Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00425-CV

IN THE INTEREST OF F.L.H. IV and D.H., Minor Children

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2016PA01447
Honorable Stephani A. Walsh, Judge Presiding[1]

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: December 27, 2017

AFFIRMED

This is an accelerated appeal of the trial court's order terminating Appellant Dad's and Appellant Mom's parental rights to their children, F.L.H. IV and D.H.

In their appeals, both Mom and Dad contend the evidence is neither legally nor factually sufficient for the trial court to have found by clear and convincing evidence that terminating Dad's and Mom's parental rights was in F.L.H. IV's and D.H.'s best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2) (West Supp. 2016). In her appeal, Mom also contends that, pursuant to *Strickland*

[1] This proceeding arises out of Cause No. 2016-PA-01447, styled *In the Interest of F.L.H, IV, a Child*, pending in the 408th Judicial District Court, Bexar County, Texas, the Honorable Angelica Jimenez presiding. The termination order in this matter was signed by the Honorable Stephani Walsh, presiding judge of the 45th Judicial District Court, Bexar County, Texas.

v. Washington, 466 U.S. 668 (1968), her trial counsel provided ineffective assistance that seriously prejudiced her case.

Because we conclude the evidence is legally and factually sufficient to support the trial court's finding that termination of both Mom's and Dad's parental rights was in the children's best interests, and Mom failed to meet her burden under *Strickland*, we affirm the trial court's order terminating Mom's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

On September 27, 2014, the Texas Department of Family and Protective Services received a referral alleging negligent supervision of newborn F.L.H. IV by Mom and Dad. F.L.H. IV was left in the care of Mom's cousins, ages twelve and four. The twelve-year-old was observed to be under the influence, Dad tested positive for methamphetamines and amphetamines, and Mom tested positive for benzodiazepines without a prescription.

On December 19, 2014, after completion of services, the Department closed the case as "risk was reduced." Mom was pregnant; F.L.H. IV was placed in Dad's care. On July 31, 2015, the Department received a subsequent referral alleging negligent supervision of newborn D.H. After Mom tested positive for benzodiazepines at the time of D.H.'s birth, she admitted to taking a prescription that was not hers.

On June 27, 2016, the Department received a new referral alleging negligent supervision of twenty-one-month-old F.L.H. IV. Dad and F.L.H. IV were living at Haven for Hope, a homeless shelter and transitional center, when Dad tested positive for amphetamines and methamphetamines on June 24, 2016; a subsequent referral was made to the Department following a second positive drug test on June 30, 2016. Dad acknowledged his drug use. On July 5, 2016, the Department filed its Original Petition for Protection of a Child, for Conservatorship, and for Termination in

Suit Affecting the Parent-Child Relationship. Following an emergency order, the Department was named temporary managing conservator of F.L.H. IV.

During the first week of August 2016, three additional referrals were received by the Department with allegations of neglectful supervision of D.H., by Mom and Dad. The reports alleged Mom was using unprescribed Xanax and methamphetamines. On August 6, 2016, Dad stopped a law enforcement officer. Dad reported he was high on methamphetamines while taking care of his one-year-old daughter, D.H. Dad told the officer that Mom left D.H. in his care and that he was not supposed to have contact with her due to his ongoing drug abuse. On August 15, 2016, the Department filed its First Amended Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. Following an emergency order, the Department was also named temporary managing conservator of D.H.[2]

On June 26, 2017, the case was called to trial. Following an extensive hearing, and multiple witnesses, the trial court signed an Order of Termination terminating Mom's parental rights to F.L.H. IV and D.H. pursuant to Texas Family Code sections 161.001(b)(1)(D), (E), (F), (N), (O), and (P) and Dad's parental rights pursuant to sections 161.001(b)(1)(D), (F), and (O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (F), (N), (O), (P). The trial court made further findings that termination of both Mom's and Dad's parental rights was in the children's best interests. *See id*. § 161.001(b)(2). The trial court named the Department as the children's permanent managing conservator.

On appeal, both Mom and Dad contend the trial court erred in determining termination of their parental rights was in the children's best interests. Additionally, Mom contends she received ineffective assistance of counsel.

[2] Another child, N.P., date of birth October 19, 2009, was also named in the Amended Petition and removed as part of the emergency order. N.P., however, is not a part of this suit.

We turn first to Mom's and Dad's claims that termination of their parental rights was not in the children's best interests.

FINDING THAT TERMINATION OF PARENTAL RIGHTS IN THE CHILDREN'S BEST INTERESTS

A. Standard of Review

"Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit from the parent." *In re L.J.N.*, 329 S.W.3d 667, 671 (Tex. App.—Corpus Christi 2010, no pet.) (citing *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985)). As a result, appellate courts must strictly scrutinize involuntary termination proceedings in favor of the parent. *Id*. (citing *In re D.S.P.*, 210 S.W.3d 776, 778 (Tex. App.—Corpus Christi 2006, no pet.)).

