marijuana daily. The children have witnessed domestic violence in the home. The home was observed to have “roaches and spiders crawling all over the furniture and in the kitchen.” There was very little food in the home to feed the children. When a Department representative came to the home, the parents denied entry to a locked room in the home. The Department removed the children “[d]ue to the neglectful supervision of the children at the hands of their parents who engage in domestic violence, are suspected of consorting with gang members, and who have allowed the home to disintegrate to the point that it is physically unsafe for the children to remain in the home.”

2. Parents’ Criminal History

Both parents were convicted of unlawfully carrying a weapon. Father was also convicted of theft, displaying a fictitious license plate, trespass, evading arrest or detention, and failure to give information.

3. Parents’ Department History

In 2012, when C.M., Jr. (“Colin”)² was a year old, and his sister, J.M. (“Julia”) was nine months old, the Department received a referral from law enforcement officers. The referral was the result of an argument between the parents. After being dispatched to a disturbance with gunfire, officers found Mother, Father, Colin, and

² We use pseudonyms to refer to the children. *See* Tex. R. App. P. 9.8.

Julia walking down the street. When told to raise his hands Father grabbed the butt of a shotgun instead of raising his hands. At that point officers intervened and removed the gun from Father's hand. Father hid himself behind the two young children. Officers reported that they felt Father "had every intention of shooting them while using [the children] as a shield."

Two years later, in 2015, the Department received another referral with regard to I.M. ("Isaac"), who was a year old at the time. The referral was a result of Isaac following Father to the store a block away from home because the parents did not know who was supervising Isaac. Bystanders saw the one-year-old walking alone and thought he was injured so they picked him up. When Father's cousin saw the bystanders holding Isaac, a disturbance ensued. It was reported that Father pulled a gun on the bystanders and the bystanders pulled a knife on Father. The child was not harmed and no arrests were made.

Later in 2015, the Department received another referral regarding the home where the children were living. The report noted that the children's paternal aunt, who was in the home at the time, is a felon, had pending child endangerment charges against her, and was selling drugs from the home. It was also reported that someone shot toward the house approximately two months earlier. Father was robbing homes and was charged with breaking and entering; the shooting was considered possible retaliation for the alleged robberies. When the Department arrived at the family's house they observed that all the children had lice, and they would go all day without eating until 3:00 p.m. It was noted that all the adults in the home are "fighting among themselves."

3. Family Service Plans

After the children were removed, both parents were ordered to comply with family service plans requiring the parents to:

- participate in the anti-gang awareness program, which is offered through the Mayor's office;
- participate in couples counseling;
- refrain from engaging in any illegal criminal activities;
- provide the Department worker with a release of information for all service providers, medical personnel, and officers of the court to obtain records and progress information regarding their case;
- maintain stable and safe housing for a minimum of six months consecutively;
- provide their current caseworker with any and all sources of income for themselves and their children by the 15th of each month;
- participate in and successfully complete a psychosocial evaluation;
- attend, actively participate in, and successfully complete parenting classes;
- participate in drug/alcohol testing upon request by the Department or a provider; and
- participate and complete a drug/alcohol assessment.

4. Pretrial Services

Each parent participated in a psychosocial evaluation as required by the family service plans; the assessments were admitted at trial. Mother's assessment reflects that at the time of the assessment she was facing criminal charges for the offense of unlawful carrying of a weapon, which was alleged to have occurred three days before the Department received the report about the children. Mother reported that Father gave her the gun just before the event in which the children were removed.

Mother reported that she and Father live in Father's grandmother's home and have been in a relationship for seven years. Mother's first child was born in 2011 when she was 16 years old and she was in the eighth grade. Mother reported

experimenting with marijuana beginning at age 14, and smoking it approximately two times per day, but not in front of her children. She reported testing positive for marijuana during one of her pregnancies.

Regarding the incident that led to the children's removal, Mother reported that Father and his brother-in-law were fighting when "things got out of hand." After the brother-in-law was "kicked out of the house," Mother "was unsure about what happened after the fight" because she was arrested for carrying Father's gun. According to Mother, the fight arose because of "the unruly living environment" in which the family lived. Several extended family members lived in the home. Mother explained that "people were always bumping heads," and "there was always a lot of chaos."

