



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00573-CV

IN THE INTEREST OF M.L.U., D.L.U., and A.L.U., Children

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-PA-00819
Honorable Peter A. Sakai, Judge Presiding

Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 12, 2021

AFFIRMED

Appellants Mother and Father appeal from the trial court's order terminating their parental rights to their children, M.L.U., D.L.U., and A.L.U.¹ In three issues, Father challenges the sufficiency of the evidence to support the trial court's findings on statutory grounds for termination. *See* TEX. FAM. CODE ANN. § 161.001(b)(1). In a single issue, Mother challenges the sufficiency of the evidence to support the trial court's finding that termination is in the children's best interest. *See id.* § 161.001(b)(2). We affirm the termination order.

¹ To protect the identities of the minor children in this appeal, we refer to the parents as "Mother" and "Father" and to the children by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

BACKGROUND

On April 22, 2019, the Texas Department of Family and Protective Services (the “Department”) removed M.L.U., D.L.U., and A.L.U. from their parents’ possession and filed a petition to terminate parental rights. On September 18, 2020, the associate judge held a bench trial, at which Mother and Father appeared only through their attorneys. At that time, M.L.U. was nine, D.L.U. was seven, and A.L.U. was five.

Trial Before the Associate Judge

At trial, M.L.U.’s therapist testified that she began therapy with M.L.U. in January 2020 and worked with her on processing anger, anxiety, and trauma. The therapist stated that, in a therapy session a month before trial, M.L.U. made an outcry of sexual abuse regarding Father and a stepbrother.² M.L.U. told her therapist that Father would walk around masturbating. According to M.L.U., when Mother was absent, Father would lay in bed “either touching himself, touching her, making—making her touch his penis, or penetrating her with his penis.” M.L.U. indicated to the therapist that penetration was vaginal and that the abuse was continual. The therapist found M.L.U.’s statements consistent and credible.

According to the therapist, M.L.U.’s outcry regarding the stepbrother was that he would pull her into a room at home and have sexual intercourse with her. The therapist found M.L.U.’s statements about the stepbrother’s sexual abuse credible. M.L.U. told her therapist that her parents did not know about her stepbrother’s abuse and that she did not believe Mother knew about the sexual abuse by either Father or the stepbrother.

The therapist believed that M.L.U. was making progress. According to M.L.U., Mother would sleep often and M.L.U. felt the need to play a mothering role for her younger siblings.

² Parental rights to the stepbrother are not involved in this case.

M.L.U. was learning, through therapy, to be a big sister and was becoming more communicative of her feelings and emotions. The therapist did not believe it would be safe to return M.L.U. to her parents' home.

The parents' therapist also testified. She testified that Mother and Father were unsuccessfully discharged from therapy in 2019, and again in 2020, for missing sessions. On cross examination, the therapist testified that the parents believed they were still enrolled in therapy in August 2020, even though the therapist had explained the discharge process to them. In total, the parents attended nine therapy sessions. In these sessions, the therapist sought to address Mother's trauma, including posttraumatic stress disorder and past sexual and child abuse, as well as Father's addiction to pornography. In addition, the therapist sought to address substance abuse concerns and domestic violence with both parents.

According to the therapist, the big issue that would lead to disagreements was Father's use of pornography. The parents reported to the therapist that Father would go into his car and watch pornography for long periods of time. These actions would lead to the parents' fighting. The parents also reported issues around infidelity, lack of trust, dishonesty between them, and disconnects regarding their vision and mission as parents and as a couple. Mother and Father denied that Father ever watched pornography around the children; however, the therapist addressed this as a concern.

Father denied to the therapist that domestic violence ever occurred. Mother stated that arguments could become loud and then Mother would grab Father to get his attention, which "would lead into a wrestling match." The parents denied drug use during the period they were engaged in therapy, but the therapist testified that each had past methamphetamine addictions and Mother had "dabbled" with opiates. The therapist stated she believed Mother loved her children.

