In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-20-00056-CV

IN THE INTEREST OF J.H., B.H., AND K.O.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. C-233,619

MEMORANDUM OPINION

After a bench trial, Karen, Mother, appeals from an order terminating her parental rights to her minor children, J.H. (age 5), B.H. (age 4), and K.O. (age 1) and appointing the Texas Department of Family and Protective Services (the Department) permanent managing conservator of the children.[1] *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (O), (2). Jim, Father of K.O., appeals from the same

[1] To protect the identity of the minors, we use initials, proper nouns, or pseudonyms to refer to the children, parents, and family members. *See* Tex. R. App. P. 9.8(b)(2). We also use pseudonyms for the Department representatives that testified at trial.

order terminating his parental rights to his minor child, K.O.[2] *See id.* § 161.001(b)(1)(D), (E), (N), (O), (2). We affirm.

Background

On October 29, 2018, the Department filed an Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. The petition was supported by an affidavit by a representative of the Department. According to the affidavit, the Department received a referral alleging medical neglect of then five-month-old K.O. by her mother, Karen. The affiant stated that K.O. had been a patient under Texas Children's Hospital's care since June 2018 and included the following, in pertinent part:

> On October 24, 2018, caseworker was contacted due to [Karen] not following the feeding plan developed by the medical team. According to information received, [K.O.] is to be fed three ounces of milk by mouth every three hours. During the hours of 12 a.m. to 6 a.m., [K.O.] does not receive a feeding. Due to growing concerns regarding [Karen] and concerns regarding [K.O.], medical staff requested an Interdisciplinary scan call. During the scan call several medical professionals, including the Child Protection Team, expressed concerns regarding [Karen's] behavior as well as her lack of understanding regarding [K.O.] All medical professionals expressed concerns due to [K.O.]'s poor weight gain and [Karen] stating [K.O.] cannot feed, when in fact she can. During the scan call, the agency was informed of the Interdisciplinary team's decision to admit [K.O.] into the hospital. The

[2] Brian, J.H.'s and B.H.'s father, signed an Affidavit of Voluntary Relinquishment of Parental Rights to the Texas Department of Family and Protective Services voluntarily relinquishing his parental rights to J.H. and B.H. to the Department. The order of termination terminated Brian's parental rights as to J.H. and B.H. based on his relinquishment of parental rights, and he is not a party to this appeal.

purpose of this hospital stay is for [K.O.] to be assessed in a controlled environment. This would allow the medical team to determine what is going on with [K.O.], from a medical standpoint. The agency was informed [Karen] stated [K.O.] had a seizure episode, but there was no medical evidence to indicate [K.O.] had a seizure. According to information provided, [Karen] informed medical professionals, [K.O.] could not swallow; however, a swallow study was completed and indicated she can swallow. The agency was also informed that [Karen] continues to express concerns that something is wrong with [K.O.] when medically there is nothing to indicate this. Concerns were expressed regarding the care [K.O.] is receiving from [Karen], as well as [K.O.] being in the care of [Karen]. Medical staff informed the agency that if [K.O.] is released to the care of [Karen], the situation will worsen and can lead to death. Due to these concerns, an immediate therapeutic separation for [K.O.] from [Karen] is being recommended.

On October 25, 2018, the agency was provided with a letter from Texas Children's Hospital regarding the above mentioned concerns. The correspondence listed detail concerns indicating [Karen] is a danger to [K.O.]'s health and well-being. It states the belief is [Karen] is inducing [K.O.]'s sickness and fabricating symptoms that has resulted in unnecessary medications, evaluations and treatment. The medical team at Texas Children is requesting an immediate therapeutic separation of [K.O.] from all family in order to determine if there is a true medical diagnosis.

[Karen] contacted caseworker to inform her [K.O.]'s G-tube had broken and medical staff was in the process of giving her pain medication. Supervisor spoke with the social worker and was informed [Karen] insisted the G-tube was broken when it in fact was not[;] [the] Social worker expressed concerns due to [Karen's] continued threat of removing [K.O.] against medical advice from the hospital. Supervisor informed the social worker to notify her immediate[ly] should this occur.

On October 26, 2018, supervisor was contacted by Texas Children's Hospital regarding concerns due to [Karen's] behavior. According to information received, [Karen] continues to threaten to remove [K.O.] from the hospital. Concerns were also expressed due to [Karen] refusing to follow the feeding plan for [K.O.] Supervisor was informed nursing staff was able to talk to [Karen] and for now she was no longer threatening to leave against medical advice.

> On October 27, 2018, supervisor was contacted by Texas Children's Hospital due to growing concerns regarding [Karen]. According to medical staff, [Karen] informed the hospital she would be leaving on today and taking [K.O.] Due to concerns of [Karen] leaving against medical advice, permission granted for removal due to exigent circumstance.

The affidavit stated that in June 2010 a CPS case was transferred to Family Based Safety Services due to Karen's erratic behavior and after medical professionals at University of Texas Medical Branch (UTMB) reported that Karen called the hospital posing as a physician. According to the affidavit, medical professionals at UTMB in 2010 believed Karen may have Munchausen by proxy syndrome.

In its petition, the Department sought temporary managing conservatorship of J.H., B.H., and K.O. due to K.O.'s age, Karen's lack of protective capacities to provide for the safety and well-being of her children, concerns regarding Karen's medical and physical neglect of K.O., additional concerns regarding the safety and well-being of J.H. and B.H., and Karen's placing her children at a substantial risk of harm because of her behavior.

Evidence at Trial

Testimony of the CPS Supervisor

The CPS Supervisor for this case testified at trial. The Supervisor testified that Karen also had two other children that lived with a relative in Jasper. According to the Supervisor, she was initially contacted when K.O. was born, and the Department attempted to help due to concerns about poverty and Karen's lack of understanding

of how to take care of a premature infant. The Supervisor testified that the initial caseworker, who no longer works for the Department, tried to assist Karen with getting resources that would help her and the children. The Supervisor worked with Karen for a few months.