The evaluator concluded that Mother seemed to understand how the events may have led to the removal of her children. She cares about her children and "seems genuinely sad that her children have been removed from her care." The evaluator concluded that Mother appeared to know how to care for and nurture her children, but may not have fully considered the impact of alcohol and marijuana on parenting.

Father also participated in a psychosocial evaluation in which he identified his grandmother as a support, but reported that his biological father had been in prison for his entire life, his mother was uninvolved, and that his uncle recently passed away. Father also had four brothers, one of whom was "involved in the legal system for multiple offenses." At the time of the evaluation, Father was on community supervision for unlawful carrying of a weapon. Father attributed the current Department case to a "lifestyle" issue, claiming that he was in the "wrong place at the wrong time." Father explained that his brother-in-law "started problems in their neighborhood with strangers," and that the strangers "shot guns in the air," over the course of several nights. Father said he was angry at his brother-in-law as a result,

and the two of them “started fighting.” After the fight with his brother-in-law, Father reported that the Department “appeared at their home due to the complaints of ‘drugs’ and the ‘shootings.’” Father denied that there had been any negative disturbances in his home.

The evaluator concluded that Father also seems to understand how the events led to the removal of the children. He also seems to understand how the environment may have contributed to the events, but does not take personal responsibility for his choices.

Father’s drug testing while the Department case was pending, shows the following positive results:

- February 16 2016 for marijuana;
- June 17, 2016 for benzodiazepine;
- July 6, 2016 for methamphetamine, cocaine, and marijuana;
- August 17, 2016 for methamphetamine and cocaine;
- September 27, 2016 for amphetamine, methamphetamine, and cocaine;
- November 8, 2016 for benzodiazepine and cocaine;
- November 30, 2016 for cocaine and marijuana;
- January 18, 2017 for methamphetamine;
- February 16, 2017 for cocaine;
- March 15, 2017 for cocaine and marijuana; and
- April 18, 2017 for benzodiazepine.

Mother’s drug testing while the Department’s case was pending shows the following positive results:

- August 17, 2016 for marijuana;
- November 30, 2016 for benzoylecgonine and cocaine;

B. Trial Testimony

1. The Department's Witnesses

Before hearing testimony the trial court admitted into evidence without objection the children's birth certificates, the parents' family service plans, the parents' psychological assessments, counseling notes, the parents' drug test results, all but one of the parents' judgments of criminal convictions, and the Child Advocates' report. Father's attorney objected to admission of Father's charge of engaging in organized criminal activity as irrelevant because the charge had been dismissed. The document showed that the charge was dismissed. The trial court overruled the objection.

Father testified first, and agreed that he was living in an unstable home at the time the children were removed. Father also confirmed that a shooting occurred at the location where he, Mother, and their five children were living, but denied that the children were present at the time. Mother was arrested for unlawful carrying of a weapon at the time of the shooting. Father confirmed that as he was walking down the street, a car drove by, and the driver shot him four times. Father denied reporting to the police that the shooting was gang-related.

While this termination case was pending Father was on community supervision for unlawfully carrying a weapon. As a condition of Father's community supervision he was to refrain from using any illegal drugs or alcohol, but admitted he still tested positive for illegal drugs throughout the pendency of the parental termination case.

The Department provided Father with a family service plan and reviewed the plan with him. Father testified that he completed some of the required tasks including his psychosocial evaluation, parenting classes, a substance abuse assessment, and a

gang awareness program. Father had not completed all recommendations from the psychosocial and substance abuse assessments.

Father had not provided the caseworker with confirmation of his income because he had not seen or talked with the caseworker. Despite positive drug tests for cocaine and methamphetamine, Father denied using those drugs. Father disclosed use of ecstasy and marijuana. Father admitted seven positive drug tests, but denied that he was living a chaotic lifestyle at the time his children were removed from his care and also denied that he was still living a chaotic lifestyle at the time of trial. Father claimed that he did not smoke methamphetamine or snort cocaine, but that the drugs were in the pills he was taking.

