



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00287-CV

In the Interest of **M.S.** and **D.S.**, Minor Children

From the 25th Judicial District Court, Guadalupe County, Texas  
Trial Court No. 15-0046-CV  
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice  
Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice

Delivered and Filed: October 26, 2016

**AFFIRMED**

Dana appeals from a judgment terminating her parental rights to her children, M.S. and D.S.<sup>1</sup> In one issue, Dana argues the evidence is legally and factually insufficient to support the trial court's finding that termination was in the children's best interest. We affirm.

**BACKGROUND**

M.S. and D.S. were removed from Dana's home and placed in the care of the Texas Department of Family and Protective Services because of ongoing family violence between Dana and her husband, Randy. The Department filed a petition for protection of the children, for conservatorship, and for termination of the parent-child relationship.

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<sup>1</sup>We refer to the parents by fictitious names and to the children by their initials. *See* TEX. R. APP. P. 9.8(b)(2); TEX. FAM. CODE ANN. § 109.002(d) (West 2014).

The case went to trial before an associate judge, who ordered the termination of Dana's parental rights. Dana sought a de novo hearing in the referring trial court. *See* TEX. FAM. CODE ANN. § 201.015(a) (West Supp. 2016). The trial court held a de novo hearing and rendered judgment terminating Dana's parental rights. The trial court found, by clear and convincing evidence, that Dana (1) had knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being; (2) had engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the children's physical or emotional well-being; (3) had had her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) of section 161.001(b) of the Texas Family Code; and (4) had failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who had been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D),(E),(M),(O) (West Supp. 2016). The trial court also found, by clear and convincing evidence, that termination of the parent-child relationship was in the children's best interest. *See id.* § 161.001(b)(2). Dana appealed.<sup>2</sup>

#### **APPLICABLE LAW AND STANDARDS OF REVIEW**

Termination of parental rights under section 161.001 of the Texas Family Code requires proof by clear and convincing evidence that the parent committed one of the acts or omissions listed in section 161.001(b)(1)(A)-(T) and that termination is in the child's best interest. *Id.* § 161.001(b)(1),(2). Clear and convincing evidence means the measure or degree of proof that will

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<sup>2</sup>Dana's husband, Randy, is D.S.'s father. M.S. has a different father. The parental rights of both fathers were terminated in the proceedings below. The fathers did not appeal.

produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. TEX. FAM. CODE ANN. § 101.007 (West 2014).

In reviewing the legal sufficiency of the evidence in a parental termination case, we consider all of the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In the Interest of J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* If we conclude that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then we must conclude the evidence is legally insufficient. *Id.*

In a factual sufficiency review, we give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id.* We must consider whether disputed evidence is such that a reasonable factfinder could not have resolved that evidence in favor of its finding. *Id.* If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

#### **THE EVIDENCE**

At trial, numerous witnesses testified, including three Department caseworkers, three police officers, the relative who was presently caring for M.S. and D.S., and Dana and Randy. The evidence showed that Dana was the mother of seven children. M.S., who was three years old at the time of trial, was Dana's fifth child. D.S., who was twenty-one months old at the time of trial, was Dana's sixth child. By the time the case went to trial, all seven of Dana's children had been removed from her care, and Dana's parental rights to four of her children had already been terminated.

***History with the Department***

Dana had a long history with the Department. This history, which began just after Dana's first child was born, spanned twelve years. In this time period, Dana had been involved in at least four relationships marked by violent behavior. The police had responded to many incidents of domestic violence involving Dana and her boyfriends or her husband. The Department had provided Dana with a total of thirty-two months of services to address this pattern of domestic violence and other related issues.

The Department opened its first case concerning Dana in 2004, shortly after her first child was born. In that case, Dana had hit the father of her first child. The Department opened another case in 2006 after Dana jumped out of a car during a dispute with her then-boyfriend. Two of Dana's children were present during the incident. Dana suffered a concussion and was flown to the hospital. The Department offered Dana domestic violence classes, counseling to address her anger issues, and outpatient drug treatment because Dana had tested positive for cocaine and marijuana. The case lasted fourteen months, and Dana made minimal progress. The case was resolved when all parties agreed that two of Dana's children would remain with their grandmother.

The Department opened a case in 2009 when Dana's boyfriend at the time, and the father of her fourth child, grabbed one of Dana's children, shook her violently, and threatened to get a gun and shoot Dana in the head. A few days later, the same boyfriend choked Dana in front of her children and tried to throw her out of a car window. During this case, Dana was referred to a women's shelter. However, even after this referral, Dana and her boyfriend had yet another physical altercation in front of the children. This case was closed when the child's grandfather was appointed temporary managing conservator of Dana's fourth child.

