Reversed and Rendered in Part, Reversed and Remanded in Part, and Affirmed in Part and Memorandum Opinion filed October 19, 2023

In The

Fourteenth Court of Appeals

NO. 14-23-00287-CV

IN THE INTEREST OF W.H., A CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2021-01704J

MEMORANDUM OPINION

Appellant T.M. (Father) appeals the trial court's final order of termination of his parental rights to W.H. (William).[1] The trial court terminated Father's parental rights under Section 161.001(b)(1)(E) and (N) of the Family Code and concluded that termination was in William's best interest. Father challenges the final order arguing that his due process rights were violated when he did not receive notice of the proceedings. We address Father's issues regarding legal sufficiency of the

[1] For his privacy, we refer to the child by an alias and to his family members by their relationships to him or by aliases. *See* Tex. R. App. P. 9.8.

evidence to support the trial court's final order, terminating his rights to William under subsections (E) and (N). We conclude the evidence is legally insufficient and, therefore, reverse the final order terminating Father's parental rights to William and render judgment in favor of Father. We further conclude that Father was denied procedural due process and harmed by that denial. We remand the case to the trial court for a new trial limited to the issue of conservatorship. We affirm the remainder of the trial court's final order.[2]

BACKGROUND

William was born in September 2021. The Department was contacted because Mother and William tested positive for controlled substances at birth. William was in the NICU for a period of time prior to being discharged. Mother was discharged prior to William and never took William home from the hospital. Prior to William's discharge, in November 2021, the Department sought temporary managing conservatorship over William. The Original Petition alleges another male, B.B., as the father of William and does not mention Father. The removal affidavit only discusses Mother and does not mention Father. At some point, Mother identified three other men that were possible fathers of William. In January 2022, B.B. was dismissed from the proceedings because the DNA results proved he was not William's father.

In March 2022, the Department filed an Amended Petition wherein four men are listed as alleged fathers of William, including Father. In the amended petition, Father's date of birth and location are "unknown."[3] Shortly after filing the amended petition, the Department filed a Permanency Report to the Court wherein

[2] Mother did not appeal the trial court's final order terminating her parental rights.

[3] This information was listed as unknown, but it was undisputed that Father was in contact with the case worker since as early as December 2021 and the case worker texted and called Father on multiple occasions.

the Department represented to the trial court that Mother had disclosed "identifying information for three potential fathers. Two out of three fathers are willing to go to DNA testing an[d] work services if they are the father." The Department also disclosed that one of the fathers had already submitted to DNA testing and was willing to work services.

In August 2022, the Department filed its Second Amended Petition, still listing Father's date of birth and location as "unknown." In November 2022, the Department filed its Third Amended Petition, listing Father as the father of William, listing his date of birth and location, and requesting that "process be served at that address or in Court." The affidavit attached to the Third Amended Petition relates to another case and has nothing to do with William or Father.

Father responded by sending a letter to the trial court regarding his wishes to raise William and alleging that he did not know that he was the father of William until he was served with the Third Amended Petition. On January 10, 2023, the trial court signed an Order Establishing Parentage concluding based on the DNA evidence that Father is the "Established father" of William. Also on January 10, 2023, the trial court rendered an order of mistrial and granted a new trial. The trial court set a new trial date. On the eve of trial, Mother voluntarily relinquished her parental rights to William.

On March 14, 2023, trial commenced. Father testified that Mother told him of her pregnancy in December 2020 and that he might be the father of William. Father testified that after William was born, he "was informed that [he] was a possible father of the child" and he submitted for DNA testing immediately so he "could be taking care of [his] obligations as a Father." He testified that although he followed up with the case worker, he was told by the case worker that she could not provide him any information about William and that he could not visit William

because the DNA testing results had not yet been returned. Father testified he called the case worker "repeatedly" and "always got the same answer: We will get back to you . . . Until then, we can't talk to you or discuss the child with you because we don't know that you are the biological father."

Father testified he did not receive any notices regarding the proceedings from November 2021 through October 2022. Father testified the first notice he received was in November 2022. Father testified that he called repeatedly, once a day for at least two weeks, to follow up with the case worker. Father testified he called the case worker's supervisor to follow up as well. Father testified that after some months went by, he assumed he was not the father and gave up. Father testified that he was worried he was missing his son's milestones and changing diapers. Father testified he never received services and never obtained a service plan. Once Father was determined to be the biological father, Father visited William. Father also met William's foster family.