Father acknowledged that he had significant criminal history. Regarding his criminal history, Father said was first arrested in 2012 for discharging a firearm. While on community supervision for that offense, Father was arrested for failing to stop and give information after a “hit and run situation.” In 2014, Father was arrested for trespass and evading arrest, and spent time in jail following pleas of guilty to those charges. In December 2015, Father pleaded guilty to displaying a fictitious license plate, theft, and carrying a weapon. Father was originally charged with the felony offense of engaging in organized criminal activity, but that charge was dismissed and refiled as misdemeanor theft. At the time of trial Father was on community supervision for the three misdemeanor convictions of displaying a fictitious license plate, theft, and carrying a weapon.

Mother testified that she had a significant past history with the Department, including testing positive for marijuana at the birth of her daughter Julia in 2012. Mother testified that she and the children were not in the home at the time of the shooting. In apparent contradiction to that testimony, Mother admitted she was arrested for unlawful carrying of a weapon at the time of the shooting.

Mother was given a family service plan and her caseworker reviewed the tasks that the Department was asking her to complete to demonstrate that she was able to take care of her children. Mother completed parenting classes and a psychosocial evaluation. Mother did not complete the recommendations from her psychosocial evaluation, was unsuccessfully discharged from individual counseling, and was unable to demonstrate to the Department's caseworker that she had safe and stable housing or proof of income. Since getting out of jail two months before trial, Mother had not submitted to drug testing, and had not completed the drug or alcohol assessment. Before going to jail Mother tested positive for cocaine and benzoylecgonine.

Mother was working at a restaurant, but after being charged with aggravated robbery she was terminated from the restaurant. Mother explained that her failure to complete the required services was because she lost her car, lost her employment, and did not have enough money to pay for therapy and counseling. Mother did not tell the caseworker about her transportation situation or being terminated from her job, because she had not spoken to the caseworker in more than three months.

The Department's investigative worker was assigned to investigate the allegations concerning all five children that were reported on the day of the shooting at the home. The investigator testified that the referral alleged domestic violence, an altercation between Father and the brother-in-law, plus a shooting. Father told the investigator that he was not the shooter's intended target, but that his brother-in-law was the intended target. Due to the report of a shooting, the Department felt the children were unsafe. Mother admitted to the investigator that she was arrested for unlawful carrying of a weapon at the time of the shooting.

When the investigator visited the home, Father's grandmother was in the home, but did not want to speak with the investigator. The investigator observed

insects behind the refrigerator in the kitchen, and “a gentleman sleeping in the closet” on a mattress “with roaches climbing up and down the mattress.” Father denied the investigator access to a locked room in the home, which was a concern for the Department. The investigator concluded that the home was not safe for small children.

Both parents were involved with the Department in 2013 after an incident in which Father “got mad and he was shooting off his rifle.” Father’s aunt feared for her life and fled the residence to call the police. The investigator also described a neglectful supervision case in 2015 where one of the children was allowed to follow Father on foot to the store after the front door was left open. Also in 2015, the Department received a referral where a four-year-old was living in the home, adults were smoking marijuana in the home, and an unrelated eleven-year-old living in the home was smoking marijuana. It was unclear how the eleven-year-old obtained the marijuana. The Department’s Family Based Safety Services program attempted to work with the family shortly before the Department received the report in June of 2016, which initiated the present case.

With regard to compliance with the family service plans, the Department’s conservatorship caseworker testified that Mother had not completed a gang awareness program or couple’s counseling, had not refrained from illegal activity, went to jail while this case was pending, had not completed her psychological evaluation recommendations, had not demonstrated safe and stable housing, had not completed the substance abuse evaluation, and did not submit to all of the required drug testing.

After Mother was released from jail, the caseworker asked her to participate in a drug test as required by the service plan. The caseworker contacted Mother three times over the course of a month, but Mother did not respond and failed to participate

in the requested drug testing. The caseworker did not know where Mother had been during the case, and until the day of trial had not seen Mother in approximately seven months. Seven months before trial was also the last time Mother had seen her children. Before that time, both parents visited the children twice a month. At that time, seven months before trial, Mother tested positive for cocaine, and since that point, had not demonstrated that she had stopped using drugs. Mother also had done nothing to change her circumstances from the time her children were removed at the beginning of the case.