The Supervisor testified that the initial caseworker worked much longer on this case than was normal because of concerns regarding K.O. and to ensure that K.O. was getting needed medical attention and going to medical appointments. The Supervisor testified that after K.O. was born and in the hospital, Karen had expressed concerns about K.O. not gaining weight and having seizures, and these concerns were addressed by the hospital. The Supervisor testified that the hospital records showed that hospital testing revealed no evidence of seizures and that K.O. had no problem gaining weight while in the hospital. The Supervisor testified that by the time K.O. was released from the hospital she was an appropriate weight. According to the Supervisor, Karen seemed to think she knew more than the hospital staff.

The Supervisor testified that, not long after K.O.'s release from the hospital, Karen continued to report K.O. having seizures and feeding issues and Karen had K.O. admitted to Texas Children's Hospital eleven times over a six-month period. The Supervisor explained that the initial caseworker spoke with the nurses, and they did not express any concern about feeding issues. Additionally, the hospital tests showed no evidence that K.O. had suffered seizures. According to the Supervisor,

Karen was repeatedly having K.O. admitted to the hospital for false and non-existent medical problems, and she believed Karen had a condition known as "Munchausen by proxy[.]" The Supervisor explained that Munchausen by proxy is a mental health issue for the parent and can cause a danger to the child because it subjects the child to unnecessary testing or procedures. The Supervisor testified that in K.O.'s case, Karen's condition caused K.O. to be subjected to having her stomach opened and a feeding tube inserted. According to the Supervisor, during the time the Department was involved, K.O. had a "G button" that was "connected that [would] allow you to be able to feed[]" K.O. The Supervisor testified that at one point, Karen reported that K.O.'s feeding tube had broken, but the hospital confirmed that it had not.

The Supervisor testified that the Complex Care team treating K.O. at Texas Children's Hospital became concerned that the procedures were unnecessary and referred the case to pediatricians certified in investigating medical abuse, which is associated with Munchausen. The Supervisor testified that those doctors then reported Karen's medical abuse of K.O. to the Department. According to the Supervisor, based on the report by Texas Children's Hospital, which was admitted into evidence at trial, the situation met the Department's definition of abuse or neglect. The Supervisor testified as follows:

> . . . I actually participated in a scan call with the multidisciplinary team which consisted of myself, the caseworkers, child abuse trauma team, physicians; and I was the one who actually asked them the question point-blank, "What exactly is wrong with this child?"

> And the doctor's response to me was "Absolutely nothing." He also went on to say that if we allowed that child to remain in the care of her mom that that child would end up dead.

The Supervisor testified that it was her understanding that Jim, the Father of K.O., was around during the hospitalizations but did not speak up regarding what was being reported by Karen to the hospital. The Supervisor never visited with Jim and she did not feel that he was the one who was creating any of K.O.'s medical issues or encouraging the medical visits.

The Supervisor testified that based on the Department's concerns for K.O., Karen's previous history with the Department relating to a similar situation with another child that placed that child at risk, and the Department's concerns with Karen's ability to protect her other children from physical abuse in the past, the Department was also concerned about Karen's ability to protect J.H. and B.H. The Supervisor testified that the Department removed J.H., B.H., and K.O. from Karen's care and placed them in a foster home.

On cross-examination, the Supervisor admitted that, although personnel at Texas Children's Hospital expressed to her that they were convinced that Karen suffers from Munchausen by proxy, the Supervisor does not have training in the medical field and does not know whether Karen suffers from it or had been diagnosed with it. The Supervisor acknowledged that the prior caseworker was the person who primarily had contact with Karen during the pendency of the case, the

Supervisor's involvement with the case was mainly through information provided by that initial caseworker, and the only time the Supervisor visited with Karen during the investigation was during the family team meeting. The Supervisor agreed at trial that a nurse at home with Karen and K.O. did not express any concerns regarding Karen's understanding of how to care for K.O., but that the hospital had ongoing concerns. The Supervisor also agreed that Karen wanted to remove K.O. from Texas Children's Hospital care and seek another doctor's opinion, but the Supervisor explained that that alone was not the reason the Department moved forward with K.O.'s removal. The Supervisor acknowledged that the Department was aware of Karen's transportation issues and that she did not have her own vehicle. The Supervisor agreed that there were no allegations against Karen for abuse or neglect of J.H. or B.H.

Testimony of the CPS Caseworker

Another CPS caseworker assigned to the case testified at trial. In the Caseworker's opinion, Jim's parental rights as to K.O. and Karen's parental rights as to all three children should be terminated.

The Caseworker testified that Karen was given a court-ordered service plan that she had over a year to complete, and a copy of the updated plan was admitted into evidence. According to the Caseworker, Karen's plan required her to visit K.O. weekly and the other two children biweekly, and that Karen attended "the majority"

of the visits. The Caseworker testified that on certain occasions she had to arrange transportation for Karen to the visits. The Caseworker testified that Karen did not have face-to-face contact with the Caseworker every month to discuss Karen's progress and Karen did not provide the Caseworker with her work schedule or copies of her check stubs, as required by her service plan. The Caseworker testified that at the beginning of the case Karen worked at a fast food restaurant and provided check stubs for one month and since then Karen has reported working at other food establishments but has not provided the Caseworker with any verification. The Caseworker testified that subpoenas went out to those food establishments, but she never received further verification of Karen's employment. Karen did, however, complete a psychosocial evaluation and follow its recommendations as required by her service plan. According to the Caseworker, Karen received required counseling through a counselor who provided in-home services, but it took Karen a year to complete twelve one-hour sessions, which is longer than the time requested by the Department that it be done. The Caseworker testified that Karen did not provide proof of safe, stable housing as required by her service plan. The Caseworker explained that Karen provided her with four places she lived during the fifteen months of the case, and the Caseworker heard that Karen was staying temporarily with relatives. According to the Caseworker, Karen told her she was living with Brian and represented it as stable housing for purposes of compliance with her

service plan. When the Caseworker went to visit the address, Brian denied that Karen lived there. The Caseworker testified that Karen and Jim would have qualified for housing assistance and she sent a referral to the housing department because the Department's initial goal was reunification, but the Caseworker was unsure why Karen and Jim did not obtain housing. The Caseworker testified that Karen and Jim separated and got back together numerous times during the case.