Father was incarcerated for four months during the pendency of the case. Father testified he was convicted of theft in October 2022 and was incarcerated for four months before he was released in February 2023. The Department admitted a Judgment of Conviction for this offense. Father testified that he has a job and is not on probation. Father also testified that he had a prior offense of assault bodily injury and was incarcerated for ninety days. The Department admitted a Judgment of Conviction for this offense. Father testified that he had been convicted previously of a drug offense, but there is no indication of when the offense or conviction occurred. The CASA report admitted into evidence lists a number of criminal charges against Father—some dismissed, some without any apparent disposition listed and as old as 2016. Father testified he had been arrested four times in his life, twice in other states. Father also testified that he did not use

illegal drugs and that his drug charges were the result of being in a vehicle with those that used drugs.

Regarding William's placement, Father testified that it appeared that William was well cared for in the foster family's home but that he did not want to "let go of [William] completely and not know that he is being taken care of and that he's - - his well-being is taken care of for the rest of his life." Father acknowledged that it would not be the best thing to take William from the only parents he has known, but Father wanted the ability to visit, know where he lives, and see that he is taken care of.

The case worker testified that she called Father and informed him that William was possibly his son in December 2021 and that he would need to submit to DNA testing. The case worker confirmed that Father immediately submitted to DNA testing. She testified that she would not provide Father with any details of the case or information about William until the DNA test results confirmed he was the father of William. The case worker indicated that usually it only takes a few weeks for the DNA test results to be returned and this case was unusual. The case worker testified that she spoke with Father twice in January 2022 but did not inform Father of the status hearing that occurred that month. The case worker testified that she again spoke with Father in February 2022, by text that she initiated. She testified that she asked for his date of birth but did not let him know that there was a hearing. The case worker testified that the next time she texted Father was in May 2022, but she did not receive a response.

The case worker also testified that a "diligent search" had been conducted but admitted that the wrong spelling of Father's last name had been used. While the case worker testified that she mailed two letters to addresses obtained in the "diligent search," there was no evidence of what addresses were used and whether

either address was Father's address or a prior address. In October 2022, the case worker received an email from Father sent by his fiancée, C.L., indicating that Father did not want to relinquish his rights. The case worker communicated with Father by email and by phone call in November 2022 while Father was incarcerated. The case worker further testified that Mother did not indicate that Father knew of Mother's drug problems.

The case worker admitted it was the Department's policy to "provide a child care (sic) resource form" and she did not provide one to Father, but she discussed it with him in January 2023. The case worker also admitted that she did not prepare a family service plan for Father. She testified that after his release, Father requested visitation with William. The case worker supervised the visit and testified it was "appropriate." She also indicated that Father was willing to provide support for William.

An office manager from the National Screening Center testified about the results of the DNA testing and explained that while the samples were collected from William and Father in December 2021, the lab did not process the results until October 2022 due to the absence of a court order. He also testified that Father had submitted to drug and alcohol testing and that the results came back negative except for a very small amount of alcohol that was classified as "normal." He testified that the result could have been from a glass of wine or beer or from the use of hand sanitizer.

In closing arguments the Department argued that the court should terminate Father's rights because he knew or should have known Mother was a drug addict when they engaged in a sexual relationship. "[D]ue to his sexual relationship with Mother, [William] was born; . . . with drugs in his system. So [Father] knowingly engaged in a conduct that harm[ed] the child." The Department further argued that

by Father's failure to visit William and because he did "nothing" to find out whether he was the father, he abandoned his child. Finally the Department argued that Father constructively abandoned the child because he was incarcerated.

The court rendered a final order terminating Father's rights pursuant to Section 161.001(b)(1)(E) and (N) and concluded that termination was in the child's best interest.

STANDARD OF REVIEW

Due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "One of the most fundamental liberty interests recognized is the interest of parents in the care, custody, and control of their children." *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019). "In parental termination cases, due process mandates a clear and convincing evidence standard of proof." *Id*. "'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 § 101.007.