Mother failed to demonstrate that it would be safe for the children to be returned to her. She failed to participate in drug testing, had not found a stable job or home, was “inconsistent,” and failed to respond to the caseworker’s attempts to contact her. On the Monday before trial, the caseworker tried to contact Mother through information provided by Mother’s attorney. Another person answered the phone and told the caseworker Mother was unavailable. The caseworker expressed that the Department needed consistency from Mother in order to consider returning the children. The caseworker testified that Mother had not shown “any sense of urgency” to obtain her children’s return.

Contrary to Father’s testimony, the caseworker further testified that Father failed to complete his gang awareness class. Father completed psychosocial and substance abuse assessments, but had not completed the recommendations made by those assessments. Father did not provide the Department with proof of employment, had not demonstrated that he had suitable and stable housing, or that he had mitigated the reasons why the children came into care.

When the children first came into the Department’s care the oldest child, Colin, had a lot of behavioral issues, including separation anxiety. Colin had nightmares, waking in the middle of the night screaming. The foster parents engaged

Colin in therapy, which helped with the anxiety and nightmares. The second oldest child, Julia, also had nightmares and would scream “due to what happened and what she witnessed in the home.” Julia was also improving in foster care. The three younger children, ages three, two, and one, were still young and had not “seen too much.” The caseworker attributed the children’s improvement to having a stable environment in foster care. Visits between the siblings also helped because, at the time, the children were placed in two separate foster homes. “When they get together they are happy to see each other.” Colin used to ask about his father, but has not asked about him in some time. The two older children do not appear attached to their parents.

The Department’s goal is to keep all five children together as a sibling group. If the parents’ rights were terminated, the Department will conduct a nationwide broadcast to increase the chances that all five children can be adopted into the same home. Even though the children’s long-term placement has not yet been identified, the caseworker testified that it would be in the children’s best interest for parental rights to be terminated because the Department has not seen the parents make any progress or demonstrate that they changed their lifestyle in order for the children to be returned to their care. The caseworker was confident that the children who had issues at the beginning of the case would continue to improve, and the Department would find an adoptive placement for the children.

The caseworker clarified that Father is employed, but has failed to produce pay check stubs to the Department. Father participated in individual and group counseling, but did not complete the counseling. The caseworker also noted that when the children were first removed Mother was being cooperative, and “on the right track.”

The Child Advocates coordinator testified that he and the Child Advocates

volunteer visited the children throughout the case. The Child Advocate agreed with the caseworker that the children made improvements during their time in the Department's care. The older children experienced issues with their behavior and with nightmares, and some behavioral issues remained, but "it's getting better." The children were in therapy and had progressed overall.

The Child Advocate also agreed that the parents had not sufficiently completed the services required by the family service plans. The parents "did try," and made minor changes, but their "overall situation appears to be the same," in that Father continued to test positive for illegal drugs, Mother was positive for marijuana seven months earlier and recently tested positive for cocaine, and they were back together and "living in the same environments."

2. Father's Witness

A substance abuse counselor with the Resource Education Center testified on Father's behalf. The counselor had been working with Father and had seen him eight times. Father's counseling was ongoing and Father was still active in his sessions. Father had been seeing the counselor once a week for at least three months before trial. In the counselor's opinion, Father was making progress toward better decision-making and removing himself from a negative environment.

The counselor learned through prior testimony that Father had not been forthcoming with him in his drug assessment. Father did not admit using cocaine, methamphetamine, amphetamine, or benzodiazepine. The counselor admitted he was unable to adequately treat someone who was not forthcoming about his drug use. The counselor, however, believed that he could work with Father going forward now knowing the extent of his drug use. The counselor recognized that for more than a year Father remained in the same home living with the same people as he was at the beginning of the case.

3. Court's Findings

After hearing closing arguments, the trial court found that the Department met its burden by clear and convincing evidence. The court ordered termination of both parents' rights on the predicate grounds of section 161.001(b)(1)(D), (E) (endangerment); (N) (constructive abandonment); (O) (failure to comply with a service plan); and (P) (use of drugs in a manner that endangers the children, and failure to complete court-ordered substance abuse treatment program). The trial court further found that termination of the parents' rights was in the best interest of the children.