The Caseworker testified that although Karen brought gifts and food for the children on occasion to visits, it was just enough food for the visit. According to the Caseworker, Karen did not comply with the part of her service plan requiring that she provide support for her children throughout the case, including providing clothing and financial support. The Caseworker testified that Karen completed her parenting classes at Life and Focus and participated in all of the Department's meetings and court hearings for the case as required by the service plan. The Caseworker testified that Karen's updated service plan added a drug and alcohol assessment because Karen was living with Jim while he was using drugs, and two of Karen's drug tests came back positive for methamphetamines. According to the Caseworker, Karen did not complete the drug assessment as required by her service plan. The Caseworker testified that on Karen's most recent drug test Karen was negative for all substances and the drug test results were admitted into evidence. The

Caseworker testified that Karen was involved with Brian during the time when Karen had some mental health commitments.

The Caseworker described Karen as "difficult to work with[.]" The Caseworker testified that toward the end of the case she had to communicate with Karen solely through her attorney because communicating directly with Karen "led to a lot of unnecessary yelling, arguing, hanging up in my face." The Caseworker testified that since the time K.O. was placed in foster care, the therapeutic separation proved that there was medical abuse by Karen.

The Caseworker testified that Karen did not engage in individual therapy until August 2019. The Caseworker agreed that, based on records from two mental health facilities where Karen had been committed prior to this case, Karen needs ongoing services for mental health issues but did not demonstrate that she was receiving such services. The Caseworker agreed that Karen was continuing to have outbursts, which seemed inconsistent with someone who is taking care of their mental health. According to the Caseworker, multiple people had tried to help Karen but ultimately pulled away from Karen because of Karen's harassment.

The Caseworker testified that Jim signed a court-ordered service plan, and the plan was admitted into evidence at trial. The Caseworker testified that Jim failed to report changes in address or telephone number within forty-eight hours of him making the changes as required by his service plan. According to the Caseworker,

Jim also did not complete his service plan because he failed to maintain safe and stable housing; failed to provide a work schedule and copies of his check stubs; and failed to participate in the Department's scheduled meetings, appointments, visits with the child, and court hearings. The Caseworker testified that Jim did not have the required monthly face-to-face visits with her, and she had only seen him twice during the pendency of the case. The Caseworker testified that Jim had not contacted her to check on K.O. and had not attended recent supervised visits with K.O. According to the Caseworker, Jim had visited with K.O. two times in the prior six months, which is not significant contact, but otherwise he interacted well with the children. Jim had been kicked out of some of the places he had lived and, although at the time of trial his attorney had told the Caseworker that he was living in Jasper, the Caseworker had not been able to verify Jim had safe and stable housing. The Caseworker testified that Jim had also not provided clothing, shoes, and financial support for K.O. during the pendency of the case. Although he completed his psychosocial evaluation, he failed to follow through with the recommendations as required by his service plan. The Caseworker testified that she provided both Karen and Jim with bus passes to have transportation to scheduled meetings and appointments. The Caseworker testified that Jim did not attend required parenting classes at Life and Focus or provide her with a form required by his service plan.

Jim also tested positive for methamphetamines and failed to complete a drug assessment, and his drug test results were admitted into evidence at trial.

The Caseworker believed that terminating Jim's parental rights to K.O. was in K.O.'s best interest and terminating Karen's parental rights to J.H., B.H., and K.O. was in the children's best interest. The Caseworker's opinion was that Jim and Karen have not shown they have a stable environment for their children to be raised in, have not tried to make the children's situation better over the last year, and would subject the children to continued criminal actions if the children were returned to their care. The Caseworker believed that Karen's situation at the time of trial was less stable than at the beginning of the case and that Karen had merely "go[ne] through the motions[]" instead of trying to change. The Caseworker testified that there were times when Brian and Karen were both incarcerated and the Caseworker believed that their behavior engaging in criminal acts endangered the children's physical and emotional well-being. The Caseworker testified that, in her opinion, K.O.'s physical and emotional well-being was endangered by Karen's conduct in bringing K.O. repeatedly to doctors and endangered by Jim's omissions and failing to correct things. The Caseworker agreed that the neglect J.H., B.H., and K.O. experienced was a danger to their physical and emotional well-being. According to the Caseworker, if Jim's and Karen's parental rights were terminated, the Department would seek a good home for the children that has educational and moral

values and a placement that could provide food, clothing, and shelter at all times and would be a positive step over what their parents had shown them in the past year. The Caseworker testified that two of the children's godmothers were interested in having the children placed with them, and one of the godmothers had possession of B.H. for more than six months while Karen was incarcerated.