"[I]n reviewing a legal-sufficiency challenge, we must determine whether 'a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.W.*, 645 S.W.3d 726, 741 (Tex. 2022) (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). We must look at all the evidence in the light most favorable to the finding, assuming the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id*. We disregard any evidence that a reasonable fact finder could have disbelieved. *Id*. However, we may not disregard "undisputed facts that do not support the finding." *In re J.F.C.*, 96 S.W.3d at 266. The factfinder is the sole arbiter of witness credibility and demeanor. *In re J.W.*, 645 S.W.3d at 741.

"If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient." *In re J.F.C.*, 96 S.W.3d at 166. Rendition of judgment in favor of the parent would generally be required if the evidence is legally insufficient. *Id*.

"Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination if there is also a finding that termination is in the child's best interest." *In re A.Q.W.*, 395 S.W.3d 285, 287 (Tex. App.—San Antonio 2013, no pet.), *overruled on other grounds by In re J.M.T.*, 617 S.W.3d 604, 610–11 (Tex. App.—San Antonio 2020, no pet.).

TERMINATION UNDER SECTION 161.001(B)(1)(E)

In his second issue[4] Father argues that the evidence is legally and factually insufficient to support the trial court's final order of termination of his parental rights to William under subsection (E).

Section 161.001(b)(1)(E) provides for termination of parental rights when 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 § 161.001(b)(1)(E). To "endanger" is to "expose to loss or injury; to jeopardize." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Subsection (E) refers to the parent's conduct, as evidenced by the parent's acts or failure to act. *In re C.V.L.*, 591 S.W.3d 734, 750 (Tex. App.—Dallas 2019, pet. denied). Under subsection (E), termination "must be

[4] Generally, when a party presents multiple grounds for relief, the appellate court should first address those issues that would afford the party the most relief. *See Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999).

based on more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required." *Id*. "[E]ndangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug use." *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009).

"A parent's criminal conduct and imprisonment are relevant to the question of whether the parent engaged in a course of conduct that endangered the well-being of the child." *In re M.T.R.*, 579 S.W.3d 548, 568 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). However, imprisonment alone is not an endangering course of conduct but is a fact properly considered on the endangerment issue. *Id*. Here, the evidence showed two terms of imprisonment for crimes committed by Father prior to William's birth. The CASA report details other charges against Father, many of which were noted as "dismissed." Others did not indicate whether they were still pending, resulted in conviction, or were dismissed. "[C]harged criminal conduct, which exposes [the parent] the incarceration, is relevant evidence tending to show a course of conduct endangering the emotional and physical well-being of the child." *In re G.C.S.*, 657 S.W.3d 114, 129 (Tex. App.—El Paso 2022, pet. denied).

One Judgment of Conviction admitted into evidence shows that Father served ninety days in jail in 2016 for misdemeanor assault. The other Judgment of Conviction admitted shows that Father was sentenced to 180 days in jail in 2022 for felony theft. While the misdemeanor assault is necessarily a violent crime, there is no evidence that the felony theft was violent. *See In re M.T.R.*, 579 S.W.3d at 569 ("The court could take into account: (1) Mother's crimes were violent; (2) she committed them all while pregnant or with a toddler at home . . . .").

Recently, the supreme court recognized and agreed that a "parent's knowledge of the other parent's drug use during pregnancy and corresponding failure to attempt to protect the unborn child from the effects of the drug use can contribute to an endangering environment and thus support an endangerment finding." *In re J.W.*, 645 S.W.3d at 749. However, the court did not "endorse attributing any and all known dangers posed to a child during a mother's pregnancy to the other parent." *Id*. at 750. Instead, such a determination is dependent on the facts and circumstances of the case. *Id*. (concluding jurors could not have reasonably concluded that the father disregarded his parental obligations and allowed the child to be in endangering environment where evidence showed the father's "concerted effort to help [the mother] address her addiction").

At trial, the Department argued that Father endangered William by engaging in a sexual relationship with Mother when he knew or should have known that Mother was a drug addict. Even were we to accept this premise as a viable theory, there is no evidence that Father knew or should have known that Mother was a drug addict. The Department cites to the CASA report admitted into evidence showing Mother's multiple drug charges. However, there is no evidence that Father was aware of any of these charges, the last one being in 2017 or three years before their "casual relationship." Father testified that in May 2022 Mother told him that she was having trouble staying off of drugs.

There was little evidence about Father and Mother's relationship except that it was "causal" and involved sex. Father testified that on occasion they would go out to dinner together. Father also testified that their relationship was short, lasting approximately one month. Further, the only evidence presented was testimony of Father that he did not know about Mother's drug addiction and the testimony of the case worker that Mother did *not* say that Father was aware of her drug problem.