II. ANALYSIS

Both parents appeal the termination of their parental rights. In a single issue Mother challenges the factual sufficiency of the evidence to support the finding that termination is in the children's best interest. In seven issues Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings on the predicate grounds and the best-interest finding. Father further challenges the legal and factual sufficiency of the evidence to support the finding that appointment of the Department as managing conservator is in the children's best interest.

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.).

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 336, 344–45 (Tex. 2009). 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

In his second issue Father argues the evidence is legally and factually insufficient to support the trial court's finding under subsection E of section 161.001(b)(1). Only one predicate finding under section 161.001 is necessary to support a judgment 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).

Relevant to this issue, subsection E provides that termination of parental rights is warranted if the fact finder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has, "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) (per curiam).

Under subsection E, the evidence must show the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). Termination under subsection E must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id.* A court may consider actions and inactions occurring both before and after a child's birth to establish a "course of conduct." *In re S.M.*, 389 S.W.3d 483, 491–92 (Tex. App.—El Paso 2012, no pet.). While endangerment often involves physical endangerment, the statute does not require that conduct be directed at a child or that the child actually suffers injury; rather, the specific danger to the child's well-being may be inferred from parents' misconduct alone. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738–39 (Tex. App.—

Fort Worth 2004, pet. denied). A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *In re A.B.*, 412 S.W.3d 588, 599 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014).

The relevant conduct includes not only the parents' conduct as evidenced by the parents' acts, but also the parents' omissions or failures to act. Endangerment can also include knowledge that a child's parent abused drugs. *In re M.J.M.L.*, 31 S.W.3d 347, 351–52 (Tex. App.—San Antonio 2000, pet. denied) (finding evidence legally sufficient for endangerment where father knew mother was a drug addict and that she abused drugs while pregnant, even though father attempted to get mother to stop taking drugs).

In evaluating endangerment under subsection E, courts may consider conduct both before and after the Department removed the child from the home. *See In re S.R.*, 452 S.W.3d 351, 361 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (considering pattern of criminal behavior and imprisonment before and after removal). Evidence of criminal conduct, convictions, and imprisonment and its effect on a parent's life and ability to parent may establish an endangering course of conduct. *In re S.M.*, 389 S.W.3d at 492. Mere imprisonment, standing alone, does not constitute engaging in conduct that endangers the physical or emotional well-being of the child. *Boyd*, 727 S.W.2d at 533. However, routinely subjecting children to the probability that they will be left alone because their parent is in jail endangers the children's physical and emotional well-being. *See In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied).

The children in this case came into the care of the Department because Father was involved in several shooting incidents, which led to unknown assailants shooting toward the home where the children were living. In his brief, Father

acknowledges that his “poor judgment by taking pills (Ecstasy) containing ‘cocaine and methamphetamine’ and his involvement with separate shooting incidents suggests that he may continue this illegal drug usage lifestyle and criminal behavior pattern without intervention.” Father further admits his longtime involvement in such conduct “weighs heavily in favor of this termination ground.” Father argues, however, that the “record as a whole provides scant evidence that such continued behavior under these facts poses a future physical and emotional danger to his children.”

To the contrary, the record reflects that Father engaged in criminal conduct and used illegal drugs throughout the course of his young children’s lives, including while he was subject to the terms of his family service plan as well as community supervision. Father used illegal drugs knowing he was risking his own incarceration when he was supposed to be working toward obtaining his children’s return, and subjecting the children to the possibility that their relationship with their father could be terminated. Father engaged in shooting incidents that exposed his children to gunfire in their home. Father created a potential for danger and was aware of the potential for danger, but disregarded it. *See In re S.M. L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (a child is endangered when the environment creates a potential for danger that the parent is aware of but disregards).

According to Father’s testimony and records admitted at trial, Father was first arrested in 2012 for discharging a firearm. Father’s first child was born one year earlier in 2011. While on community supervision for that offense, Father committed another offense for which he was convicted. The incident that resulted in the removal of the children involved individuals retaliating against Father by shooting toward the home where the children lived. Father remained on community supervision throughout the pendency of the parental termination case.