Cindy's Testimony

Cindy, Jim's cousin and Karen's cousin, testified that she appeared at the status hearing in November of 2018, testified then that she is a licensed clinical social worker with a master's degree, a single mother, and she wanted J.H., B.H., and K.O. placed with her. At trial, Cindy testified that the children were placed with foster parents for about a month before they lived with her for eight months. Cindy testified she was aware before the children came into her care that Texas Children's Hospital had suggested that K.O. should have a "therapeutic separation" from Karen. According to Cindy, when K.O. came into her care, the feeding tubes had been removed and K.O. was able to suck, swallow, and feed without the assistance of machines or tubes. Cindy testified that she took K.O. to follow-up medical appointments at Texas Children's Hospital during the time she cared for K.O. Cindy agreed that, while in her care, K.O. gained weight, got "back into the better part of the growth curve[,]" and did not require medical assistance for feeding. According to Cindy, although Karen had told doctors that K.O. had seizures, turned blue, and

had problems taking a bottle, Cindy never observed these issues while K.O. was in Cindy's care. Cindy testified that K.O. did have to go to a doctor for allergies, and K.O. was diagnosed with sleep apnea after a sleep study, but no treatment was advised until K.O. turned two.

Cindy testified that initially she was skeptical of CPS's involvement and had hoped that there was not a problem as to Karen's or Jim's care of K.O. Cindy testified that while she had the children, she began to have conflicts with Karen and "[i]f [Karen] didn't get her way, if I didn't do something that she wanted me to do, if she was just mad about whatever, there were arguments[.]" According to Cindy, the stress of the situation was difficult for her and the Department caseworker and supervisor intervened.

Cindy testified that Karen and Jim had poverty issues and a lack of resources during periods of their relationship. Cindy also testified that there had been conflict between Karen and Jim, that their relationship was inconsistent and involved fighting and arguing, and that law enforcement had to be called in some instances. Cindy testified that Jim did not have a lot of contact with her but that he would attend some of the visits when Cindy took K.O. to visits. According to Cindy, although Karen gave Cindy some formula and groceries and gas money one time, Karen and Jim did not give Cindy money or basic things necessary for K.O.'s care. Cindy agreed that the children required a lot of her time and required her to give up extra

income and work. Cindy also agreed that, toward the end of the time she was caring for the children, Department representatives pleaded with her to continue taking care of the children.

Cindy testified as to the incident that resulted in her not being able to continue caring for the children and in her deciding "that it was in my best interest and the best interest of my child to remove myself from the situation." According to Cindy, she told Karen about inappropriate behavior by J.H. that had been brought to Cindy's attention and Karen "cursed [her] out[,]" they argued, "and then from that moment it went downhill from there." Cindy testified, "I got reports that she was threatening my job and she was coming for me and she was posting stuff on Facebook about me, sharing it to these groups and different things like that." Cindy testified that Karen's posts were false, defamatory, and could have jeopardized her employment. Cindy testified that this created a situation where she could not take care of the children, and in turn, this created a bad situation for the children. According to Cindy, she had not noticed any improvement in Karen's and Jim's situation since the children were placed in foster care a year and three months before trial.

On cross-examination, Cindy testified that at the visits Karen would interact with the children, the children appeared happy and not fearful, and that Jim would interact with K.O. Cindy testified that she had expressed to the caseworker that she was overwhelmed with the children when she cared for them. Cindy also testified

that while caring for the children she expressed to Karen that J.H. was having behavioral problems and "getting marks" at school every day and Cindy was having to go to the school on a regular basis. Cindy testified that anyone taking in three children would experience a certain level of stress like she did but what overwhelmed her "was the extra stuff, the drama, the back and forth[,] chasing down lies, trying to prove the truth. Like, it was always something with [Karen] - - it became less about the children, and it - - more about the interaction with her." Cindy testified that giving the children to CPS was one of the hardest decisions she has ever made in her life because she had grown attached to them.

Cindy acknowledged that in response to Karen's posts on social media, she posted responses that she believed were truthful, but she agreed she used bad language. Cindy explained that she then packed the children's things, brought the children to the CPS office, and told CPS she could not care for the children anymore.

According to Cindy, Jim "FaceTime[d]" her a few times so he could see K.O. Cindy testified that Jim did not provide items for K.O.'s care but that Jim's interactions with K.O.'s were positive and he would hold her, play with her, and change her diaper. Cindy testified that she had had one bad argument with Jim during the time she had the children when he got mad that Cindy was going to tell the caseworker that he and Karen were not compliant or doing their part and Jim thought she should be on his and Karen's "side[.]" Cindy testified that she had made it clear

in the beginning that she was there for the children and not for Karen or Jim. Cindy testified that after the argument, Jim did reach out to her and apologized and they were able to "talk[] the situation out."

According to Cindy, J.H. was the only one who had issues with separation from Karen and he "took a little while to understand structure, rules, [and] responding to consequences." Cindy testified that J.H. "was accustomed to just being on a tablet all day and doing whatever he wanted and, so, he gave me a lot of pushback and it took months[] and a lot of patience and hard work to get him on track." Cindy explained that she was able to establish an effective reward system with J.H. and then had no problems with his behavior. Cindy testified that B.H. was "very reserved, quiet[]" and not eating much when she came into her care. Cindy testified that B.H. was put on PediaSure, gained weight, and blossomed while in her care. As to K.O.'s progress while in her care, Cindy testified as follows:

> [W]hen I reflect back on her progress . . . it just makes me emotional because I remember her first being in NICU before she was even removed, to seeing her in the hospital before the removal happened, being on a feeding tube and all of that, to where she progressed in my home, to getting rid of all the specialists;
>
> Her no longer being diagnosed failure to thrive, her gaining the appropriate weight to be on target, her hitting her developmental milestones with ECI, which she was getting Early Childhood Intervention.
>
> She hit her developmental milestones. When I first got [K.O.], she was nine months; and she couldn't sit up without assistance. Probably within two weeks she was sitting up on her own, and from there she just took off.

> . . . I believe I was told while she was in foster care she gained one pound. I had her a month. She gained 3. She continued to put on weight. By the time she left me, she was, like, 20, maybe 22, in between 20, 22 pounds.
>
> She was just now starting to wear 12-month clothing. She had been in three to six months for, like, a very long time. She was that small.
>
> She was off the bottle when she left me. She was eating table food. . . . all she did was walk and eat all day long, and she was just full of energy.