There was also no evidence regarding Mother's drug use during their relationship and no evidence that Father knew or should have known about Mother's drug use. *See City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) ("Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted."). Further, there was no evidence that Father was around while Mother was pregnant and saw her using drugs or knew she was using drugs while pregnant and failed to intervene. *See In re J.W.*, 645 S.W.3d at 749–50 ("[N]either do we endorse attributing any and all known dangers posed to a child during pregnancy to the other parent. . . the inquiry is necessarily dependent on the facts and circumstances.").

After William was born, Father did not leave him in Mother's care because the Department took William into care at the time of his discharge from the hospital. Again, there is no evidence that Father knew or should have known about Mother's drug use, and William was never in Mother's care after birth. There was also no evidence that Father used drugs at any time. The only evidence showed that Father's drug test results were negative. There was limited evidence of one assault in Father's past. *See In re C.A.B.*, 289 S.W.3d 874, 886 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (reviewing father's criminal history of violence, particularly violence against family members, to support endangerment ground of termination). There was no evidence regarding the details of the assault conviction or that it was against a family member. *See In re D.T.*, 34 S.W.3d 625, 636–37 (Tex. App.—Fort Worth 2000, pet. denied) (reviewing conduct before child was born and evidence as to how parent treated other children or spouse as relevant under subsection (E)). None of the other charged offenses indicate that they were violent or involved family violence. Finally, when Father was permitted

to see William, the case worker testified that Father's visitation was "appropriate." *See In re D.C.*, 2023 WL 3243483 at *3. At best, the evidence of Father's criminal charges is relevant evidence tending to show a course of conduct endangering the emotional and physical well-being of the child, but it is not sufficient, in and of itself, to establish endangerment. *See In re E.N.C.*, 384 S.W.3d 796, 805 (Tex. 2012) ("Under the court's reasoning, the mere threat of deportation or incarceration resulting from an unlawful act, regardless of severity, would establish endangerment. We disagree with that analysis."); *In re G.C.S.*, 657 S.W.3d at 129.

The Department contends that "Father admitted that he socializes and drives around with people who use, possess or traffic drugs" as an admission of endangering behavior. However, there was no evidence of when Father engaged in this behavior and whether he continues to do so. It appears that the most recent charge for possession was in September 2020. The Department admits that Father's drug testing results were "clean" but question their reliability because they were taken just after Father was released from jail. However, the Department was able to request court-ordered drug testing on additional dates, both before Father was incarcerated and after his release, but failed to do so.

The Department contends that Father's fiancée, C.L., admitted to two felony charges—one of "providing false information to obtain credit, and another was a fraud charge"—and that C.L. failed a urine test, violating her criminal bond. The Department argues that this is "not a good environment" to place William.

Father and C.L. testified that they do not live together currently. C.L. testified that she lives in Oklahoma, and Father testified he lives in Harris County. However, both were in the same car while testifying during the trial (via Zoom hearing). The Department argues that it "seems contradictory" that they testified to not living together but they were testifying from the same car. However, being in

the same car is not evidence that Father and C.L. live together, nor is cohabitation a reasonable inference. Father admitted C.L. is his fiancée. But no evidence was presented that the two were living together. "The trier of fact may draw inferences, but only reasonable and logical ones." *In re E.N.C.*, 384 S.W.3d at 804.

The Department contends that Father "never provided" his home address to anyone, precluding a home study. Even assuming this is true, this does not show that Father has engaged in "endangering" conduct toward William. There was also no testimony about the efforts of the Department to obtain Father's address to conduct a home study. Reviewing the evidence in the light most favorable to the finding, the Department failed to show by clear and convincing evidence "a voluntary, deliberate, and conscious course of conduct" by Father to endanger William. *See In re C.V.L.*, 591 S.W.3d at 750. No reasonable trier of fact could have formed a firm belief or conviction that its finding was true because there was no evidence that Father engaged in conduct that placed William in danger. Therefore, the evidence is legally insufficient to support this ground of termination.

We sustain Father's second issue.

TERMINATION UNDER SECTION 161.001(B)(1)(N)

In his third issue Father argues that the evidence is legally and factually insufficient to support the trial court's final order of termination of his parental rights to William under subsection (N). The Department concedes that the evidence is factually insufficient to support this ground of termination.