An order terminating parental rights must be supported by clear and convincing evidence that (1) the parent has committed one of the grounds for involuntary termination as listed in section 161.001(b)(1) of the Family Code, and (2) terminating the parent's rights is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001; *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2003). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014); *J.F.C.*, 96 S.W.3d at 264.

"There is a strong presumption that the best interest[s] of the child[ren] [are] served by keeping the child[ren] with [their] natural parent, and the burden is on [the Department] to rebut that presumption." *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). "The same evidence of acts or omissions used to establish grounds for termination under section 161.001[(b)](1) may be probative in determining the best interest of the child." *Id*.

1. Legal Sufficiency

When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "look at all 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 re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). If the court "determines that [a] 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 [sufficient]." *See id.* (quoting *J.F.C.*, 96 S.W.3d at 266). This court must assume "the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *J.F.C.*, 96 S.W.3d at 266.

2. Factual Sufficiency

Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *accord In re K.R.M.*, 147 S.W.3d 628, 630 (Tex. App.—San Antonio 2004, no pet.). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord C.H.*, 89 S.W.3d at 25. "If, in light of the entire record, [unless] 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, . . . the evidence is factually [sufficient]." *J.F.C.*, 96 S.W.3d at 266.

B. Testimony Elicited during the Termination Hearing

The trial court heard from several witnesses over a two day period. The relevant testimony is set forth below.

1. Mom

Mom described a very contentious, violent relationship between her and Dad. She contends she stopped dating Dad after F.L.H. IV was born. In September of 2014, Mom explained that Dad called the Department after she left newborn F.L.H. IV alone with her twelve-year-old cousin. Mom contended she completed the Department's service plan; she further denied using benzodiazepines at the time or that Dad was awarded custody of F.L.H. IV. She testified, "[Dad] kidnapped [F.L.H. IV]."

Mom suggested during her testimony that D.H. was the result of Dad raping her; she then clarified, "it wasn't really a rape thing. It just happened." In July of 2015, Mom tested positive for benzodiazepines at the time of D.H.'s birth. She admitted taking a prescription for benzodiazepines that was not hers. Dad was present at D.H.'s birth, but had not seen her since that time. Mom testified that when D.H. was seven or eight months old, Dad called and told Mom that he was admitting himself into a rehabilitation facility and asked if she would bring D.H. to see him. She agreed and met Dad at a hotel. Mom continued that the following morning, Dad told her that he was leaving with D.H. to pick up a bottle at the house. Instead, Dad gave the baby "to the cops and tells them a lie."

Mom testified that when Dad did not come back to the hotel room, she tried to find him at several different stores. "I didn't see him at any of the stores, I already knew, like, he kidnapped her, my other baby again." She did not call the police and denied knowing that Dad was using drugs at the time. When the Department asked why she was not in the hotel room when the police came back to the room looking for her, she explained that she "must have been looking in the stores for D.H." Mom adamantly denied using methamphetamines, or other drugs, that day or the day before.

During her testimony, Mom acknowledged two prior theft arrests, but denied a previous arrest for possession of a controlled substance. When pushed, Mom conceded, "I was at the wrong place at the wrong time." Mom was adamant that she did not have a drug problem and explained that her positive drug test on March 30, 2017, for amphetamines, methamphetamines, opiates, and benzodiazepines as, "I fell once." Mom also denied missing court-ordered drug tests. When asked why she failed to appear for the hair-follicle drug test, Mom testified that she lost her wallet and did not have the necessary identification. Additionally, Mom denied that her caseworker ever sent her for a drug evaluation because "she did not have a drug problem." During her testimony, Mom denied using methamphetamines, amphetamines, or benzodiazepines and agreed to be drug tested during the lunch break.

Regarding her ability to provide for her children, Mom testified that she works part-time helping with the elderly. They are family friends; she works approximately three hours per week and they pay her $100.00. Through her counsel, Mom offered certificates for parenting classes, alcohol and substance abuse support group attendance verification, Alcoholics Anonymous attendance, and Narcotics Anonymous classes. Mom also testified that she never missed a visitation; on one occasion, however, she arrived five minutes late and they sent her home. As for living arrangements, Mom testified that the children would live with her at her mother's house. On cross-examination, Mom acknowledged her sister, who suffers from untreated bipolar disorder and schizophrenia, also lives with her mother.

During the lunch period, Mom submitted to the court-ordered drug test. The results were positive for opiates. When asked about her positive drug test, Mom acknowledged taking a pain pill due to pain stemming from the epidural during her c-section with D.H. On cross-examination, the attorney inquired whether the pills were prescribed to her. Mom replied, "I don't remember going to the doctor, no."

2. Dad

Dad admitted to using methamphetamines beginning in 2002. Dad acknowledged it was a series of choices that put his children in danger. "I made a bad choice to use. And I'm accountable for that. I am a recovering addict." He also admitted using in a convenience store bathroom, while F.L.H. IV was in a stroller. He testified that he knowingly kept methamphetamines in his van, while driving F.L.H. IV. After being released from rehab, Dad acknowledged one relapse. He was adamant about his honesty. He did not test positive, but he told his probation officer that he had been using drugs. Dad explained that he is committed to recovery—"Recovery is a lifetime."