Drug test records also revealed that Father tested positive for illegal drugs throughout the pendency of this termination case. Father admits he engaged in illegal conduct and illegal drug use before and after his children were removed. Given the evidence of Father's repeated criminal conduct, and his frequent positive drug tests, including while he was subject to the terms of community supervision and a family service plan, the trial court had sufficient evidence to conclude that Father engaged in conduct that endangered the welfare of his five young children.

Reviewing all the evidence—including the evidence summarized above—in the light most favorable to the termination finding under subsection E, we conclude that a reasonable fact finder could have formed a firm belief or conviction as to the truth of the finding that Father endangered his children through his conduct. *See In re J.O.A.*, 283 S.W.3d at 344. In light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of these termination findings is not so significant that a fact finder could not reasonably have formed a firm belief or conviction as to the truth of the termination finding. *See In re H.R.M.*, 209 S.W.3d at 108. We hold the evidence is legally and factually sufficient to support the predicate termination finding under subsection E, and overrule Father's second issue.

Because there is legally and factually sufficient evidence of endangerment under subsection E, we need not address Father's arguments that the evidence is insufficient to support the trial court's findings under section 161.001(b)(1)(D), (N), (O), and (P). *See In re A.V.*, 113 S.W.3d at 362. We overrule Father's first five issues.

Mother does not challenge the sufficiency of the evidence to support the trial court's findings that termination was proper under section 161.001(b)(1)(D) and (O) of the Texas Family Code. 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, pet. denied) (mem. op.) (same). We have reviewed the record and determined that the record supports the unchallenged findings. Because the record supports the trial court’s findings, we treat them as conclusively established.

B. Best Interest of the Children

Father challenges the legal and factual sufficiency of the evidence to support the trial court’s finding that termination is in the best interest of the children. Having conceded the predicate grounds and legal sufficiency of the evidence to support the best-interest finding, Mother challenges the factual sufficiency of the evidence to support the best-interest finding.

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 children's best interest. Tex. Fam. Code Ann. § 263.307(a).

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

1. *Desires of the children*

At the time of trial, the children were ages one, two, three, five, and six. 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).

Father argues in his brief that he was unable to bond with his children because there was no visitation order in place. Father testified that he had not seen the children for at least six months. The record reflects, however, that Father failed to maintain contact with the caseworker in order to obtain visitation rights.

The record reflects that the two oldest children were not bonded with their parents, and suffered behavioral issues when they came into care. The five children were in two separate foster homes, but the Department's goal was to seek placement for all five children. Both the caseworker and the Child Advocate testified that the children had improved while in foster care and that they were bonded with each other. The caseworker attributed the oldest two children's improvement in behavior and demeanor to the stable environment provided by their foster family.

Mother argues that the Department failed to present evidence of efforts made to place the children as a sibling group. 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 the Department has not yet been able to obtain a foster home willing to take all five children together. The caseworker explained that a nationwide broadcast to increase the pool of potential adoptive families would be done if the parents' rights were terminated.

The lack of evidence about definitive plans for permanent placement and adoption, however, 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. *Id.* "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. *Present and future physical and emotional needs of the children and present and future physical and emotional danger to the children*

Mother argues that evidence regarding the children's current and future needs was "woefully insufficient to satisfy the clear and convincing evidentiary standard." Father admits that his history of illegal drug use and continued involvement in criminal activities are evidence that Father cannot provide for the present and future physical and emotional needs of his children. Father argues, however, that such evidence is not conclusive of his behavior in the future.

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 children. *See In re C.H.*, 89 S.W.3d at 28 (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 continued to use illegal drugs while this case was pending and while on community supervision. 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.). Father continued to engage in criminal conduct that led to the home being “shot up” in retaliation. Mother was convicted of unlawfully carrying a weapon after hiding a gun from police when they investigated the shooting. During the Department's investigation, Mother “admitted her home was shot up three times because her boyfriend's sister's boyfriend cause[d] drama with neighbors down the street[.]” Mother described the home as an “unruly living environment” where several relatives lived together and “there was always a lot of chaos.”

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 trial court reasonably could have considered that Father's repeated acts of violence would continue in the future, and would lead to potential harm to the children. *See In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.) (fact finder may infer from past conduct endangering the children's well-being that similar conduct will recur if the children

are returned to the parent).