Section 161.001(b)(1)(N) provides for termination of parental rights when the parent has:

> constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department . . . for not less than six months, and:
>
> (i) the department has made reasonable efforts to return the child to the parent;
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> (ii) the parent has not regularly visited or maintained contact with the child; and
>
> (iii) the parent has demonstrated an inability to provide the child with a safe environment.

Tex. Fam. Code § 161.001(b)(1)(N).

The Department argued at trial that by Father's failure to visit William and because he did "nothing" to find out whether he was the father, he abandoned his child. The Department also argued that Father constructively abandoned William because he was incarcerated. Under subsection (N), the Department must prove by clear and convincing evidence that (1) it made reasonable efforts to return the child to the parent; (2) the parent has not regularly visited or maintained contact with the child, and (3) the parent has demonstrated an inability to provide the child with a safe environment. Tex. Fam. Code § 161.001(b)(1)(N).

Here, there is no evidence of any reasonable efforts made by the Department to return William to Father. The undisputed evidence shows that the Department did not prepare a service plan for Father or attempt to engage him in any services. *See In re A.Q.W.*, 395 S.W.3d at 289–90 (evidence legally insufficient to support finding that Department made reasonable effort to return child to the appellant when the appellant was not confirmed as father of child until thirty-six days before termination hearing, did not receive a service plan until thirty-four days before termination hearing, and was given no opportunity to work any services); *In re K.M.B.*, 91 S.W.3d 18, 25 (Tex. App.—Fort Worth 2002, no pet.) (reasonable efforts shown through prepared service plans and efforts made to engage parent to

work services); *In re M.R.J.M.*, 280 S.W.3d 494, 505 (Tex. App.—Fort Worth 2009, no pet.) (same). The Department had the burden to provide clear and convincing evidence of each element of subsection (N) to obtain termination on this ground. *See In re D.T.*, 34 S.W.3d at 633 ("If there is no evidence of one or more of these elements, then the finding of constructive abandonment fails.").

The record shows that Father did not visit William until February 2023. However, given the undisputed evidence that the Department refused to allow visitation until DNA established paternity, we cannot count this entire period against Father. Instead, the record supports that when Father was released from jail, he made arrangements to visit his son. Lastly, there is no evidence that Father has demonstrated an inability to provide William with a safe environment. The only evidence in this regard is that Father was incarcerated for approximately four months during the pendency of this case. Incarceration alone is insufficient to support termination. *Cf. Boyd*, 727 S.W.2d at 533 (imprisonment alone is not conduct endangering child). It is undisputed that after Father was released, he obtained employment and was employed at the time of trial. It was also undisputed that Father had living arrangements and the support of family members. No home study was conducted on Father's residence to determine its suitability.

Reviewing the evidence in the light most favorable to the finding, the trial court could not have formed a firm belief or conviction that its finding was true because the Department failed to show any reasonable efforts to return William to Father. *See* Tex. Fam. Code 161.001(b)(1)(N); *In re J.M.T.*, 617 S.W.3d at 610–11. The Department also failed to show that Father did not regularly visit or maintain contact with William or an inability to provide William with a safe environment. The evidence is legally insufficient to support this ground of termination.

We sustain Father's third issue on appeal.

DUE PROCESS AND CONSERVATORSHIP

In his first issue, Father contends that the determination of conservatorship should be remanded to the trial court because Father was denied procedural due process because he was not given any notice of hearings occurring in the case from December 2021 through October 2022. Without being present at the hearings, he was denied the right to cross-examine any witnesses and to contest any evidence presented against him as to why William should not be in his care. We agree.

A. General Legal Principles

"The primary consideration in determining issues of conservatorship and possession of and access to the child is always the child's best interest." *In re J.A.J.*, 243 S.W.3d 611, 614 (Tex. 2007) (citing Tex. Fam. Code § 153.002). There is a rebuttable presumption that a parent will be named the child's managing conservator, unless the court finds that such an appointment would not be in the child's best interest "because the appointment would significantly impair the child's health or emotional development' or finds there is a history of family violence involving the parents. Tex. Fam. Code § 153.131; *see also In re J.A.J.*, 243 S.W.3d at 614.