In August of 2016, the Department removed F.L.H. IV from Dad's care and F.L.H. IV was placed with Dad's brother. Dad decided to return to the Victory Gospel, a spiritual recovery for people with drug and alcohol problems. But before he re-entered the ministry, he called Mom and asked to see D.H. Mom agreed and they met at a hotel. Dad testified that while they were together, he saw Mom use "heroin, narcos, [X]anax, footballs, and blue bars." Dad further testified that he and Mom used methamphetamines together on several occasions.

The following morning, Mom told him that she had things to do and left. Dad recognized that he should not be alone with D.H. while he was under the influence of a controlled substance. He left to call his uncle, but no one answered. He walked out to the street and saw an officer. He decided to hand the baby to the officer.

At several points during his testimony, the trial court noted that Dad was crying one minute and laughing the next. Dad did not recall the Department asking him to see a psychiatrist. He does not think he has a psychiatric problem and denies being told by several people associated with the Department of his bipolar diagnosis. He acknowledges that he is overanxious and easily excited, but he contends that he has normal, rational thinking. Dad believes his recovery has provided clarity; he is just an emotional person. He hurts and he has pain, "but it's not all over the

place. I'm actually a lot better." Dad explained that he has learned through his two-year spiritual background that "the Devil gets you in your mind, in your addiction." Dad also explained his lens-less glasses are a spiritual reference; "it's a characteristic that no one else does. And the spiritual significance behind that is I'm not of this world. I'm trying to find something, if I'm not of this world, that I do and normally from other people. I don't just do things to do them."

With regard to the different services, Dad testified that the Department did not want him to take parenting classes; he was told "your protective skills are over the roof. So you don't need parenting skills." He believes that he has missed one or two visits with the children. He has worked at Age Industries for seven years and earns $10.00 per hour and typically works forty hours per week. He is attending Narcotics Anonymous and he is starting to enjoy his life and he misses "his babies." Dad explained the children have been in his brother's and sister-in-law's custody since the Department's removal in August of 2016. He acknowledges the children are doing very well, but he does not think that he should lose his parental rights.

3. Stephanie Sanchez

Stephanie Sanchez is the Department investigator that handled the removal of F.L.H. IV. She testified that she received a referral on June 27, 2016, for alleged neglectful supervision by Dad. Dad tested positive for methamphetamines on two occasions. She described Dad as hyper and displaying unusual behavior.

Sanchez eventually made contact with Dad at the Haven for Hope shelter. He admitted snorting methamphetamines the previous weekend and every weekend for the past four months; he also described using methamphetamines in a gas station bathroom while F.L.H. IV was in a stroller. Dad also told Sanchez that he kept the drugs in a speaker in his van.

When Sanchez asked Dad about his drug use, he told her that it was "okay for him to use." "He stated that the devil would whisper to him telling him it was okay to use as his child would be

safe and wouldn't be harmed if he did use." Throughout the two hour interview, Dad's behaviors were very erratic; he would cry, then start laughing, he could not sit down; he would get angry, and then start laughing again. Sanchez testified that Dad made her uncomfortable to the point that she ensured staff members were able to hear what was happening in her office.

4. Erica Lincoln

Erica Lincoln, an investigative caseworker with the Department, removed D.H. The original referral was for neglectful supervision following Mom testing positive for benzodiazepines at the time of D.H.'s birth. Mom admitted taking prescription medication that was not prescribed to her.

Following Dad's handing D.H. to the police officer, Lincoln contacted Mom. Mom was very upset and reported that Dad "had taken [D.H.] from her and then got her removed." Mom refused to submit to drug testing.

Mom explained that, although she knew she was not supposed to be around Dad, she agreed to take D.H. to see Dad before he entered the rehabilitation facility. They met at the hotel and stayed that night. Mom acknowledged that she brought him a bag of "ice [methamphetamines]," but was adamant that she did not use drugs that night. Mom reported D.H. was at the hotel the entire time that Dad was using; Dad told her that he had used one week prior to that night.

Lincoln testified Dad reported they woke the next morning and Mom told him that she was hungry. Dad tried to give her D.H., but Mom told him to take D.H. with him. "As he was walking out of the hotel room, [Mom] was laughing at him, but couldn't explain why." When he returned, Mom was gone, and so were all of his belongings. Dad also acknowledged knowing that he and Mom were not supposed to be around each other. Dad explained that he realized that he was still under the influence, so he flagged down a police officer. He handed D.H. to the officer, he told

the officer that he was not supposed to have the baby, and that he was under the influence of methamphetamines.

Lincoln described D.H. as "very dirty . . . her eyes, her ears. She appeared to have some kind of infection going on. She had a severe diaper rash."

