COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00025-CV

IN THE INTEREST OF C.W.,
A CHILD

FROM COUNTY COURT AT LAW NO. 2 OF PARKER COUNTY
TRIAL COURT NO. CIV-16-0023

MEMORANDUM OPINION[1]

After a bench trial, the trial court terminated the parent-child relationship between Appellant L.P. (Father) and his son C.W. In four issues, Father contends that the evidence is legally and factually insufficient to support the trial court's findings of endangerment, constructive abandonment, and

[1]*See* Tex. R. App. P. 47.4.

noncompliance with the court-ordered reunification plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), (O) (West Supp. 2016). Father does not challenge the trial court's best interest finding. *See id.* § 161.001(b)(2). Because we hold that the evidence is legally and factually sufficient to support the trial court's finding that Father engaged in conduct which endangered C.W.'s physical or emotional well-being, *see id.* § 161.001(b)(1)(E), we affirm the trial court's judgment.

I. Background Facts

A. C.W. is the Product of a Brief Relationship Between Father and B.W. (Mother).

Mother testified that

- She and Father dated three to four months;
- They saw each other two or three times a week and had sex "probably twice" a week;
- She found out she was pregnant with C.W. in March 2015, around the middle of the relationship;
- She told Father immediately;
- At that time, she was "[n]inety percent" sure that the unborn child was Father's and felt like Father knew the unborn child could be his; and
- Father did not deny being the father or ask her if someone else could be the father.

Father went to jail in late June 2015 on charges that he had committed aggravated sexual assault of a child under six years old and indecency with a child by contact on or about May 23, 2015. Although Mother and Father spoke

once on the telephone after he went to jail, she testified that his arrest ended their relationship.

B. The State Intervened Because of Mother's Drug Use During and After the Pregnancy.

On December 10, 2015, Mother tested positive for amphetamines during a prenatal doctor's visit. When C.W. was born the next week, he tested negative for drugs, but his meconium tested positive for methamphetamine. On December 23, 2015, Mother's hair strand tested positive for methamphetamine and marijuana. Additionally, Mother's daughter, C.N., who is not part of this appeal, told a Texas Department of Family and Protective Services (TDFPS) investigator that Mother and her new boyfriend smoked marijuana in the car in C.N.'s presence. With Mother's cooperation, TDFPS placed C.N. with her paternal grandparents and C.W. with maternal relatives.

C. Mother Regained Sobriety, Completed Her Service Plan, and Regained Possession of C.W.; Father Remained in Jail.

On January 13, 2016, TDFPS filed its petition for termination of the parent-child relationships between Mother and C.W. and between an unknown father and C.W. Mother told TDFPS that Father was C.W.'s probable father at the adversary hearing on January 28, 2016. On February 5, 2016, TDFPS filed an amended petition for termination naming Father as C.W.'s alleged father and requesting a paternity test. The paternity test results confirming Father's paternity of C.W. were filed on June 21, 2016. After receiving the paternity test results, the TDFPS conservatorship worker, Amanda Rodriguez, visited Father in

jail and discussed the service plan with him. Father signed the service plan on June 30, 2016.

While C.W. was living with Mother's relatives, she stayed sober and successfully completed her service plan. She regained temporary possession of C.W. on July 14, 2016.

D. After a Bench Trial, Mother was Named C.W.'s Permanent Managing Conservator, but Father's Parental Rights Were Terminated.

The first trial on Father's pending criminal charges ended in a mistrial. Father was still in jail awaiting retrial in his criminal case when the January 2017 termination trial occurred. While Father appeared at the termination trial, he invoked his right not to testify in response to each question asked of him.