"One of the most fundamental liberty interests recognized is the interest of parents in the care, custody, and control of their children." *In re N.G.*, 577 S.W.3d at 235; *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Courts have reversed final orders of termination when parents were not properly admonished or afforded counsel at key stages of the proceedings. *See In re B.C.*, 592 S.W.3d 133, 137–38 (Tex. 2019) (failure of trial court to admonish indigent mother of right to have counsel appointed in accordance with the statute was harmful error and

required reversal); *In re A.J.*, 559 S.W.3d 713, 718 (Tex. App.—Tyler 2018, no pet.); *In re S.C.*, No. 09-21-00325-CV, 2022 WL 1037912 (Tex. App.—Beaumont Apr. 7, 2022, no pet.) (mem. op.). "When the State moves to destroy weakened familial bonds, it must provide the parents fundamentally fair procedures." *Santosky*, 455 U.S. at 753–54.

To assess the process Father was due before the termination of Father's parental rights, we weigh the three *Eldridge* factors: (1) the private interest affected by the proceeding or official action; (2) the countervailing government interest supporting use of the challenged proceeding; and (3) the risk of erroneous deprivation of that interest due to use of the procedures. *See In re B.L.D.*, 113 S.W.3d 340, 352 (Tex. 2003) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). We must weigh these factors to determine whether the fundamental requirements of due process have been met by affording an "'opportunity to be heard' at a meaningful time and in a meaningful manner" under the circumstances. *See City of Los Angeles v. David*, 538 U.S. 715, 717 (2003) (quoting *Eldridge*, 424 U.S. at 333).

"[A] parent's interest in maintaining custody of and raising his or her child is paramount." *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). The child also holds a "substantial interest" in the decision and proceedings. *In re M.S.*, 115 S.W.3d at 547. "Both the parent and the child have a substantial interest in the accuracy and justice of a decision." *Id*.

In a parental-rights termination case, the State's fundamental interest is to protect the best interest of the child. *Id*. at 548. The State and the child both have an interest in a process that is not unduly prolonged and in a final decision so that

the child may be adopted and have a stable home or be returned to the parents. *Id*. Particularly for the best interest of the child, time is of the essence. *See id*. "The State has an interest in the economical and efficient resolution of parental-termination cases." *Id*.

"The parent's, child's, and government's interest in a just and accurate decision dovetails with the third *Eldridge* factor—that of the risk of erroneous deprivation." *Id*. at 549. "[A]ny significant risk of deprivation is unacceptable." *Id*.

The Family Code provides that certain "persons"[5] are "entitled to at least 10 days' notice of a hearing. . . and are entitled to present evidence and be heard at the hearing." Tex. Fam. Code § 263.0021(b). To further protect the parent's interest in their parental rights, Section 107.013 requires that the trial court appoint an attorney ad litem for an "alleged father who failed to register with the registry under Chapter 160 and whose identity and location is unknown." Tex. Fam. Code § 107.013(a)(3).

When the trial court appoints an attorney ad litem for an alleged father, the ad litem's powers and duties are specified in the Family Code:

> (a) Except as provided by Subsections (b) and (d), an attorney ad litem appointed under Section 107.013 to represent the interests of an alleged father is only required to:
>
> (1) Conduct an investigation regarding the petitioner's due diligence in locating the alleged father, including by verifying that the petitioner has obtained a certificate of the results of a search of the paternity registry under Chapter 160;

[5] "Persons" includes "each parent of the child" and "any other person or agency named by the court to have an interest in the child's welfare." Tex. Fam. Code § 263.0021(b)(3), (9).

(2) Interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the alleged father; and

(3) Conduct an independent investigation to identify or locate the alleged father, as applicable.

(b) If the attorney ad litem identifies and locates the alleged father, the attorney ad litem shall:

(1) Provide to each party and the court the alleged father's name and address and any other locating information; and

(2) If appropriate, request the court's approval for the attorney ad litem to assist the alleged father in establishing paternity.

(c) If the alleged father is adjudicated to be a parent of the child and is determined by the court to be indigent, the court may appoint the attorney ad litem to continue to represent the father's interests as a parent under Section 107.013(a)(1) or (c).

(d) If the attorney ad litem is unable to identify or locate the alleged father, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to identify or locate the alleged father with a statement that the attorney as litem was unable to identify or locate the alleged father. On receipt of the summary required by this subsection, the court shall discharge the attorney from the appointment.