5. Latoya Lofton

Latoya Lofton, the Department caseworker for both F.L.H. IV and D.H., testified that at the time of the hearing, F.L.H. IV was almost three-years-old and D.H. was almost two-years-old. Both children were living with Dad's brother and his wife and doing very well. F.L.H. IV was receiving behavioral therapy for acting out and his speech had improved significantly; D.H. was walking. Lofton further testified that the paternal uncle and aunt were willing to be a permanent home for both F.L.H. IV and D.H., but only if the trial court terminated Mom's and Dad's parental rights.

Lofton testified that she personally reviewed the court-ordered service plans with both parents. Mom signed her service plan, but Dad refused to sign because his attorney objected to him signing his service plan.

a. <u>Mom</u>

Mom claims she finished her parenting class, but did not provide the certificate. She completed the psychological assessment, but failed to follow through with therapy after only three appointments. Mom also did not complete the MidCoast drug assessment or submit to any inpatient or outpatient drug rehabilitation treatment. Although ordered to submit to twice-monthly drug testing, Mom only submitted four times. Including two additional tests taken on the days of hearings, Mom tested positive on three out of six tests taken, but she was adamant that she did not have a drug problem. Lofton opined that Mom does not appear to understand the serious nature of the situation that placed her children in harm's way. She has not demonstrated an ability to

change her pattern of behavior, to provide for her children, to protect her children from future abuse or neglect, or to put her children's needs before her own. Finally, of the possible twenty-five parent-child visits ordered by the trial court, Mom attended only fifteen sessions.

Lofton testified that she believes it is in the children's best interests for Mom's parental rights to be terminated because Mom has failed to show that she can provide a safe and stable environment for the children, that she can be free from drugs, or that she can provide for the children's everyday needs. Lofton opined that Mom is not willing to change the behaviors that brought her children into the Department's care. Mom denies that she has a problem and is unwilling to access the services provided by the Department. Mom's history of substance abuse alters the way she can care for her children and creates a dangerous condition for her children. Lofton concluded that the children are very young and Mom's lack of attendance at parent-child visits prohibited the necessary bond between mother and child.

b. Dad

Lofton testified that Dad did submit to psychological and psychiatric examinations; he participated in drug treatment and regularly visited his children. He was supposed to attend psychiatric appointments and maintain medications, but failed to comply. Lofton provided Dad with the necessary referrals on numerous occasions. Lofton explained that Dad does not believe or recognize that he needs treatment or medication for his bipolar disorder, methamphetamine use disorder, or cannabis use disorder diagnoses. Dad only acknowledges his attention deficit hyperactivity disorder (ADHD) and only believes in natural treatment methods. For Dad, that meant drinking a Coke because it reversed the effect of the ADHD.

Lofton further testified that Dad calls frequently. He has highs and lows;

> one minute he can be very happy and then the next minute he just drops and he starts crying. Also, he can get very angry and then he'll hang up and call me back a second later and say—apologize and say he didn't mean it, that everything's okay

> now. Also, the not being able to sit still in one place. He's constantly moving all over the place.

This behavior has carried over during several of the court settings. At one of the court settings, Dad was very upset and would not calm down; Lofton requested he submit to a drug test. He cursed her out and "stated I was just trying to catch him. That I was like all the other women that was trying to get him caught up." He then called later and apologized for cursing at her and understood what he needed to do. At another court setting, Dad was in the hallway talking to himself very loudly and demonstrating erratic behavior; it was to such a degree that one of the attorneys actually asked the bailiff for assistance.

Lofton described Dad's speech as "very stream of consciousness without any focus . . . he skips from one topic to another." Additionally, Lofton testified Dad has not had housing during the pendency of the case, and did not have housing at the time of the hearing. She cited concern as to where the children would live if the court were to award him custody.

Lofton also believes it is in the children's best interests for Dad's parental rights to be terminated based on his failure to address his mental health issues. Dad continues to exhibit highs and lows and very erratic behaviors. His mental health disorders are exacerbated by his extended history of substance abuse. Although Dad has shown a willingness to address his drug use and counseling, he has refused to address the psychiatric concerns. It is Lofton's belief that his psychiatric issues are a large part of the reason the children came into the Department's care. Lofton does not believe that Dad can provide F.L.H. IV and D.H. with a safe home environment or provide the stability needed to effectively parent his children.

6. Christine Gracia

Counselor Christine Gracia began meeting with Dad in November of 2016. Dad acknowledged using illegal drugs less than two weeks before his first appointment. She described

Dad as very manic and testified that it is very difficult to redirect him—he is "very hyper, very animated." Gracia further explained that Dad's moods swing back and forth very quickly; he is very focused one minute, and then upset and loud, and then sensitive and crying.

Dad was diagnosed as Bipolar One: including mood swings, elevating manic agitation quickly, inability to focus, ADHD, elevated mania, and somewhat delusional. Gracia opined that she does not believe he can effectively parent without receiving psychiatric care; she further testified that she discussed with Dad, probably every other session, the need for psychiatric medication. Dad has made progress with the substance abuse, but Gracia acknowledges that Dad simply does not listen with regard to the psychiatric help he needs; he "hyper-focuses on what he wants to say . . . you can tell [him] until you're blue in the face and [he] just [does not] listen." In her experience, people with untreated mental health issues often resort to using illegal substances; it's a two-prong problem, "they go hand in hand, . . . and the one does affect the other."