Mother and TDFPS conservatorship worker Rodriguez also testified, and the trial court admitted exhibits including the indictment pending against Father, the service plan signed by Father, and a permanency hearing order showing that his service plan was court-ordered. After hearing the evidence, the trial court named Mother as C.W.'s permanent managing conservator, removing all conservatorship rights, duties, and responsibilities from TDFPS, but terminated Father's parental rights, finding that termination was in C.W.'s best interest and that Father had

- knowingly placed or knowingly allowed C.W. to remain in conditions or surroundings which endangered his physical or emotional well-being;

- engaged in conduct or knowingly placed C.W. with persons who engaged in conduct which endangered his physical or emotional well-being;

- constructively abandoned C.W., who had been in the temporary managing conservatorship of TDFPS for not less than six months, and: (1) TDFPS had made reasonable efforts to return C.W. to Father; (2) Father had not regularly visited or maintained significant contact with C.W.; and (3) Father had demonstrated an inability to provide C.W. with a safe environment; and

- failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of C.W., who had been in the temporary managing conservatorship of TDFPS for not less than nine months as a result of his removal from the parent under Chapter 262 for abuse or neglect.

See Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), (O).

II. Legally and Factually Sufficient Evidence Supports the Trial Court's Endangering Conduct Finding.

In his second issue, Father contends that the evidence is legally and factually insufficient to support the trial court's finding that he engaged in conduct or knowingly placed C.W. with persons who engaged in conduct which endangered his physical or emotional well-being. The parties dispute whether we can properly rely on the trial court's finding stating that Father knowingly placed C.W. with persons who engaged in conduct which endangered his physical or emotional well-being. Father contends that he did not know he was C.W.'s father until he received the paternity test results and therefore cannot be charged with knowledge that Mother was using methamphetamine during her pregnancy or thereafter. TDFPS contends that by not denying his paternity when Mother told him she was pregnant, Father held himself out as the parent, and

thus his conduct regarding Mother's drug use during and after the pregnancy is relevant. We do not need to resolve this conflict because we hold that the evidence is legally and factually sufficient to support the trial court's finding that Father's own conduct endangered C.W.'s physical or emotional well-being. *See id.* § 161.001(b)(1)(E).

A. We Determine Whether TDFPS Proved Endangering Conduct by Clear and Convincing Evidence.

Termination decisions must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001(b) (West Supp. 2016), § 161.206(a) (West 2014); *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012). Evidence is clear and convincing if it "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); *E.N.C.*, 384 S.W.3d at 802.

In evaluating the evidence for legal sufficiency, we determine whether the evidence is such that the trial court could reasonably form a firm belief or conviction that TDFPS proved that Father engaged in conduct which endangered C.W.'s physical or emotional well-being. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E); *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005).

We review all the evidence in the light most favorable to the finding and judgment. *J.P.B.*, 180 S.W.3d at 573. We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all

evidence that a reasonable factfinder could have disbelieved. *Id.* We consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.*

We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses because that is the factfinder's province. *Id.* at 573–74. And even when credibility issues appear in the appellate record, we defer to the factfinder's determinations as long as they are not unreasonable. *Id.* at 573.

To determine whether the evidence is factually sufficient to support the termination of a parent-child relationship, we must perform "an exacting review of the entire record." *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). We give due deference to the factfinder's findings and do not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). In this case, we decide whether, on the entire record, the trial judge could reasonably form a firm conviction or belief that the Father engaged in conduct which endangered C.W.'s physical or emotional well-being. *See* Tex. Fam. Code Ann. § 161.001(b)(1); *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

B. Father's Invocation of Privilege Against Self-Incrimination Produced Evidence Against Him.

Father's repeated assertions of the Fifth Amendment privilege against self-incrimination nevertheless yielded evidence against him. "A party may invoke his

Fifth Amendment privilege against self-incrimination in a civil proceeding if he reasonably fears that the answer sought might incriminate him." *In re A.B.*, 372 S.W.3d 273, 275 (Tex. App.—Fort Worth 2012, no pet.) (citing *United States v. Balsys*, 524 U.S. 666, 671–72, 118 S. Ct. 2218, 2222 (1998)). A termination proceeding is a civil proceeding for purposes of the privilege against self-incrimination. *Murray v. Tex. Dep't of Family & Protective Servs.*, 294 S.W.3d 360, 367 (Tex. App.—Austin 2009, no pet.). In a civil case, a factfinder is free to draw negative inferences from a party's assertion of the privilege against self-incrimination. *See* Tex. R. Evid. 513(c); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *see also Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) (holding Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them); *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *Webb v. Maldonado*, 331 S.W.3d 879, 883 (Tex. App.—Dallas 2011, pet. denied).