Cindy testified that in this case it was her opinion that Jim's and Karen's parental rights should be terminated.

Karen's Testimony

Karen testified that she did not want her parental rights to be terminated, but that it "seemed like the devil already had his mind made up with [her] situation[]" and she just needed someone to "stand over [her] and just be a guardian until all this is better[.]" Karen testified that the visitations with her children during the pendency of the case were good, but that it was hard when it was time for the children to leave because she has a connection with the children. Karen testified that she has been diagnosed with bipolar disorder and has "battled with that for a long time." According to Karen, her mother never took her to the doctor or never had her get medication for the disorder, and, as an adult, Karen has sought help for herself and she is seeing a doctor to help her understand what was going on with her and why she suffered from mood swings. Karen testified that in 2009 she got into a relationship with Brian, whom she "knew from the streets[,]" and the relationship

was volatile and "toxic." She testified that at one point they began living together and Brian was "punching, hitting [her], stomping [her], [and] choking [her]." Karen testified that she and Brian had J.H. and B.H., and when B.H. was about three weeks old, Karen spent six months in jail for violating probation for her theft case. According to Karen, when she went to jail, B.H.'s and J.H.'s godparents took care of them. Karen testified that she was raising the children on her own because their fathers were absent and she was "trying to show my mom and them that I could do it by myself." She testified that when the case started she was struggling and did not like her counselor, but that the counselor ended up being "a blessing because she broke through me on some stuff[.]" Karen testified that she started to go to church and sought counseling with the pastor to get on the right track. Karen testified that, despite her bipolar disorder, she kept her house and children clean and had food for them.

Karen testified she believed she had completed most of her service plan. Karen disagreed at trial with the caseworker's testimony that Karen was "just going through the motions[,]" and Karen testified that she completed services because she "was at [her] breaking point[]" and wanted to become a better person. According to Karen, when Jim left her and Brian was getting out of a halfway house, she left the one-bedroom place she had furnished with the help of CASA and CPS in preparation for the children's return home because Brian told her he could help her pay for

something bigger. After she had already left the house, put everything in storage, and gone to his sister's house, Brian then told her he could not help her obtain a bigger place. Karen testified she believed he would help her because he had been in prison for four years and said that he would not hit her and that he had changed. According to Karen, Brian lied when the Caseworker came to his sister's house and Brian said Karen was not living there.

Karen testified that at the time of trial she was employed at a restaurant. Karen testified that she knows that she has to take care of her mental health in order to be able to care for her children, and that she would take her blood pressure medication and Prozac to stabilize her mood. According to Karen, her mental commitment was "nine or ten years ago[]" when she "first got with [Brian]." She agreed that during the case she "had some pushback[]" and was in "fight mode[,]" but she eventually realized that she needed to cooperate to get her children back instead of show resistance. Karen testified that she had been trying to find a place to live in the days leading up to trial and that she knew she "didn't move fast enough[]" in securing stable and suitable housing. Karen testified that she was no longer dating Jim and that regardless of what happened in the case she would continue to take care of herself.

Other Evidence

The trial court admitted into evidence records of multiple convictions for Jim: a 2005 judgment for misdemeanor assault for which he was sentenced to nine months in county jail; a 2011 Judgment Adjudicating Guilt for possession of a controlled substance (cocaine) for which he was sentenced to three years' of confinement; a 2014 judgment for theft for which he was sentenced to thirty days in county jail; a 2014 judgment for possession of marijuana for which he was sentenced to thirty days in county jail; a 2017 judgment for possession of a controlled substance for which he was sentenced to forty-five days in county jail; and a 2019 judgment for possession of a controlled substance for which he was sentenced to twenty-five days in county jail.

The trial court admitted into evidence records of multiple convictions for Karen: a 2005 judgment for theft for which she was sentenced to thirty days in county jail; a 2014 judgment for theft of property for which she was sentenced to three days in county jail; a 2015 judgment for possession of a controlled substance with intent to deliver for which she was sentenced to seven years in prison; and a 2015 judgment for theft of property for which she was sentenced to one year of confinement in state jail to be served concurrently with the possession case, but was released in 2016 and placed on community supervision for ten years.

Karen's mental health records were also admitted into evidence. The records documented suicide attempts prior to the case, her bipolar diagnosis, her failure to stay on her prescribed medications, her unwillingness to leave situations involving physical abuse, and her mood swings and angry outbursts. The trial court also admitted K.O.'s medical records from Texas Children's Hospital and records from UTMB from prior to the case.

Issues on Appeal

In Karen's first issue, she challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that she knowingly placed or knowingly allowed her children to remain in conditions or surroundings which endanger their physical or emotional well-being. *See* Tex. Family Code Ann. § 161.001(b)(1)(D). In her second issue, she challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that she engaged in conduct or knowingly placed her children in with persons who engaged in conduct which endangers her children's emotional and physical well-being. *See id.* § 161.001(b)(1)(E). In her third issue, she challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that she failed to comply with the provisions of her court-ordered service plan. *See id.* § 161.001(b)(1)(O). In her fourth issue, she challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that

termination of Karen's parental rights was in the best interest of the children. *See id.* § 161.001(b)(2).

In Jim's first issue, he challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that he knowingly placed or knowingly allowed K.O. to remain in conditions or surroundings which endanger her physical or emotional well-being. *See* Tex. Family Code Ann. § 161.001(b)(1)(D). In his second issue, he challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that he engaged in conduct or knowingly placed K.O. with persons who engaged in conduct which endangers K.O.'s emotional and physical well-being. *See id.* § 161.001(b)(1)(E). In his third issue, he challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that Jim constructively abandoned K.O. *See id.* § 161.001(b)(1)(N). In his fourth issue, he challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that he failed to comply with the provisions of his court-ordered service plan. *See id.* § 161.001(b)(1)(O). In his fifth issue, he challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of Jim's parental rights was in K.O.'s best interest. *See id.* § 161.001(b)(2).