Gracia testified that it is concerning to her that Dad does not believe he has a psychiatric condition that requires treatment because they have been discussing it on a regular basis. Denial creates a huge hurdle to addressing mental health issues and dramatically increases the risk of relapse. Dad's hyper religious conversations have diminished and he's talked less and less about it recently; but she does not think he is ready to have the children returned at this time. She explained that hyper-religiosity and bipolar disorder are often found together. In her professional opinion, Gracia testified that Dad's untreated bipolar disorder would be an emotional and physical danger to a child in his care. It is difficult for individuals who are hyper-focused on themselves and their emotional issues to notice problems or issues with children, "it's not malicious or anything, it's just that they don't have the wherewithal to do it." Finally, Gracia explained that given that she and the caseworker have both explained the need for Dad to seek psychiatric

intervention and Dad has refused, she does not have reason to believe he would seek such help in the next six months.

7. Dr. Michelle Moran

Dr. Michelle Moran conducted psychological evaluations of Mom and Dad.

a. Mom

Dr. Moran saw Mom in December of 2016. Per the Department's reports, Dr. Moran understood there were two positive drug tests. Mom explained one was the result of "single time taking a Xanax pill" in 2014 that had not been prescribed to her and one in 2015 had been prescribed for anxiety and panic attacks. Mom denied any pattern of regular drug use.

Mom also did not see herself as responsible for neglecting the children, but instead reported that Dad absconded with D.H. Dr. Moran testified that Mom presented with a "great deal of conflicting information about the same topic or issue." This raised an issue as to honesty; "those shifting beliefs are either the sign of dishonesty or some type of mental health problem." Mom denied any prior drug arrest, but the criminal history showed differently. Mom told Dr. Moran that she completed the drug assessment and that she does not require any substance abuse treatment, however, Mom did not complete the assessment.

Dr. Moran indicated a definite issue of concentration. She diagnosed Mom with adjustment disorder with mixed anxiety and depressed mood. Dr. Moran further testified that she believed there was a more extensive use of benzodiazepine than Mom was reporting and an unspecified personality disorder relating to a history of maladaptive relationships.

b. Dad

Dad's evaluation was on November 24, 2015. Dad admitted drug usage as recently as a few days before the evaluation and that he had been using for about a year. Dad reported a history of ADHD and depression. Dr. Moran described Dad as follows: he was restless and fidgety; he

spoke rapidly with pressured speech; he would shift between pleasant mood and tears in a matter of seconds; he expressed distortions of reality.

Dr. Moran testified that she tried to discuss her diagnosis with Dad. "[H]e did not believe that there was a mood disorder such as bipolar; he did believe that he was depressed and it worsened because of the situation. But he believed the other symptoms of talking rapidly, the energetic activity level, were related to the ADHD." Dr. Moran recommended psychiatric evaluation and individual therapy, substance abuse, and inpatient treatment. She further opined that if Dad's bipolar disorder remained untreated, he could cause emotional and physical danger to his children both now and in the future.

7. Paternal Sister-in-Law

Dad's paternal sister-in-law was very torn about testifying. She loves Dad but he needs help with substance abuse and parenting skills; she does not think that he is capable of parenting his children. She would like for Dad to remain in their lives depending on his stability and behavior and assuming he does not backtrack and start using drugs again.

8. Paternal Brother

Dad's brother is an engineer officer in the Army and a graduate of the United States Military Academy (West Point). He was adamant that he wanted his brother to have a fair trial and he did not want the trial court to choose between his brother and himself and his wife. He wanted the trial court to determine his brother's parental rights before deciding irrespective of whether he and his wife would adopt the children. He conceded, however, that he and his wife were not willing to adopt the children if Dad's parental rights were not terminated.

C. Statutory Violations under the Texas Family Code

The trial court found by clear and convincing evidence that Mom

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;

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

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

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

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

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child; [and]

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:

(i) failed to complete a court-ordered substance abuse treatment program; or

(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance.

TEX. FAM. CODE ANN. § 161.001(b)(1)(D, (E), (F), (N), (O), (P).

The trial court found by clear and convincing evidence that Dad

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

> (F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition; [and]
>
> (O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

Id. § 161.001(b)(1) (D), (F), and (O).

On appeal, neither Mom nor Dad challenge the trial court's statutory grounds' findings.

The trial court further found by clear and convincing evidence that termination of Mom's and Dad's parental rights was in the children's best interests. *See id*. § 161.001(b)(2).

D. Best Interests Findings

1. Arguments of the Parties

Mom contends any emotional and physical danger resulted exclusively from Dad's actions, the positive drug tests were not as a result of wrong doing on her part, and the concerns about her parenting abilities were unfounded. Mom contends that, when taken together, the *Holley* factors and the evidence produced at trial do not provide clear and convincing grounds on which to find that termination of her parental rights is in the children's best interests.