The Department's caseworker also testified before the associate judge. In November 2018, the Department received a referral of neglectful supervision and medical neglect. In addition, the Department had concerns about the parents' drug use and domestic violence. While the case was being investigated, Mother made a statement that Father had choked her, and the children made statements that they had witnessed domestic violence. In addition, the parents had been evicted from their apartment. Removal of the children from their parents' care resulted from the parents' refusal to drug test, meet the Department's investigator, admit to any issues, and take classes required by the Department.

After the children were removed, the Department prepared service plans for the parents, and the trial court ordered the parents' compliance with these plans. The plans required Mother and Father to engage in therapy, complete parenting courses, complete domestic violence courses, and submit to drug testing, assessment, and treatment. The caseworker testified that both parents completed their parenting course and that Father completed drug treatment. However, neither parent completed therapy or their domestic violence courses, and Mother did not finish her drug treatment. In November 2019, Father tested positive for methamphetamine, and both parents failed to submit to drug tests for several months before trial.

The caseworker testified that M.L.U. told her that Father showed M.L.U. pornography and that M.L.U. had seen her parents have sexual intercourse many times. At the time of trial, the children were placed in a foster home, where they had lived for the past year and where their basic needs were met. A.L.U. required medical treatment for an eye condition, which the parents had known about but had not addressed while A.L.U. was in their care. A.L.U. and her sister D.L.U. were behind in school, and M.L.U. and A.L.U. acted out sexually. The caseworker testified that the girls were excited because a foster family had been identified to adopt them. The children loved their parents, but M.L.U. and D.L.U. told the caseworker they wanted the fighting between

their parents to stop before they felt safe to return home. The caseworker further testified that the parents were living in hotels and motels and had not provided proof of employment, as required by their service plans.

Following this testimony, the associate judge signed an order terminating Father's and Mother's parental rights, finding that Father engaged in conduct or knowingly placed his children with persons who engaged in conduct that endangered the physical and emotional well-being of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). The associate judge also found that Father and Mother failed to comply with the provisions of a court order that established the actions necessary for them to obtain the return of their children; used controlled substances in a manner that endangered the children's health or safety; and that termination of parental rights was in the children's best interest. *See id.* § 161.001(b)(1)(O), (P); *id.* § 161.001(b)(2).

Trial De Novo

Father and Mother requested a de novo hearing with the trial court, which was held on November 9, 2020. *See id.* § 201.015. The trial court took judicial notice of the transcript and an exhibit from the trial before the associate judge and made each a part of the record. *See id.* § 201.015(c) (authorizing the referring court to consider the record from the hearing before the associate judge). Father, Mother, and several additional witnesses testified.

The children's court appointed special advocate testified that she observed visits between the parents and the children and saw affection and a bond between them. A long-time friend of Mother's testified that Mother was attentive with the children, and the family seemed very happy; however, the friend testified that she was not very close with the family.

Mother testified that she did not engage with her court-ordered services from May to October 2019 because she could not find providers for the required services or the providers were closed. She testified that her unsuccessful discharge from therapy in 2020 was the result of the

therapist's miscommunication. Mother testified that Father never viewed pornography around the children and that she did not believe M.L.U.'s allegations of sexual abuse. According to Mother, she and Father had transportation, Father was employed, and the parents intended to lease a portion of a house the weekend following trial. Mother wished that the children would be returned to her care in the summer to avoid disruptions during the school year.

The Department's caseworker testified that she told Mother and Father they were discharged from therapy and explained how they could obtain therapy on their own. The caseworker stated that Mother was upset when her drug treatment program was extended and that Mother was discharged from treatment because she did not reengage after the program's extension.

In his testimony, Father denied M.L.U.'s allegations but admitted that he had not completed his court-ordered services.

After hearing this additional testimony, the trial court signed an order of termination with the same findings as those made by the associate judge. Mother and Father appeal from this order.

STANDARD OF REVIEW

A parent-child relationship may be terminated, pursuant to section 161.001 of the Texas Family Code, only if the trial court finds by clear and convincing evidence one of the predicate grounds enumerated in subsection (b)(1) and that termination is in a child's best interest. *See id.* § 161.001(b)(1), (2). Clear and convincing evidence requires "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." *Id.* § 101.007.