Tex. Fam. Code § 107.0132. An ad litem attorney appointed under Section 107.0132 is subject to disciplinary action if he or she fails to perform the above duties. *See* Tex. Fam. Code § 107.0133.

B. Analysis

First, the Department contends that Father did not properly preserve any of these arguments on appeal. We disagree. At trial, Father argued that he was denied procedural due process because he did not have notice of the hearings that took place prior to November 2022. Father also filed a "Show Cause" motion regarding his lack of notice of the prior hearings. Father elicited testimony from Father and the case worker about whether Father was given any notice of the

hearings. In closing, Father argued, "[T]he crux of this case is, is a blatant disregard for [Father's] due process rights." Under the facts herein, the issue is preserved for appellate review. *Cf. In re L.M.I.*, 119 S.W.3d 707, 710–11 (Tex. 2003) (concluding father failed to preserve due process issues for appellate review where he did not raise any legal argument before the trial court about a constitutional claim, did not file any claim in his answer or counterclaim, and did not raise the issue post-judgment).

Father argues he was denied counsel and as a result his due process rights were violated because he could not meaningfully defend himself at the January 2022 status hearing and the April 2022 permanency hearing. Father does not allege that any other hearings occurred and there is no indication in the record that any other hearings were conducted.

Once the Department named Father as an alleged father in the amended petition (filed March 25, 2022), the trial court should have appointed an ad litem attorney to represent Father. *See* Tex. Fam. Code § 107.013(a)(3). There is no such appointment in the record. The Department did not supplement the record or otherwise dispute Father's factual allegation that he was without counsel at least until November 2022.[6] Because Father's allegation is undisputed, we take it as true. *See In re K.M.L.*, 443 S.W.3d 101, 119 (Tex. 2014) ("Given the constitutional implications of parental rights termination cases . . . and [the

[6] It is unclear from the record when the trial court appointed trial counsel for Father. The docket notes indicate that Father's trial counsel made appearances at an August permanency hearing and the first trial in October. In November 2022, the docket notes indicate that trial counsel was "reappointed" after the DNA results proved William's parentage. Generally, we cannot refer to the trial court's docket notes as evidence. The Department did not supplement the record and does not dispute Father's allegations, despite Father raising the issue in his brief. *See Elite Towing, Inc. v. LSI Fin. Group*, 985 S.W.2d 635, 645 (Tex. App.—Austin 1999, no pet.) ("The record before us does not contain either a motion . . . or a ruling on same. The docket sheet reflects such a motion was filed and denied. However, we find no request . . . to include with . . . in the court's record brought forward to this Court.").

father's] statement on the record that he did not receive notice of trial, and absent any evidence to the contrary, we must conclude that [the father] did not receive notice of trial."). There is also no summary of the ad litem's efforts to identify or locate Father in the record. *See* Tex. Fam. Code § 107.0132; *see also In re K.M.L.*, 443 S.W.3d at 119. At least as of November 2022, Father had appointed counsel and that counsel represented Father through the trial that took place in March 2023.

Father further argues that he was denied due process through a lack of personal notice to him of all the hearings in the case—again, only identifying two hearings that he failed to receive notice for. Under Section 263.0021, prior to being adjudicated as a "parent," as that term is defined, Father may have also been entitled to notice as "any other person . . . named by the court to have an interest in the child's welfare." Tex. Fam. Code § 263.0021(b)(9). However, there is nothing in the record showing that, prior to November 2022, Father had been "named" by the trial court as having an interest in William. Though, we note, the Department's filings indicate its belief that notice to Father of the hearings was "required" under Section 263.0021, as it indicates as much in the proposed orders filed with the trial court. *See In re S.C.*, 2022 WL 1037912, at *2 ("[T]he Status Reports filed by [the Department] with the trial court . . . indicate that D.C. as the 'alleged Father' was aware of the proceedings and he was entitled to notice of the hearings . . . .").