The Department opened another case in 2010, after police responded to Dana's home for a domestic violence call. In this incident, Dana and her boyfriend had bit and assaulted each other

in the presence of some of Dana's children. Again, Dana was offered counseling for domestic violence, anger management, conflict resolution, and basic communication skills. Nevertheless, during an unsupervised visit with the children, Dana and her boyfriend engaged in another incident of domestic violence in front of the children.

The Department opened a case in 2013 after it received a report alleging neglectful supervision of M.S., who was only a year old at the time. Dana and Randy were involved in a physical altercation and the police were called to intervene. The police officers who responded to the call saw that Randy had scratches on his face. Both Dana and Randy were charged with assault. The Department offered Dana and Randy services, but they refused. M.S. was not physically injured in the incident, but it was nevertheless determined that M.S. was at risk of substantial harm.

### ***Criminal Cases***

Both Dana and Randy had criminal histories related to domestic violence. In 2007, Dana was charged with assaulting the father of two of her children. Dana pled guilty to the misdemeanor charge and was placed on deferred adjudication. In 2014, Dana was charged with providing false information to a police officer. According to the State's allegations, Dana told a police officer that the father of her oldest child did not have a knife during an altercation they had in November 2013, when in fact he did. Dana pled guilty to the charge and was sentenced to ten days in jail.

In 2015, Randy was charged with continuous family violence and assault family violence, both of which were third degree felonies. These charges stemmed from incidents in May 2014 and August 2014 in which Randy had struck Dana with objects, had caused Dana to strike objects, or had choked Dana. Randy pled guilty to the offenses and was sentenced to ten years in prison. The sentence was suspended and Randy was placed on probation for ten years.

***The Department's Current Case***

In November 2014, police officers were dispatched to Dana and Randy's home for a domestic disturbance. The incident was reported by neighbors. Dana and Randy lived in the home with M.S. and D.S. The police officers heard yelling and screaming inside the home. Because they believed an assault was taking place, the police decided to break down the door to enter the home. However, Dana opened the door before the police made a forced entry. Once inside the home, the police saw Randy and Dana. Randy had numerous scratches and blood on his face and neck. Dana had scratch marks on one side of her face. The police heard Randy say to Dana, "That's what you get for putting your hands on me." The children were present. One child was walking around and crying. Although Randy and Dana appeared extremely upset, neither would give a statement to police. After conducting an investigation, the police concluded that Dana had been the aggressor in this incident. Dana was arrested and charged with assault causing bodily injury; however, Dana was not prosecuted. The police reported the incident to the Department.

About a week later, a Department caseworker visited Dana and Randy at their home. Dana and Randy denied that an altercation had taken place between them or that the children were present during an altercation. The police reports showed otherwise. Dana and Randy were not cooperative with the caseworker and provided no names of relatives who would be able to care for the children. After considering Dana's history, the ongoing domestic violence, and the absence of relatives to care for the children, the Department decided that M.S. and D.S. should be removed from Dana and Randy's home.

In January 2015, the Department removed M.S. and D.S. from Dana and Randy's home and obtained temporary custody of M.S. and D.S. The Department developed service plans for Dana and Randy. Dana was ordered to submit to random drug screenings; complete protective parenting classes; participate in counseling; maintain an appropriate home free of domestic

violence, substance abuse, and illegal activity; complete a psychological evaluation; participate in a family violence prevention program; and maintain weekly contact with the Department. In addition to completing classes and services, Dana was also required to demonstrate appropriate behavior that would guarantee the children a safe and stable home. Her service plan stated that if Dana and Randy remained together, reunification would occur only if both she and Randy were successful in achieving their case plan goals.

By August 2015, Dana had completed all of her required classes and services. Nevertheless, incidents of domestic violence between Dana and Randy continued to occur. That same month, Randy walked into the local police department and claimed he had been assaulted by Dana. Randy had scratches on his chest and face and was bleeding. The police conducted an investigation and concluded Dana was the aggressor.

Less than two months later, on October 12, 2015, a police officer responded to an assault in progress at Dana and Randy's home. Dana told the officer that she and Randy had been fighting, Randy threw her outside, and she landed on her head. Dana also told the officer that Randy had twisted her finger. Dana had scratches on her neck and chest, but she indicated these injuries were from another incident with Randy. Randy told the officer that Dana had come to him when he was on the couch and started scratching and slapping him and he had thrown her out the door to get her away from him. Randy's two children from another relationship were present during the incident and were frightened. Dana's seventh child, an infant, was also present during the incident. The officer obtained statements from neighbors and arrested Randy. Additionally, the officer testified that he was familiar with Dana and Randy because he had been dispatched for disturbances and assaults between them about five times in the past. According to this officer, sometimes Dana was the perpetrator and other times Randy was the perpetrator; Dana and Randy would "go back and forth."