We review the legal and factual sufficiency of the evidence under the standards of review established by the Texas Supreme Court in *In re J.F.C.*, 96 S.W.3d 256, 266–67 (Tex. 2002). In reviewing the legal sufficiency of the evidence, we must "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.” *Id.* at 266. “[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.” *Id.* In reviewing the factual sufficiency of the evidence, we “must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing.” *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.*

FATHER

Father argues, in three issues, that the evidence is legally and factually insufficient to support findings on the three predicate grounds for termination. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (O), (P). Because we must consider Father’s appeal as to predicate ground (E), and because this ground alone is sufficient to satisfy section 161.001(b)(1), we consider only Father’s issue challenging the subsection (E) finding. *See In re N.G.*, 577 S.W.3d 230, 234 (Tex. 2019) (per curiam) (explaining that an appellate court must address issues raised challenging the trial court’s finding as to subsection (E) because termination pursuant to that subsection may have implications for a parent’s parental rights to other children); *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (explaining that only one predicate finding under section 161.001(b)(1) is necessary to support a judgment of termination).

Subsection (E) allows termination of parental rights if the trial court finds by clear and convincing evidence that the parent “engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.” TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Under subsection (E), the trial court must determine “whether there is evidence that a parent’s acts, omissions, or failures to act endangered the child’s physical or emotional well-being.” *In re C.J.G.*, No. 04-19-00237-CV, 2019 WL

5580253, at *2 (Tex. App.—San Antonio Oct. 30, 2019, no pet.). “[E]ndanger’ means “to expose a child to loss or injury, or to jeopardize a child’s emotional or mental health.” *Id.* at *3 (citing *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996) (per curiam)). “An endangerment finding often involves physical endangerment, but the statute does not require that the parent’s conduct be directed at the child or that the child suffer actual injury.” *In re K.J.G.*, No. 04-19-00102-CV, 2019 WL 3937278, at *5 (Tex. App.—San Antonio Aug. 21, 2019, pet. denied) (mem. op.). “Rather, the specific danger to the child’s well-being may be inferred from the parent’s misconduct alone.” *Id.* (citation omitted). “Conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child.” *Id.* Our analysis under subsection (E) may not rest on a single act or omission; it must be “a voluntary, deliberate, and conscious course of conduct.” *Jordan v. Dossey*, 325 S.W.3d 700, 723 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). We may consider conduct both before and after the Department removed the child from the home. *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Father argues that the evidence does not support a finding under subsection (E) because we can look only to evidence from before the children’s removal. However, Father confuses the standard for subsection (D) with that for subsection (E), and the case Father cites in his brief to support his assertion correctly states the subsection (E) standard. *See In re E.A.R.*, 583 S.W.3d 898, 911 (Tex. App.—El Paso 2019, pet. denied) (discussing subsection (E): “The conduct need not occur in the child’s presence, and it may occur both before and after the child has been removed by the Department.”); *see also In re A.R.G.*, No. 04-19-00749-CV, 2020 WL 1277739, at *3 (Tex. App.—San Antonio Mar. 18, 2020, no pet.) (mem. op.) (explaining the distinctions in the applications of subsections (D) and (E)).

Father acknowledges that evidence shows Father's drug use prior to the children's removal and he asserts: "While M.L.U.'s safety was endangered by the stepbrother's actions, [there was] no testimony put on by the Department or their representative that the department [*sic*] had any knowledge of it." Father argues that evidence of drug use prior to removal and his lack of knowledge about the stepbrother's sexual abuse makes a finding as to subsection (E) legally and factually insufficient.

As to drug use, Father ignores evidence of his positive drug test for methamphetamine in November 2019, after the children were removed. *See In re K.J.G.*, 2019 WL 3937278, at *5 (stating in a subsection (E) analysis: "Evidence that a parent continued to use illegal drugs even though the parent knew her parental rights were at risk is conduct showing a voluntary, deliberate, and conscious course of conduct, which by its nature endangers a child's well-being.").