Mother recognizes that drug use and criminal history are factors that can support a finding that termination is in the children's best interest, but argues that under the facts of this case these factors should not have been given paramount importance. Mother points out that her criminal history consists of one misdemeanor conviction for unlawfully carrying a weapon. She argues that, "[a] solitary misdemeanor conviction hardly shows an extensive criminal history," and that she did not own the gun. When the offense is considered in context, however, it supports the trial court's best-interest finding. Mother was convicted because she appeared to be hiding Father's gun from the police while they were investigating a shooting in the home where the children lived. While the offense may not have carried a severe punishment, the trial court could have considered it in considering whether termination was in the best interest of the children.

The evidence of Father's drug use and criminal history, Mother's drug use and criminal history, and the chaotic nature of the household supports the trial court's best-interest finding under this factor.

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, the parents' history of drug abuse and its attendant unstable lifestyle, plus both parents continuing narcotics use while this case was pending, not only supports the trial court'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).

In his brief, Father admits this factor “weighs heavily in favor of the best interest termination finding.” Not only did Father admit continued drug use, but Mother admitted testing positive for marijuana at the time Julia was born in 2012. While the termination case was pending, Mother tested positive for marijuana, cocaine, and benzoylecgonine. Mother also did not appear for several requested drug tests. Father had multiple positive drug tests while the parental termination case was pending.

Mother argues that the fact that she and Father are “together again” is contrary to the trial court's best-interest finding. To the contrary, Mother's continued relationship with Father was not a stabilizing force, but showed that the children would be subject to the same instability if they remained in their parents' care. Mother concedes that the children were exposed to endangering conditions in their home prior to their removal. Father testified that he left his grandmother's home to live with his mother because the grandmother's home was unsuitable. Therefore, these factors weigh 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.

Both parents argue that the Department did not present evidence to show that relatives were considered for placement. To the contrary, each family service plan contains a notation that “Other family members are part of the gang and thus difficult to place children with the rest of the family members.” In this case, the record reflects that several family members were living in the grandmother’s home where the shootings took place. These family members included Mother, Father, the five children, the grandmother, and two uncles. There was also an unrelated adult female living in the home.

At the time of trial the Department did not have permanent placement plans for the children. As noted earlier, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor. *See In re C.H.*, 89 S.W.3d at 28. Under these facts even though the Department is unable to identify the children’s future home environment, termination of both parents’ rights is in the best interest of the children.

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

C. Conservatorship

In his seventh issue, Father contends the evidence is legally and factually insufficient to support a finding that appointment of the Department as managing conservator is in the children’s best interest. We review a trial court’s appointment of a non-parent as sole managing conservator for abuse of discretion and reverse only if we determine the appointment is arbitrary or unreasonable. *In re J.A.J.*, 243

S.W.3d 611, 616 (Tex. 2007).

Father contends a parent shall be named a child's managing conservator unless the court determines that such appointment is not in the best interest of the child because it would "significantly impair the child's physical health or emotional development." Tex. Fam. Code Ann. § 153.131(a) (West 2014). However, when the parents' rights are terminated, as here, section 161.207 of the Family Code controls the appointment of a managing conservator. *In re C.D.G.*, 14-17-00261-CV, 2017 WL 4320176, at *9–10 (Tex. App.—Houston [14th Dist.] Sept. 28, 2017, no pet.) (mem. op.). Section 161.207 states, "[i]f the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child." Tex. Fam. Code § 161.207(a) (West Supp. 2017). Having terminated both parents' rights, the trial court was required to appoint the Department, or another permissible adult or agency as the children's managing conservator. *See In re L.G.R.*, 498 S.W.3d at 207. The appointment may be considered a "consequence of the termination." *Id.*

We have concluded the evidence supporting both parents' termination was legally and factually sufficient. Accordingly, section 161.207 controls. We conclude the trial court did not abuse its discretion in appointing the Department as sole managing conservator of the children. *See id.* We overrule Father's seventh issue.

III. CONCLUSION

The evidence is legally and factually sufficient to support the predicate termination findings under subsection E. And, based on the evidence presented, the trial court reasonably could have formed a firm belief or conviction that terminating both parents' 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.).

We affirm the decree terminating parental rights and naming the Department managing conservator.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Jamison, and Brown.