On October 20, 2015, another police officer was dispatched to Dana and Randy's home for a domestic disturbance. The neighbors said they could hear a woman yelling and arguing with a man. Dana told the officer that she and Randy had been arguing about a phone, that she was trying to leave, and that Randy had thrown a weight through her car window to stop her from leaving. Dana had cuts on her arm from the glass and she was bleeding.

A Department caseworker, who was familiar with Dana's relationships and her history of domestic violence, reiterated that Dana was not the victim in all of the domestic violence incidents. Dana had perpetrated some of the incidents by striking, hitting, scratching, or provoking her partner. However, even if Dana had been the victim in all of the incidents, Dana's decisions to stay in these volatile relationships was concerning because the relationships exposed M.S. and D.S. to emotional and physical harm. According to the caseworker, even when Dana decided to leave an abusive relationship, she would always return. Dana tried to justify her decisions to return. On one occasion, Dana had left a relationship and went to live with her mother, but Dana ultimately returned to the relationship saying that she had to leave her mother's house because of an "occupancy issue." In another instance, Dana said that she had decided to return to the relationship because her name was on the lease and she was entitled to stay in the apartment with her children. In yet another instance, Dana said that she had remained in the relationship because the police department did not offer to take her to a women's shelter for domestic violence. According to the caseworker, if Dana had asked her assistance in finding a shelter, she would have assisted her in finding one.

After their removal, M.S. and D.S. were placed in the home of a relative, Dana's aunt. The home was free of domestic violence and the aunt was responsive to the children's needs. M.S. had some behavioral problems, including temper tantrums and bouts of crying that would last for extended periods of time. M.S. also hit her caregivers. Nevertheless, the caseworker had seen



progress in M.S.'s behavior during the course of this case. During her initial visits with Dana, M.S. had engaged in outbursts and crying, but the caseworker had not observed this behavior more recently. The younger child, D.S., did not have any behavioral problems. If Dana's parental rights were terminated, the aunt was willing to continue to care for and nurture M.S. and D.S., provided that the Department continued to provide assistance for M.S.'s behavioral problems.

***Dana's Testimony***

Dana testified that she had completed a protective parenting class and a batterer's intervention and prevention class. Dana had also participated in a psychological evaluation and had attended counseling and therapy. Dana said that she had not spoken to Randy in a long time and that she was seeking to divorce him. Nevertheless, Dana admitted she had gone to the jail on two occasions to see Randy because she needed him to fill out a form.

Dana admitted that she and Randy had engaged in domestic violence even after she had completed the domestic violence classes mandated by her service plan. Dana believed that Randy's marijuana use played a role in these recent domestic violence incidents and that the incidents would not have happened if Randy had not used marijuana.

Dana acknowledged that children should not be around people who are engaging in physical fights because it is "bad for [the children's] mental state" and "because accidents happen all the time." Dana claimed that she was the victim and not the perpetrator in the majority of the domestic violence incidents between her and Randy. Dana said that she was "not a violent person." Dana further claimed that the domestic violence classes she attended and her individual counseling sessions were not particularly helpful for her because they did not address the victim's role in domestic violence.

**BEST INTEREST OF THE CHILDREN**

On appeal, Dana does not challenge the sufficiency of the evidence to support the grounds for termination under section 161.001(b)(1). Dana only challenges the legal and factual sufficiency of the evidence to support the trial court's finding that termination of parental rights is in the children's best interest.

In arguing that the evidence is insufficient to support the trial court's best interest finding, Dana points out that the Department never questioned her ability to care for her children's "basic needs." Dana emphasizes that she has a job and housing and that the children have a bond with her. Dana also argues that the Department did not present any evidence that M.S. or D.S. were ever physically harmed during an altercation, nor did the Department present any evidence that M.S. and D.S. were fearful of living in Dana's home. Dana asserts the evidence shows she will no longer allow herself to be a victim and will not expose the children to domestic violence in the future. In support of this argument, Dana emphasizes that she has obtained a protective order against Randy and has initiated divorce proceedings. According to Dana, she will no longer maintain a relationship with Randy when he is released from prison.

"[T]here is a strong presumption that the best interest of a child is served by keeping the child with a parent." *In the Interest of R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). However, the prompt and permanent placement of a child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016). Section 263.307(b) of the Texas Family Code lists factors for the court to consider in determining whether the child's parents are willing and able to provide the child with a safe environment. *Id.* § 263.307(b). Among these factors are the child's age and physical and mental vulnerabilities; the magnitude, frequency, and circumstances of the harm to the child; whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; the willingness and ability of

the child's family to effect positive environmental and personal changes within a reasonable period of time; and whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with guidance and supervision consistent with the child's safety, a safe physical home environment, and protection from repeated exposure to violence even though the violence may not be directed at the child. *Id.* § 263.307(b)(1),(3),(7),(11),(12)(C),(D),(E).