There are important procedural safeguards put into place by the Legislature to prevent the deprivation of parental rights without due process. *In re B.C.*, 592 S.W.3d at 133 ("Parents face a complex and nuanced family-law system . . . . [T]he Legislature has adopted important safeguards in sections 107.013 and 263.0061 to help ensure parents will not be deprived of their parental rights without due process of law."). Under Section 107.013(a)(3), Father was entitled to the appointment of an attorney ad litem. There is also no time period under which the trial court must

appoint counsel under Section 107.013. *See* Tex. Fam. Code § 107.013. However, the trial court, understanding the important legislative safeguards and the interests at work in a parental termination case, should have appointed counsel for Father at some point after Father was named in the Third Amended Petition and prior to the April 2022 permanency hearing. *See In re V.L.B.*, 445 S.W.3d 802, 807 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (discussing Section 107.013(a), "Considering the mandatory nature of the appointment of counsel . . ., and the appointed attorney's specific obligations . . ., a trial court should address [appointment of counsel] as soon as possible—before the next critical stage of the proceedings, whether it be a hearing, a mediation, a pretrial conference, . . . and allow a reasonable time for appointed counsel to make necessary preparations"); *In re A.J.*, 559 S.W.3d at 719 (same); *In re J.F.*, 589 S.W.3d 325, 332–33 (Tex. App.—Amarillo 2019, no pet.) (same). Therefore, we agree that Father was denied counsel and procedural due process because the trial court did not appoint statutory counsel for a period of approximately nine months of the proceedings.

Without appointed counsel, there was no urgency to complete the DNA testing. Because of this delay, Father's ability to possibly develop a bond with William and prove that living with Father is in William's best interest is significantly handicapped. This problem is exacerbated the longer Father is without appointed counsel. *See* Tex. Fam Code § 107.0132(b)(2) ("If appropriate, request the court's approval for the attorney ad litem to assist the alleged father in establishing paternity."). This issue particularly influences the determination of conservatorship. Under the facts herein, we cannot predict with any accuracy what would have occurred had Father been able to participate in the hearings meaningfully from at least March 2022 when he was first named as an alleged father. *See In re A.J.*, 559 S.W.3d at 722 (reasoning that because court could not

conclude with any accuracy what would have occurred absent the violation, "the denial of procedural due process in this case probably caused the rendition of an improper judgment"). The failure to appoint an ad litem attorney violated Father's procedural due process rights and, under these particular facts, probably resulted in an improper judgment. *See id.*; *see also In re S.C.*, 2022 WL 1037912, at 18 ("Even if we do not presume harm, the record before us establishes harm."). We sustain Father's first issue, in part.[7]

On remand the trial court should conduct a new trial on conservatorship, including any potential placements offered by Father. *See In re F.E.N.*, 579 S.W.3d 74, 76–77 (Tex. 2019) (remand for new trial on conservatorship was appropriate after overturning final order terminating parental rights on legal sufficiency grounds); *see also In re S.C.*, 2022 WL 1037912, at *21.

CONCLUSION

We conclude the evidence is legally insufficient to support either predicate finding for termination of Father's parental rights. Therefore, we do not address whether the evidence is factually sufficient or supports a best interest finding. Tex. R. App. P. 47.1. In the "interest of justice" we may remand for further proceedings. *See In re J.M.T.*, 617 S.W.3d at 611 ("We may determine, in our discretion, that remanding for a new trial is in that interest of justice, but in that event we must affirmatively state in our opinion that we are exercising our discretion and state our reasons for doing so."). However, we note that the Department has not filed a brief arguing any reasons for a remand should we

[7] In his first issue Father also argues that because he did not receive notice or have the opportunity to meaningfully participate, we should reverse and remand the entire case to the trial court for a new trial. Because we have already concluded the evidence legally insufficient to uphold the trial court's final order terminating Father's rights, we do not address those issues because they would afford Father less relief. *See Bradleys' Elec., Inc.*, 995 S.W.2d at 677.

conclude that the evidence is legally insufficient. *See In re J.F.C.*, 96 S.W.3d at 266 ("Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence."); *see also Mobil Oil Corp. v. Frederick*, 621 S.W.2d 595, 596 (Tex. 1981) (holding court of appeals had duty to render judgment after reversing when court did not indicate it was remanding in the interest of justice and party had not urged there was additional evidence that could be offered on disputed issue). Thus, we conclude it is appropriate to reverse and render the judgment the trial court should have rendered, denying termination of Father's parental rights. We remand the case to the trial court for further proceedings limited to the issue of conservatorship. *See In re F.E.N.*, 579 S.W.3d at 77 (affirming appellate court's reversal of trial court's judgment terminating the father's parental rights but remanding for new trial on conservatorship). We affirm the remainder of the trial court's judgment terminating Mother's parental rights.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Bourliot, and Spain.