Standard of Review

The decision to terminate parental rights must be supported by clear and convincing evidence, that is, "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). The movant must show that the parent committed one or more predicate acts or omissions and that termination is in the child's best interest. *See* Tex. Fam. Code Ann. § 161.001(b); *see also In re J.L.*, 163 S.W.3d at 84. We will affirm a judgment of termination if any one of the statutory grounds is supported by legally and factually sufficient evidence and the best interest finding is also supported by legally and factually sufficient evidence. *In re C.A.C.*, No. 09-10-00477-CV, 2011 Tex. App. LEXIS 3385, at **13-14 (Tex. App.—Beaumont May 5, 2011, no pet.) (mem. op.).

In reviewing the legal sufficiency of the evidence in a parental rights termination case, we must consider all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *In re J.O.A.*, 283 S.W.3d 336, 344-45 (Tex. 2009) (citing *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)). We assume the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, and we disregard all evidence that a reasonable factfinder could have

disbelieved. *Id.* at 344. In a factual sufficiency review, we "give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *In re J.F.C.*, 96 S.W.3d at 266. We must determine "'whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.'" *Id.* (quoting *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002)). "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.* We give due deference to the factfinder's findings and we cannot substitute our own judgment for that of the factfinder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). The factfinder is the sole arbiter when assessing the credibility and demeanor of the witnesses. *See id.* at 109 (citing *In re J.L.*, 163 S.W.3d at 86-87); *In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003) (explaining that an appellate court should not reweigh the evidence or "second-guess" a trial court's resolution of disputed evidence). The trier of fact may draw reasonable and logical inferences from the evidence presented. *See In re E.N.C.*, 384 S.W.3d 796, 804 (Tex. 2012) (citing *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997)).

Only one predicate finding under section 161.001(b)(1) is necessary to support a judgment of termination when there is also a finding that termination is in

the child's best interests. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) (applying previous version of the statute); *In re C.M.C.*, 554 S.W.3d 164, 169 (Tex. App.—Beaumont 2018, no pet.). Generally, we will affirm the termination order if the evidence sufficiently establishes any statutory ground upon which the trial court relied in terminating parental rights as well as the best interest finding. *See In re A.V.*, 113 S.W.3d at 362. However, given the potential future consequences of a 161.001(b)(1)(D) or (E) finding for a parent to a different child, due process and due course of law requirements mandate that a court of appeals review and detail its analysis for a subsection D or E finding. *See In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam).

Endangerment Under D and E

In their first two issues, both Karen and Jim challenge the sufficiency of the evidence to support termination under subsections D and E. Under subsection D, parental rights may be terminated if clear and convincing evidence supports that the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child[.]" Tex. Fam. Code Ann. § 161.001(b)(1)(D). Under subsection E, parental rights may be terminated if clear and convincing evidence supports 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[.]" *Id.* § 161.001(b)(1)(E).

Under subsection D, parental rights may be terminated based on a single act or omission by the parent. *In re L.E.S.*, 471 S.W.3d 915, 925 (Tex. App.—Texarkana 2015, no pet.) (citing *In re A.B.*, 125 S.W.3d 769, 776 (Tex. App.—Texarkana 2003, pet. denied)). Subsection D requires the endangerment to the child to be the direct result of the child's environment. *See In re K.P.*, No. 09-13-00404-CV, 2014 Tex. App. LEXIS 9263, at *38 (Tex. App.—Beaumont Aug. 21, 2014, no pet.) (mem. op.). In evaluating endangerment under subsection D, we consider the child's environment before the Department obtained custody of the child. *See In re J.L.V.*, No. 09-19-00316-CV, 2020 Tex. App. LEXIS 2070, at *34 (Tex. App.—Beaumont Mar.11, 2020, no pet.) (mem. op.) (citing *In re S.R.*, 452, S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). It is not necessary that the parent know for certain that the child is in an endangering environment; rather, awareness of the potential for danger and a disregard of the risk is enough to show endangering conduct. *See In re S.M.L.*, 171 S.W.3d 472, 477 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Subsection D cannot constitute the basis for termination if the parent was unaware of the endangering environment. *See In re C.M.C.*, 554 S.W.3d at 171-72 (citing *In re T.H.*, 131 S.W.3d 598, 603 (Tex. App.—Texarkana 2004, pet. denied)).

Termination under subsection E requires more than a single act or omission and a "'voluntary, deliberate, and conscious course of conduct by the parent is required.'" *See In re L.E.S.*, 471 S.W.3d at 923 (quoting *Perez v. Tex. Dep't of Protective & Regulatory Servs.*, 148 S.W.3d 427, 436 (Tex. App.—El Paso 2004, no pet.)); *see also In re C.M.C.*, 554 S.W.3d at 172. Under subsection E, a court may consider conduct occurring before and after a child's birth to establish a course of conduct. *See In re C.M.C.*, 554 S.W.3d at 172 (citing *In re S.M.*, 389 S.W.3d 483, 491-92 (Tex. App.—El Paso 2012, no pet.)). Because the evidence of statutory grounds D and E is often interrelated, we may consolidate our review of the evidence supporting these grounds. *See In re J.L.V.*, 2020 Tex. App. LEXIS 2070, at *33 (citing *In re M.Y.G.*, 423 S.W.3d 504, 510 (Tex. App.—Amarillo 2014, no pet.)); *In re J.B.*, No. 09-16-00442-CV, 2017 Tex. App. LEXIS 4543, at *23 (Tex. App.—Beaumont May 18, 2017, no pet.) (mem. op.).