C. Law on Endangerment

As this court has often discussed,

> Endangerment means to expose to loss or injury, to jeopardize. . . .
>
> . . . . Under subsection (E), the relevant inquiry is whether evidence exists that the endangerment of the child's physical or emotional well-being was the direct result of the parent's conduct, including acts, omissions, and failures to act. . . .
>
> To support a finding of endangerment, the parent's conduct does not necessarily have to be directed at the child, and the child is

> not required to suffer injury. The specific danger to the child's wellbeing may be inferred from parental misconduct alone. . . . As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being.
>
> . . . .
>
> Further, even though imprisonment alone does not prove that a parent engaged in a continuing course of conduct that endangered the physical or emotional well-being of his child, it is nevertheless a factor that we may properly consider on the issue of endangerment.

In re I.C., No. 02-15-00300-CV, 2016 WL 1394539, at *7 (Tex. App.—Fort Worth Apr. 7, 2016, no. pet.) (mem. op.) (citations and internal quotation marks omitted). A mere threat of incarceration as a result of the commission of an offense, no matter how serious, is insufficient on its own to satisfy the endangerment ground. *See E.N.C.*, 384 S.W.3d at 805. There must be evidence "that [the parent's] actions created such uncertainty and instability for his children sufficient to establish endangerment." *Id.* But we may consider evidence of the parent's conduct occurring before and after the child's birth. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied).

In assessing the evidence of a parent's endangering conduct, a court may also consider a parent's failure to complete a service plan. *In re D.A.*, No. 02-15-00213-CV, 2015 WL 10097200, at *5 (Tex. App.—Fort Worth Dec. 10, 2015, no pet.) (mem. op.); *see In re R.F.*, 115 S.W.3d 804, 811 (Tex. App.—Dallas 2003, no pet.). Additionally, a parent's ability to provide financially for his children may

be considered. *See In re M.N.G.*, 147 S.W.3d 521, 538–39 (Tex. App.—Fort Worth 2004, pet. denied) (op. on reh'g).

A factfinder may infer from past conduct endangering the well-being of the child that similar conduct will recur if the child is returned to the parent. *In re M.M.*, No. 2-08-029-CV, 2008 WL 5195353, at *6 (Tex. App.—Fort Worth Dec. 11, 2008, no pet.) (mem. op.). Further, "evidence of improved conduct, especially of short-duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices." *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009); *accord In re A.N.*, No. 02-14-00206-CV, 2014 WL 5791573, at *18 (Tex. App.—Fort Worth Nov. 6, 2014, no pet.) (mem. op.).

D. The Applicable Evidence

1. Mother's Testimony

At trial, Mother testified that she never saw Father use drugs. But she also testified that

- Father was arrested during the month she met him;
- Father had four other children;
- Father visited his youngest two children only once during the three to four months he and Mother dated;
- Mother and Father made no plans for her pregnancy or the future child;
- Father did not do anything to ensure that she obtained prenatal care, nor did he offer her any help in getting medical care or insurance for her or C.W.; and

- Father never gave her any financial help during or after the pregnancy.

Mother testified that she believed that Father was employed when she found out about her pregnancy.

Mother also testified that even if Father had not been in jail at the time of the removal and his pending criminal charges had not been an issue, he would not have been a good placement option for C.W. because he did not have stable housing. Further, to the question, "Who's in control of whether he's in jail?" Mother answered, "He is."

2. Testimony of TDFPS Conservatorship Worker Amanda Rodriguez

TDFPS conservatorship worker Amanda Rodriguez testified that she did not believe that Father had provided financial support for his other four children and that he never paid any support to Mother or for C.W. Father had never met C.W., who was almost thirteen months old at trial.

Rodriguez testified that she was aware of Father's past history of drug abuse because she knew of his convictions for drug-related offenses.

Rodriguez also testified that she did not believe that Father would provide a safe and stable living environment for C.W. and that Father's pending criminal charges concerned her because if he had sexually assaulted a child or "was indecent with a child," she would be concerned about C.W.'s safety or the safety of Mother's daughter, C.N. Rodriguez believed that the complainant was a four- or five-year-old male.