Father, in his brief, also ignores M.L.U.'s outcries that Father sexually assaulted her, masturbated before her, and engaged in sexual intercourse with Mother in M.L.U.'s presence. According to M.L.U.'s therapist, M.L.U.'s outcries were consistent and credible. The trial court was free to credit M.L.U.'s outcry statements. *See In re B.S.C.F.*, No. 01-18-00907-CV, 2019 WL 1246281, at *7 (Tex. App.—Houston [1st Dist.] Mar. 19, 2019, pet. denied) (mem. op.) (holding a trial court could credit evidence that a father had inappropriately touched his children even though the father had not been charged with sexual assault and there was no physical evidence to corroborate the children's statements); *In re S.M.T.*, No. 13-17-00064-CV, 2017 WL 3084300, at *8 (Tex. App.—Corpus Christi July 20, 2017, pet. denied) (mem. op.) (holding a jury was free to credit a child's outcries, described in testimony from the Department's investigator and the child's counselor, and disbelieve a father's denial); *see also In re M.S.*, No. 02-20-00147-CV, 2020 WL 6066400, at *6 (Tex. App.—Fort Worth Oct. 15, 2020, no pet.) (mem. op.) (rejecting a mother's hearsay complaint regarding a foster parent's testimony about a child's allegations against the

mother because the complaint was not preserved for appellate review); *In re C.Y.*, No. 04-03-00882-CV, 2004 WL 1392722, at *2 (Tex. App.—San Antonio June 23, 2004, pet. dismissed w.o.j.) (mem. op.) (rejecting an argument that a trial court erred by failing to hold a hearing to determine the reliability of a child's outcry statement). “[I]t is beyond question that sexual abuse is conduct that endangers a child's physical or emotional well-being.” *In re R.W.*, 129 S.W.3d 732, 742 (Tex. App.—Fort Worth 2004, pet. denied) (citation omitted). “[E]vidence of sexual abuse of one child is sufficient to support a finding of endangerment with respect to other children.” *Id.*

We overrule Father's issue challenging the trial court's subsection (E) finding because the evidence is legally and factually sufficient to support the finding. Father does not challenge the trial court's best interest finding. Accordingly, we affirm the termination order as to Father.

MOTHER

In a single issue, Mother argues there is legally and factually insufficient evidence to support the trial court's finding that termination of her parental rights is in the children's best interest.

There is a strong presumption that keeping a child with a parent is in a child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, it is equally presumed that “the prompt and permanent placement of the child in a safe environment is . . . in the child's best interest.” TEX. FAM. CODE ANN. § 263.307(a). In determining whether a child's parent is willing and able to provide the child with a safe environment, we consider the factors set forth in Texas Family Code section 263.307(b). *See id.* § 263.307(b).

Our best-interest analysis is guided by consideration of the non-exhaustive *Holley* factors. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). These factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking

custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (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 id.*; accord *In re E.C.R.*, 402 S.W.3d 239, 249 n.9 (Tex. 2013). The Department is not required to prove each factor, and the absence of evidence regarding some of the factors does not preclude the factfinder from reasonably forming a strong conviction that termination is in a child's best interest, particularly if the evidence is undisputed that the parent-child relationship endangered the safety of the child. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Our concern is whether the evidence, as a whole, is sufficient for the trial court to have formed a strong conviction or belief that termination of the parent-child relationship is in the best interest of the child. *Id.*

The first *Holley* factor concerns the children's desires. *See Holley*, 544 S.W.2d at 372; *see also* TEX. FAM. CODE ANN. § 263.307(b)(5) (providing that a court may consider whether a child is fearful of living in or returning to the child's home). While there is evidence that Mother loves her children and is bonded with them, there is also evidence that M.L.U. and D.L.U. wish that their parents would cease fighting before they felt safe to return home.