Dad contends that he acknowledges his mistakes, but he has learned from his mistakes and has been sober for over a year; his communication has improved, as have his manic episodes and behaviors. Dad even conceded he is willing to accept psychiatric services, if required.

Both Mom and Dad contend the evidence before the trial court was insufficient to overcome the presumption that keeping the children with a parent is in the children's best interests.

The State counters that both parents failed to complete their court-ordered service plans, to evidence an ability to effectively parent the children, or to provide a safe and stable environment

for the children. Neither parent was willing to take responsibility for their actions or to make the necessary changes to make a better life for their children. The State argues the record supports, by clear and convincing evidence, that termination of Mom's and Dad's parental rights is in the children's best interests.

2. The Holley *Factors and Texas Family Code section 263.307(b)*

Some factors used to ascertain the best interest of the child were set forth in *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

(1) the child's desires;
(2) the child's emotional and physical needs now and in the future;
(3) any 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 the individuals seeking custody to promote 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) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and
(9) any excuse for the parent's acts or omissions.

See also In re E.N.C., 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors).

The *Holley* Court warned that "[t]his listing is by no means exhaustive, but does indicate a number of considerations which either have been or would appear to be pertinent." *Holley*, 544 S.W.2d at 372; *accord E.N.C.*, 389 S.W.3d at 807 (describing the *Holley* factors as nonexclusive). "The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child." *C.H.*, 89 S.W.3d at 27. In fact, evidence of only one factor may be sufficient for a factfinder to reasonably form a firm belief or conviction that termination is in a child's best

interest—especially when undisputed evidence shows that the parental relationship endangered the child's safety. *See id*.

In addition to consideration of the *Holley* factors, courts remain mindful that "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest." TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2016); *In re B.R.*, 456 S.W.3d 612, 615 (Tex. App.—San Antonio 2015, no pet.). There is also a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). In determining whether a parent is willing and able to provide the child with a safe environment, courts should consider the following statutory factors set out in section 263.307(b) of the Code, which include the following:

(1) the child's age and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) 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;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills; . . . and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.

TEX. FAM. CODE ANN. § 263.307(b); *see In re G.C.D.*, No. 04-14-00769-CV, 2015 WL 1938435, at *4 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.) (citing *In re A.S.*, No. 04-14-00505-CV, 2014 WL 5839256, at *2 (Tex. App.—San Antonio Nov. 12, 2014, pet. denied) (mem. op.)); *B.R.*, 456 S.W.3d at 616.

When determining the best interest of a child, a court "may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence." *B.R.*, 456 S.W.3d at 616 (citing *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied)). A factfinder may also measure a parent's future conduct by his or her past conduct to aid in determining whether termination of the parent-child relationship is in the best interest of the child. *Id*. Finally, the grounds on which the trial court granted termination, pursuant to section 161.001 of the Code, "may also be probative in determining the child's best interest; but the mere fact that an act or omission occurred in the past does not ipso facto prove that termination is currently in the child's best interest." *In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.) (citation omitted).

Applying each standard of review, we examine the evidence pertaining to the best interests of F.L.H. IV and D.H. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *E.N.C.*, 384 S.W.3d at 807; *J.F.C.*, 96 S.W.3d at 284. We remain mindful that the trial court is the sole judge of the weight and credibility of the evidence, including the testimony of the Department's witnesses. *See In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (per curiam) (requiring appellate deference to the factfinder's findings); *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

a. Ages, Vulnerabilities, and Desires of the Children

The children were both under three-years-old at the time of the hearing and neither child testified. *See* TEX. FAM. CODE ANN. § 263.307(b)(1) (child's age and physical and mental vulnerabilities); *Holley*, 544 S.W.2d at 371–72. As stated by the Fourteenth Court of Appeals, "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 them, and have spent minimal time with a parent." *In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Latoya Lofton, the Department's caseworker, testified that the children's young age and Mom's lack of attendance at parent-child visits prohibited the necessary bond to develop between the children and Mom. No evidence indicates either of the children expressed a desire to return to either their mother's or their father's care. Conversely, the record strongly supports a strong bond between the paternal uncle and aunt and the children. The children are doing well and showing great strides both physically and mentally. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (13); *Holley*, 544 S.W.2d at 371–72; *see also C.H.*, 89 S.W.3d at 28 (holding placement plans and adoption evidence are relevant to best interest determination).

b. Emotional and Physical Needs of the Child Now and in the Future, Emotional and Physical Danger to the Child Now and in the Future, and Willingness to Accept Services and Effect Positive Change

"The need for permanence is the paramount consideration for the child[ren]'s present and future physical and emotional needs." *Dupree v. Tex. Dep't of Protective and Regulatory Servs.*, 907 S.W.2d 81, 87 (Tex. App.—Dallas 1995, no writ). This court considers a parent's conduct before and after the Department's removal of the children. *See In re S.M.L.D.*, 150 S.W.3d 754, 758 (Tex. App.—Amarillo 2004, no pet.). Additionally, the children's young ages render them vulnerable if left in the custody of a parent who is unable or unwilling to protect them or attend to their needs. *See* TEX. FAM. CODE ANN. § 263.307(b)(1), (2); *Holley*, 544 S.W.2d at 371–72; *In re*

J.G.M., No. 04-15-00423-CR, 2015 WL 6163204, at *3 (Tex. App.—San Antonio Oct. 21, 2015, no pet.) (mem. op.).