Rodriguez further testified that at the end of June 2016, she met with Father at the Parker County Jail to discuss his service plan, and he signed the plan. The trial court included the service plan as part of the July 14, 2016 order establishing the parent-child relationship between Father and C.W. Father was to complete some services upon his release from jail, but other services—such as demonstrating cooperation with TDFPS by maintaining contact with Rodriguez and participating by attending all conferences and hearings, having a psychological evaluation, and accepting responsibility for C.W.'s removal—did not include an excused delay based on Father's confinement.

Rodriguez testified that Father did not successfully complete any of the services. She said that he told her that because he was not in the jail's general population, he could not complete any services. Rodriguez admitted on cross-examination that other than Narcotics Anonymous (NA), a Parker County Jail inmate could not "perform the service plan." But Rodriguez also indicated on redirect-examination that Father never took any initiative to attempt to complete any services and that parents in other cases who had been confined in Parker County Jail had completed more services. Rodriguez specifically testified that Father did not

- ask her to schedule a psychological evaluation;
- inquire about how he could support Mother or C.W.;
- give Rodriguez a card or letter to give to C.W.;
- fill out a caregiver request form; or

- attend NA, which Rodriguez claimed Father could have done at the jail.

Rodriguez visited with Father four to six times during the pendency of the case, and each time they discussed services, C.W.'s welfare, and the circumstances surrounding the removal. Rodriguez testified that Father had the ability to make calls and send written correspondence from jail. Finally, she admitted that Father said that he wanted to have a relationship with C.W. and that Father believed that he could do that after his release from jail, which he thought would occur within months of the termination trial.

3. Negative Inferences from Father's Assertions of the Privilege Against Self-Incrimination

From Father's invocations of the Fifth Amendment, the trial court could have properly inferred that

- Father had been arrested seventeen times;
- Father had been convicted of possession of methamphetamine in 1986;
- Father had been convicted of possession of a controlled substance in 1988;
- Father had been convicted of burglary of a habitation in 1990;
- Father had been convicted of driving while intoxicated in 2003;
- Father had been convicted of possession of marijuana and a second driving-while-intoxicated offense in 2009;
- Father had been convicted of possession of a controlled substance in 2010 and sentenced to two years' confinement;
- Father had been in prison at least five times;

- Father's parole had been revoked at least twice;
- Father had not raised any of his five children;
- Father had been ordered to pay child support for his other four children but did not pay it;
- Father knew of Mother's pregnancy when he went to jail;
- Father had not met C.W. or supported him;
- Father never filled out a caregiver resource form and returned it to TDFPS despite Rodriguez's request;
- Rodriguez visited Father monthly; and
- He wrote her only one letter.

E. Analysis

At the time of trial, Father had been in prison multiple times and had a criminal history spanning over thirty years. He had not supported any of his five children, including C.W., and he had never seen C.W., who was just over a year old at trial. Father did not attempt to complete any steps on the service plan or otherwise show that he was ready to be a parent on C.W.'s timetable instead of on Father's own timetable based on his unsubstantiated belief that he would soon be released from jail.

Father contends that all of his convictions occurred between 1986 and 2010, well before C.W.'s birth in 2015, and that nothing in the record therefore indicates that his criminal acts directly resulted in C.W.'s endangerment or were a present or future threat to C.W. *See In re S.A.P.*, 169 S.W.3d 685, 703 (Tex. App.—Waco 2005, no pet.) (holding father's conduct with other children was too