Additionally, courts consider the factors articulated in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976), in evaluating the best interest of the child. The *Holley* factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* In evaluating the *Holley* factors, we focus on the best interest of the child, not the best interest of the parent. *Dupree v. Texas Dept. of Prot. and Regulatory Serv.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ).

There is no requirement that evidence be presented as to each of the *Holley* factors. *In the Interest of C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). The same evidence proving acts or omissions under section 161.001(b)(1) of the Texas Family Code may be probative of the child's best interest. *Id.* at 28. In analyzing the best interest of the child, we may consider direct and circumstantial evidence, subjective factors, and the totality of the evidence. *In the Interest of E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). "A trier of fact may measure a parent's

future conduct by his past conduct and determine whether termination of parental rights is in the child's best interest." *Id.*

We now consider the evidence in light of the factors relevant in this case. The evidence showed that Dana had engaged in a long-term pattern of domestic violence and that she exposed M.S. and D.S. to this violence. The domestic violence created a dangerous environment for M.S. and D.S., both physically and emotionally. A caseworker testified that continuing to live in a home with domestic violence would have serious ramifications for M.S. and D.S.'s emotional and mental health. According to the caseworker, exposure to domestic violence sets children up for learning disabilities and for engaging in violent behavior themselves. The caseworker emphasized that M.S. and D.S. were still very young and were going to be dependent on their parents for all of their physical and emotional needs for a very long time.

Dana admitted in her testimony that she and Randy had engaged in multiple instances of domestic violence and that this home environment was dangerous for M.S. and D.S. Dana also acknowledged that domestic violence had harmed M.S. and D.S. emotionally and had put them at risk of being harmed physically.

The Department provided Dana with a multitude of services to address her domestic violence issues including anger management classes, relationship classes, protective parenting classes, and batterer's intervention classes. Although Dana completed these classes and attended therapy and counseling, she failed to alter her behavior. Even after Dana completed all of the domestic violence and parenting classes required in this case, she engaged in at least three more incidents of domestic violence. Because they had already been removed from Dana's home, M.S. and D.S. did not witness any of these incidents, but other children did. Two of Dana's stepchildren and her seventh child were present during one of the incidents. Based on this evidence, the trial

court could have found that Dana was unwilling or unable to alter her patterns of behavior and to effect positive environmental and personal changes within a reasonable period of time.

Dana testified that she is in the process of severing her relationship with Randy. However, the trial court could have doubted this testimony, especially in light of evidence of that Dana had recently visited Randy while he was in jail. A factfinder is not required to accept the truth or accuracy of a parent's testimony, either as to her past actions or future intentions. *D.F. v. State*, 525 S.W.2d 933, 939-40 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). Furthermore, the evidence showed that Dana had engaged in a series of relationships that were tainted by domestic violence. A caseworker testified that, given Dana's relationship history, Dana had a high risk of developing another violent relationship in the future. The trial court could have credited this testimony. In addition, the trial court was entitled to measure Dana's future conduct by her past conduct and determine that termination of Dana's parental rights was in the best interest of the children. *See E.D.*, 419 S.W.3d at 620.

Thus, the evidence showed that Dana was unwilling or unable to modify her long-time pattern of engaging in domestic violence and exposing children to this violence. Exposure to domestic violence is relevant when determining a child's best interest. *In the Interest of B.R.*, No. 02-12-00137-CV, 2013 WL 43518, at \*13 (Tex. App.—Fort Worth 2013, pet. denied). Repeated exposure to violence, even if the violence is not directed at the child, undermines the safety of the home environment. *In the Interest of A.M.Y.*, No. 04-15-00352, 2015 WL 6163212, at \*4 (Tex. App.—San Antonio 2015, no pet.).

As to the children's current placement, the evidence showed that M.S. and D.S. were living with a relative, their mother's aunt. The aunt was attentive to M.S. and D.S. The home was free of domestic violence, stable, and safe. M.S. was making progress on her behavioral problems. The Department was providing services to assist in the aunt in addressing these problems. Furthermore,

with this assistance, the aunt was willing to continue to care for and nurture M.S. and D.S. The Department's plan was for M.S. and D.S. to be adopted by the aunt.

Considering the evidence under the appropriate standards of review, we conclude that the trial court could have formed a firm belief or conviction that the termination of Dana's parental rights was in the best interest of M.S. and D.S. We hold that the evidence is legally and factually sufficient to support the trial court's best interest finding.

**CONCLUSION**

The judgment of the trial court is affirmed.

Karen Angelini, Justice