The testimony supports that this case began when newborn F.L.H. IV was left in the care of Mom's twelve-year-old cousin. Both Mom and Dad were using illegal substances at the time. Both parents completed some services and the case was closed as "risk reduced" with F.L.H. IV placed in Dad's custody. Less than seven months later, at D.H.'s birth, the Department was notified when Mom tested positive for benzodiazepines. Once again, Mom offered an excuse for her positive drug test and downplayed the potential danger to her unborn child.

Both parents exhibited an extensive history with drug abuse and denial regarding the changes necessary to provide for their children. Mom never addressed the drug issue and Dad entered recovery and relapsed on several occasions. Lofton testified that Mom was unable to understand the serious nature of the situation that placed her children in harm's way on several occasions. Mom was unwilling to address or admit that her substance abuse alters the way she cares for her children, or to demonstrate an ability to change her behavior to protect her children from future abuse or neglect. When discussing the Department's involvement, Mom testified at one point that Dad "kidnapped" F.L.H. IV and D.H.; and at another point she testified that D.H. was a result of Dad raping her. Mom provided no evidence of any of these allegations and subsequently backed away from her statements. When asked about the exchange at the hotel room when D.H. was removed, Mom did not even know how old D.H. was at the time. Mom testified D.H. was seven or eight months old; yet, the records indicate D.H. turned one year old a little more than a week before Dad handed her to the police officer.

Lofton also testified that Dad's failure to understand his need for psychiatric care creates a potential danger to the children. She believes his failure to acknowledge and address his psychiatric issues are a large part of the reason the children came into care and the reason he turns

to drugs for relief. These same sentiments were echoed by several witnesses. As his counselor, Christine Gracia stated, "they go hand in hand." Dr. Moran did not mince words, she testified that Dad's untreated bipolar condition could cause emotional and physical danger to the children both now and in the future.

Based on the testimony presented during the hearing, the trial court could have formed a firm belief or conviction that the children's living conditions and surroundings endangered the children's physical and emotional well-being before the Department became involved and that Mom and Dad were unable or unwilling to protect them or attend to their needs now or in the future. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *Holley*, 544 S.W.2d at 371–72; *J.G.M.*, 2015 WL 6163204, at *3.

c. Parenting Abilities and Services Available

Dad consistently visited the children, but Mom did not. Additionally, although Dad maintained employment throughout the proceedings, his employment proved an impediment to his maintaining services and appointments and he remained homeless throughout the proceedings. Mom testified that she was paid $100.00 per week caring approximately three hours per week for an elderly couple. With those funds, living with her mother, and shopping at Dollar General, Mom testified she could support the children. The trial court could have formed a reasonable belief that neither Mom nor Dad made the necessary changes to address their finances and housing needs sufficiently to protect and provide a safe and stable environment for their children. *See Dupree*, 907 S.W.3d at 87.

Dad clearly knew his children's safety was a concern. In fact, it was Dad that alerted the Department when newborn F.L.H. IV was left with a young babysitter and it was Dad that turned over young D.H. to the police officer when he was under the influence of methamphetamines. However, there was also testimony, confirmed by Dad, that F.L.H. IV was in Dad's care when

voices told him that F.L.H. IV would be safe if Dad used drugs. Dad's refusal to acknowledge his psychiatric issues prevented him from benefitting from the services being offered by the Department. Additionally, although Mom contends she attended parenting classes, she was unable to make the necessary changes to meet the children's needs. *See In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009) (concluding short duration improvements do not necessarily negate long history of irresponsible choices). A parent is not simply expected to complete the service plan, but to attain service plan goals by "demonstrat[ing] an understanding of services." *See* TEX. FAM. CODE ANN. § 263.307(b)(10), (11); *Holley*, 544 S.W.2d at 371–72. The parent must show an ability to protect the children, develop healthy relationships, and make good decisions. The evidence indicates neither Mom nor Dad was able to change their own behaviors based on what they learned from the classes in which they participated. *See* TEX. FAM. CODE ANN. § 263.307(b)(10), (11); *Holley*, 544 S.W.2d at 371–72.

Accordingly, based on the evidence presented, the trial court could have formed a firm belief or conviction that, even in light of Mom and Dad's participation in some of the court-ordered services, both Mom and Dad failed to work with the Department and did not fully comply with the terms of their service plans. *See J.L.*, 163 S.W.3d at 85; *J.F.C.*, 96 S.W.3d at 261.