Generally, subjecting a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *See In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied). Although incarceration alone will not support termination, evidence of criminal conduct, convictions, and imprisonment together with other conduct may support a finding of endangerment under subsection E. *See In re A.R.M.*, No. 14-13-01039-CV, 2014 Tex. App. LEXIS 3744, at *21 (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.); *In re R.W.*, 129

S.W.3d at 743 (father's criminal history and resulting imprisonment alone was insufficient to support an endangerment finding, but when considered with the evidence of father's history of substance abuse, mental instability, and sexual misconduct, such evidence provided further proof of a course of conduct that endangered the child's well-being); *In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—Fort Worth 2003, no pet.) (evidence of father's prior criminal conduct, convictions, and imprisonment was relevant to endangerment determination). Abusive or violent conduct by a parent may also produce a home environment that endangers a child's well-being. *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

In addition, a pattern of drug abuse will also support a finding of conduct endangering a child even if there is no evidence that such drug use actually injured the child. *Vasquez v. Tex. Dep't of Protective & Regulatory Servs.,* 190 S.W.3d 189, 196 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). A history of illegal drug use and drug-related criminal activity is conduct that subjects a child to a life that is uncertain and unstable, endangering the child's physical and emotional well-being. *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied); *Dupree v. Tex. Dep't of Protective & Regulatory Servs*., 907 S.W.2d 81, 84 (Tex. App.—Dallas 1995, no writ); *see also S.R.*, 452 S.W.3d at 361-62 (parent's drug use may qualify as a voluntary, deliberate, and conscious course of conduct endangering

the child's well-being); *Walker v. Tex. Dep't of Family & Protective Servs*., 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (illegal drug use may support termination under subsection E because "it exposes the child to the possibility that the parent may be impaired or imprisoned[]"). A parent's continued drug use when the custody of his child is in jeopardy supports a finding of endangerment. *See In re S.R.*, 452 S.W.3d at 361-62; *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs*., 221 S.W.3d 244, 253-54 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (en banc). A parent's drug use, incarcerations, incidents of domestic violence, criminal history, and employment and housing instability prior to and during the case create a course of conduct from which the factfinder may determine the parent endangered the child's emotional and physical well-being. *See In re M.C*., No. 09-18-00436-CV, 2019 Tex. App. LEXIS 2961, at **15-16 (Tex. App.—Beaumont Apr. 11, 2019, no pet.) (mem. op.); *see also Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 534 (Tex. 1987); *In re D.O*., 338 S.W.3d 29, 36-37 (Tex. App.—Eastland 2011, no pet.); *In re V.V*., 349 S.W.3d 548, 553-54 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

"[N]eglect can be just as dangerous to the well-being of a child as direct physical abuse." *In re M.C*., 917 S.W.2d 268, 270 (Tex. 1996). In addition, a court may consider a parent's failure to complete a service plan as part of its analysis of

endangering conduct. *See In re J.B.*, 2017 Tex. App. LEXIS 4543, at **22-23 (citing *In re R.F.*, 115 S.W.3d 804, 811 (Tex. App.—Dallas 2003, no pet.)).

Termination Under D or E as to Karen

In her first two issues, Karen argues that there is nothing in the record to indicate a causal connection between the children's environment and any danger resulting in harm or injury to the children's physical or emotional well-being. According to Karen, there is nothing in the record to show that K.O. was in any real present or future danger and Karen's past conduct of fabricating her older children's health problems cannot serve as the basis for termination of her parental rights to J.H., B.H., and K.O. Karen argues that the record is void of any evidence that she exposed the children to person(s) who could endanger the children's physical or emotional well-being. She asserts K.O. was provided with eighty-four hours of home nursing care, the home nurse found no problem with K.O.'s health condition, and Karen had very little involvement with the feeding of K.O.

The evidence reflects that medical professionals at Texas Children's Hospital believed Karen subjected K.O. to unnecessary medical treatment and procedures; that Karen suffers from Munchausen by proxy syndrome, a form of medical abuse that endangers the child's health and well-being; and that Karen had a pattern of this behavior. The Caseworker testified that Karen tested positive for methamphetamines twice during the pendency of the case and that Karen did not complete the drug

assessment required by her service plan. The Caseworker testified that, since the time K.O. was placed in foster care, the therapeutic separation proved that there was medical abuse by Karen. The Caseworker testified as to Karen's mental health issues, explained that during the case Karen acted inconsistently with someone who was taking care of their mental health, and stated that Karen had not provided proof that she was engaged in mental health services. The Caseworker testified that Karen was less stable at the time of trial than when the case began. The trial court heard the Caseworker testify that Karen's criminal behavior endangers the children's physical and emotional well-being. The Caseworker testified, and Karen admitted, that Karen failed to obtain safe, suitable housing during the pendency of the case. The Caseworker testified that the neglect J.H., B.H., and K.O. experienced while in Karen's care was a danger to their physical and emotional well-being.

We conclude the trial court could have reasonably formed a firm belief or conviction that termination of Karen's parental rights was supported under subsections D and E. *See In re J.F.C.*, 96 S.W.3d at 264-65; *In re L.E.S.*, 471 S.W.3d at 925. We conclude the Department established, by clear and convincing evidence, that Karen committed the predicate acts enumerated in subsections D and E. Further, in light of the entire record, and applying the applicable standard of review as outlined above, we find the evidence legally and factually sufficient to support the trial court's findings of endangerment of the children by Karen under subsections D

and E. *See In re J.F.C.*, 96 S.W.3d at 266. We overrule Karen's issues one and two. Because only one statutory basis is required to support termination of parental rights, we need not consider the sufficiency of the evidence under subsection O, and we overrule Karen's third issue. *See In re A.V.*, 113 S.W.3d at 362.