remote and scant evidence existed that his past conduct was present or future danger to child), *abrogated in part on other grounds by In re E.C.R.*, 402 S.W.3d 239 (Tex. 2013); *In re R.R.F.*, 846 S.W.2d 65, 68–69 (Tex. App.—Corpus Christi 1992, writ denied) (holding father's conduct five years before trial was too remote to support termination where there was no evidence that prior conduct was a future threat to children), *overruled in part on other grounds*, *In re D.S.P.*, 210 S.W.3d 776, 781 (Tex. App.—Corpus Christi 2006, no pet.); *see also Ruiz v. Tex. Dep't of Fam. & Protective Servs.*, 212 S.W.3d 804, 818 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (op. on reh'g) (holding insufficient evidence of endangering course of conduct when there was no direct evidence that parent had an ongoing narcotics problem or that parent used drugs around child); *In re S.M.L.*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (placing "particular significance" on crimes committed after child's birth because parent committed them knowing that they would result in incarceration, leaving the child without his support). Father additionally contends that when considering whether a parent's criminal history warrants termination under subsection (E), courts look to the nature of the offenses, placing particular emphasis on offenses involving children. *See In re M.D.S.*, 1 S.W.3d 190, 198–99 (Tex. App.—Amarillo 1999, no pet.) (affirming termination of parental rights of incarcerated father who had negotiated the dismissal of indictment for aggravated sexual assault of another child and who had history of multiple sexual encounters with children); *In re K.M.M.*, 993 S.W.2d 225, 228 (Tex. App.—

Eastland 1999, no pet.) (finding sufficient evidence of endangerment where incarcerated father was convicted of sexual assault of fifteen-month-old child, had three previous juvenile adjudications for aggravated sexual assault of children, and was still incarcerated at time of trial). According to Father, the only evidence TDFPS offered regarding his criminal history was his pleading the Fifth to general questions about his prior arrests and convictions and the indictment for his current criminal case, which included enhancement paragraphs for four prior felony convictions. He further contends that TDFPS presented no evidence regarding the circumstances of his prior arrests or convictions and that none of his prior convictions involved offenses against children.

We note, though, that at the time of the termination trial, Father was approximately 52 ½ years old. He had convictions ranging from his early twenties to his late forties. He was still on parole, and his parole was in jeopardy; TDFPS's Exhibit Two shows that Father had been in jail since June 22, 2015, on charges involving a child but was also being held on a parole warrant. Father's criminal history is directly relevant to his absence from C.W.'s life, his failure to financially and emotionally support C.W., and his instability.

Although Father did not assault Mother, he is similar in other ways to the father in *In re V.V.*, 349 S.W.3d 548 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (op. on reh'g en banc). In *V.V.*, the court held that the father's conduct jeopardized his child:

> None of the excuses for abandoning this infant girl—confinement in jail, inadequate notice of impending fatherhood, insufficient assistance from the DFPS—overcome the fundamental truth that the father's conduct placed this infant in danger. The father has never seen the child, paid support, or made any arrangements to provide her with food, clothing, shelter or care. He has spent a good deal of his adult life engaging in criminal activity or incarcerated. These facts and his assault against the mother days before the hearing were before the trial court. They reflect conduct that jeopardizes this child's physical and emotional well-being. All are reasons that other courts have upheld termination. We reject the father's contention that the evidence does not support a finding of endangerment.

Id. at 557 (footnote omitted).

Having reviewed all the evidence in the light most favorable to the finding and judgment, we hold that the evidence is legally sufficient to support the trial court's finding that Father engaged in conduct which endangered C.W.'s physical or emotional well-being. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E). Having performed an exacting review of the entire record while giving the trial court's findings due deference, we likewise hold that the evidence is factually sufficient to support the trial court's finding that Father engaged in conduct which endangered C.W.'s emotional well-being. *See id.* We overrule Father's second issue.

III. Conclusion

Along with a best interest finding, a finding of only one ground alleged under family code section 161.001(b)(1) is sufficient to support a judgment of termination. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *In re K.H.*, No. 02-15-00164-CV, 2015 WL 6081791, at *3 (Tex. App.—Fort Worth Oct. 15, 2015, no

pet.) (mem. op.); *In re E.M.N.*, 221 S.W.3d 815, 821 (Tex. App.—Fort Worth 2007, no pet.). Father did not challenge the best interest finding, and we have upheld the trial court's finding of endangering conduct. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (2). Accordingly, we do not reach Father's remaining issues. *See* Tex. R. App. P. 47.1.

Having overruled Father's second issue, which is dispositive, we affirm the trial court's judgment terminating his parent-child relationship with C.W.

PER CURIAM

PANEL: PITTMAN, SUDDERTH, and KERR, JJ.

DELIVERED: May 25, 2017