3. Conclusion

Reviewing the evidence under the two sufficiency standards, and giving due consideration to evidence that the trial court could have reasonably found to be clear and convincing, we conclude the trial court could have formed a firm belief or conviction that terminating Mom's and Dad's parental rights to F.L.H. IV and D.H. was in the children's best interests. *See J.L.*, 163 S.W.3d at 85; *J.F.C.*, 96 S.W.3d at 266; *see also H.R.M.*, 209 S.W.3d at 108.

We next turn to Mom's appellate issue alleging ineffective assistance of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Arguments of the Parties

Mom argues her trial counsel was ineffective on a multitude of grounds, including trial counsel's failure to have Mom sit at counsel's table, counsel raised mediation discussions, counsel failed to object to positive drug-test results, counsel failed to object to inappropriate hearsay, counsel failed to object to questions that required speculative answers, counsel failed to cross-examine Dad's counselor, counsel failed to object to improper chain of custody, counsel struggled to admit exhibits, counsel was not paying attention or could not hear, and counsel allowed evidence of an arrest that did not result in a conviction to be admitted before the trial court.

The State argues Mom failed to meet her burden of proof and her claims are not supported by the record.

B. Effective Representation

The Texas Supreme Court upheld the "statutory right to counsel for indigent persons in parental-rights termination cases." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003) (citing TEX. FAM. CODE ANN. § 107.013(a)(1) (West 2014)); *In re J.M.O.*, 459 S.W.3d 90, 93 (Tex. App.—San Antonio 2014, no pet.). The court further explained that such right "embodies the right to effective counsel." *M.S.*, 115 S.W.3d at 544 ("[W]e believe '[i]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively.'" (quoting *In re K.L.*, 91 S.W.3d 1, 13 (Tex. App.—Fort Worth 2002, no pet.)).

Following the standard set forth in *Strickland v. Washington*, a successful ineffective assistance of counsel claim must show proof, by a preponderance of the evidence, that (1) "counsel's performance was deficient" *and* (2) "that the deficient performance prejudiced the defense." *Id*. at 545 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To find that

"trial counsel was ineffective, the trial record must affirmatively demonstrate [trial counsel's] deficiency." *In re K.O.*, 488 S.W.3d 829, 835 (Tex. App.—Texarkana 2016, pet. denied). "In reviewing trial counsel's performance, we take into account the circumstances surrounding the case and focus primarily on whether the manner of [trial counsel's] performance was reasonably effective." *Id*. (quoting *In re J.M.A.E.W.*, No. 06-14-00087-CV, 2015 WL 1119761, at *3 (Tex. App.—Texarkana 2015, no pet.) (mem. op.); *see also In re H.R.M.*, 209 S.W.3d at 111; *M.S.*, 115 S.W.3d at 545.

An appellate court affords "great deference to counsel's performance, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' including the possibility that counsel's actions are strategic." *M.S.*, 115 S.W.3d at 545 (quoting *Strickland*, 466 U.S. at 689). Only when conduct is "'so outrageous that no competent attorney would have engaged in it'" will an appellate court determine the conduct amounted to ineffective assistance of counsel. *Id*. (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *accord Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)).

C. Application

Mom outlines a long list of complaints against trial counsel. She contends a more prepared attorney would have conducted trial more efficiently, cross-examined witnesses, and kept inadmissible information out of evidence. Mom did not file a motion for new trial allowing her trial counsel to explain counsel's reasoning for each of Mom's alleged errors. *See In re G.H. Jr.*, No. 12-16-00327-CV, 2017 WL 2464694, at *3 (Tex. App.—Tyler June 7, 2017, no pet.) (mem. op) (citing *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002)).

"We may not speculate to find trial counsel ineffective when the record is silent regarding counsel's reasons for his actions." *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 623 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). In the absence of evidence regarding

any strategic reasons, or lack thereof, for counsel's behavior, we conclude that Mom has not overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *M.S.*, 115 S.W.3d at 545; *accord Strickland*, 466 U.S. at 689.

Mom also failed to show that, but for counsel's allegedly unprofessional errors, the results of the proceedings would have been different. *See Strickland*, 466 U.S. at 694. Mom offered no explanation how the trial court's determination regarding her parental rights would have changed. Mom did not challenge the trial court's statutory findings regarding sections 161.001(b)(1)(D), (E), (F), (N), (O), or (P), thereby conceding the sufficiency of the evidence supporting those findings.

Because Mom failed to show that the result of the hearing would have been different, but for the alleged errors of her trial counsel, she has failed to meet *Strickland*'s second prong as well. *See id.* at 697. We overrule Mom's appellate issue regarding alleged ineffective assistance of counsel.

CONCLUSION

Based on a review of the entire record, we conclude the evidence is legally and factually sufficient to support the trial court's finding, by clear and convincing evidence, that termination of Mom's and Dad's parental rights to F.L.H. IV and D.H. is in each of the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2).

Additionally, Mom has failed to meet her burden to show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceedings would have been different. *See Strickland*, 466 U.S. at 697.

Having overruled each of the appellate issues raised by both Mom and Dad, we affirm the trial court's termination of parental rights order.

Patricia O. Alvarez, Justice