The second *Holley* factor concerns the children's current and future physical and emotional needs, and the third *Holley* factor concerns the emotional and physical danger to the children now and in the future. *See Holley*, 544 S.W.2d at 372; *see also* TEX. FAM. CODE ANN. § 263.307(b)(1) (providing that a child's age and physical and mental vulnerabilities are relevant to a best-interest determination); *id.* § 263.307(b)(6) (providing that psychiatric, psychological, and developmental evaluations of a child are relevant to a best-interest determination). According to the Department's caseworker, A.L.U. and D.L.U. were behind in school, and M.L.U. and A.L.U. acted out sexually. Additionally, M.L.U. saw a therapist to process anger, anxiety, and trauma. According to the

caseworker, M.L.U. made outcries of sexual assault that occurred at the parent's home and reported that she had seen her parents have sexual intercourse many times. *See* TEX. FAM. CODE ANN. § 263.307(b)(7) (providing that a history of abusive or assaultive conduct by the child's family is relevant to a best-interest determination). Mother described to her therapist arguments with Father that would devolve into "wrestling match[es]." *See id.* § 263.307(b)(12)(E) (providing that courts may consider whether a parent has adequate skills to protect the child from repeated exposure to violence although violence may not be directed at the child).

Holley factor four concerns the parental abilities of Mother, and *Holley* factor five concerns the programs available to assist Mother to promote the best interest of the children. *See Holley*, 544 S.W.2d at 372. M.L.U.'s therapist testified that M.L.U. felt the need to play a mothering role for her younger siblings because Mother would leave the children unattended to sleep. *See* TEX. FAM. CODE ANN. § 263.307(b)(12)(A), (C) (providing that courts may consider whether a parent has adequate skills to provide the child with minimally adequate health and nutritional care and with guidance and supervision consistent with the child's safety). Mother acknowledged a history of drug use, and she failed to complete drug treatment or testing, as required by her court-ordered service plan. *See In re T.N.J.J.*, No. 04-19-00228-CV, 2019 WL 6333470, at *5 (Tex. App.—San Antonio Nov. 27, 2019, no pet.) (noting that a father's drug use and failures to submit to drug testing and treatment were relevant to multiple *Holley* factors, including the emotional and physical needs of the children, the emotional and physical danger to the children, the father's parental abilities, and the stability of the father's home).

Holley factor six concerns the plans for the children by those seeking custody, and *Holley* factor seven concerns the stability of the home or proposed placement. The caseworker testified that Mother lived in hotels and motels during the pendency of the case, and Mother testified that she had located, but not yet moved, to a rental home at the time of trial. According to the

caseworker, the Department had located a family which intended to adopt the children. *See In re L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing a child’s need for stable, permanent home as paramount consideration in best interest determination).

Holley factor eight concerns Mother’s acts or omissions which may indicate that the parent-child relationship is not a proper one, and *Holley* factor nine concerns excuses for Mother’s acts or omissions. *Holley*, 544 S.W.2d at 372. Mother argues that she made progress toward the completion of her court-ordered services despite difficulties she had in obtaining assistance from the Department and her therapist. However, the trial court was free to credit testimony from Mother’s therapist that Mother was discharged twice for missing sessions and testimony from the Department’s caseworker that the caseworker had informed Mother about the status and availability of therapy. Additionally, the trial court was free to credit testimony that Mother was upset when her drug treatment program was extended and that Mother did not reengage with the program after the extension. *See In re J.M.T.*, 519 S.W.3d at 270 (“A fact finder may infer from a parent’s failure to take the initiative to complete the services required to regain possession of his child that he does not have the ability to motivate himself to seek out available resources needed now or in the future.”); *see also* TEX. FAM. CODE ANN. § 263.307(b)(10), (11) (providing courts may consider willingness and ability of the child’s family to seek out, accept, and complete counseling services and willingness and ability of the child’s family to effect positive environmental and personal changes within a reasonable period of time).

Having reviewed the record, we hold the evidence is legally and factually sufficient to support the trial court’s finding that termination of Mother’s parental rights is in the children’s best interest. Mother does not challenge the predicate grounds for termination. Accordingly, we affirm the termination order as to Mother.

CONCLUSION

We affirm the trial court's order of termination.

Rebeca C. Martinez, Chief Justice