Termination Under D or E as to Jim

In his first two issues, Jim argues that CPS did not take issue with Karen's parenting skills until Karen wanted to remove K.O. from Texas Children's Hospital to get a second opinion and "he was following the feeding plan and doing everything properly." According to Jim, his criminal activity alone is not enough to pose a specific danger to K.O., and while incarcerated he did not know of Karen's prior drug use when he left K.O. in her care and was unaware of any concerns regarding Karen's ability to care for K.O.

According to the Caseworker, Jim's omissions in failing to correct Karen when she subjected K.O. to unnecessary treatments and procedures endangered K.O.'s physical and emotional well-being. The Caseworker testified that Jim tested positive for methamphetamines during the pendency of the case, he failed to follow through with the recommendations from his psychosocial evaluation, the environment he and Karen provided the children was not stable, and the children would be subjected to his continued criminal activities if they were returned to his

care. The Caseworker also testified that Jim failed to provide proof of safe and stable housing for K.O.

We conclude the trial court could have reasonably formed a firm belief or conviction that termination of Jim's parental rights was supported under subsections D and E. *See In re J.F.C.*, 96 S.W.3d at 264-65; *In re L.E.S.*, 471 S.W.3d at 925. We conclude the Department established, by clear and convincing evidence, that Jim committed the predicate acts enumerated in subsections D and E. Further, in light of the entire record, and applying the applicable standard of review as outlined above, we find the evidence factually sufficient to support the trial court's findings of endangerment of K.O. by Jim under subsections D and E. We conclude the disputed evidence the trial court could not reasonably have credited in favor of its endangerment findings is not so significant that the court could not reasonably have formed a firm belief or conviction that Jim endangered K.O. *See In re J.F.C.*, 96 S.W.3d at 266. We overrule Jim's first two issues. Because only one statutory basis is required to support termination of parental rights, we need not consider the sufficiency of the evidence under subsections N and O, and we overrule Jim's third and fourth issues. *See In re A.V.*, 113 S.W.3d at 362.

Best Interest of the Children

Karen and Jim challenge the trial court's determination that termination of their parental rights was in the best interest of the children. Trial courts have wide

latitude in determining a child's best interest. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). Nevertheless, there is a strong presumption that the best interest of a child is served by keeping the child with his or her parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (citing Tex. Fam. Code Ann. § 153.131(b)); *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. Tex. Fam. Code Ann. § 263.307(a).

The Family Code outlines factors to be considered in determining whether a parent is willing and able to provide a safe environment for a child. *Id.* § 263.307(b). There are several factors that may be considered when determining whether termination of parental rights is in the best interest of the child, including: (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 that 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. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (setting forth the "*Holley* factors" and noting "[t]his listing is by

no means exhaustive[]"). No particular *Holley* factor is controlling, and evidence of one factor may be enough to support a finding that termination is in the child's best interest. *See M.C. v. Tex. Dep't of Family & Protective Servs*., 300 S.W.3d 305, 311 (Tex. App.—El Paso 2009, pet. denied) ("Undisputed evidence of just one factor may be sufficient to support a finding that termination is in the best interest of a child.") (citing *C.H.*, 89 S.W.3d at 27); *In re A.P.*, 184 S.W.3d 410, 414 (Tex. App.—Dallas 2006, no pet.). Stability and permanence weigh heavily in considering a child's best interest. *See In re J.D.*, 436 S.W.3d 105, 120 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *In re T.D.C.*, 91 S.W.3d 865, 873 (Tex. App.—Fort Worth 2002, pet. denied)).

The best-interest determination may rely on direct or circumstantial evidence, subjective factors, and the totality of the evidence. *In re N.R.T.*, 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.). If, in light of the entire record, no reasonable factfinder could form a firm belief or conviction that termination was in the children's best interest, then we must conclude that the evidence is legally insufficient to support termination. *See In re J.F.C.*, 96 S.W.3d at 266.

The Caseworker and a relative of Karen's and Jim's testified that terminating the parental rights of Karen as to all three children and parental rights of Jim as to K.O. would be in the children's best interest. The trial court heard testimony from the Caseworker that neither Karen nor Jim had completed their service plans.

Documents admitted into evidence demonstrate a pattern of criminal behavior and illegal drug use by both Karen and Jim. The Caseworker testified that neither Karen nor Jim had provided proof of stable, suitable housing, or proof of employment. Karen failed to show she was engaging in necessary mental health services, and Jim only visited with K.O. twice in the six months. Cindy testified that all three children showed progress when they were removed from Karen's and Jim's care. The Caseworker testified that if Jim's and Karen's parental rights were terminated, the Department would seek a good home for the children that has educational and moral values and a placement that could provide food, clothing, and shelter at all times and would be a positive step over what their parents had shown them in the past year. And, according to the Caseworker, two of the children's godmothers were interested in having the children placed with them, and one of the godmothers had possession of B.H. for more than six months while Karen was incarcerated.

On the record now before us, and after deferring to the trial court on witness credibility determinations, we conclude the evidence is legally and factually sufficient to support the trial court's findings that terminating Karen's parental rights was in J.H.'s, B.H.'s, and K.O.'s best interest and terminating Jim's parental rights was in K.O.'s best interest. *See In re J.F.C.*, 96 S.W.3d at 266. The evidence was sufficient to produce in the mind of the trial court a firm belief or conviction that termination of Karen's and Jim's parental rights was in the children's best interest.

See In re C.H., 89 S.W.3d at 25. We overrule Karen's fourth issue and Jim's fifth issue.

Having overruled all of Appellants' issues, we affirm the trial court's final order.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on July 6, 2020
Opinion Delivered August 6, 2020

Before McKeithen, C.J., Horton and Johnson, JJ.