COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-18-00127-CV

IN THE INTEREST OF R.S., A CHILD

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-98278J-13

MEMORANDUM OPINION[1]

I. Introduction

In a termination case, the State seeks not just to limit parental rights but to erase them permanently—to divest the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except the child's right to inherit. Tex. Fam. Code Ann. § 161.206(b) (West 2014); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). We strictly scrutinize termination proceedings and

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

strictly construe involuntary termination statutes in favor of the parent. *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012); *In re E.R.*, 385 S.W.3d 552, 554–55 (Tex. 2012); *Holick*, 685 S.W.2d at 20–21. For a trial court to terminate a parent-child relationship, the Department of Family and Protective Services (DFPS) must establish by clear and convincing evidence that the parent's actions satisfy one ground listed in family code section 161.001(b)(1) and that termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b) (West Supp. 2017); *E.N.C.*, 384 S.W.3d at 803; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). Both elements must be established; termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987); *In re C.D.E.*, 391 S.W.3d 287, 295 (Tex. App.—Fort Worth 2012, no pet.).

After R.S. tested positive for drugs at his birth in 2013, DFPS placed him into foster care and sought termination of Mother's parental rights and of any rights that Appellant Father, as the child's alleged father, might have. The trial court subsequently adjudicated Father's parentage of R.S. but opted not to terminate either parent's rights, and the case ended when R.S. was returned to Mother.

Four years after R.S.'s birth, but only a little over two years since his return to Mother, DFPS again sought to terminate both parents' rights to R.S. This time, Mother filed an affidavit of relinquishment, and the trial court, after finding that Father had endangered R.S. and had knowingly engaged in criminal conduct resulting in his conviction, confinement, and inability to care for R.S. for not less

than two years from the date of the petition's filing, found that the termination of both parents' rights was in R.S.'s best interest. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (Q), (2). The trial court left managing conservatorship of R.S. with DFPS and possessory conservatorship with Sally and Calvin,[2] R.S.'s foster parents.

In a single issue, Father argues that the evidence is legally and factually insufficient to support the trial court's best interest finding. We reverse this portion of the trial court's judgment and remand the case for a new trial on best interest as to Father.[3]

II. Best Interest

There is a strong presumption that keeping a child with a parent is in the child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). We review the entire record to determine the child's best interest. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). Nonexclusive factors that the trier of fact in a termination case may also use in determining the best interest of the child include

(A) the desires of the child;

(B) the emotional and physical needs of the child now and in the future;

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[2]To protect R.S.'s privacy, we use pseudonyms for the names of R.S.'s foster parents and Father's girlfriend. *See* Tex. Fam. Code Ann. § 109.002(d) (West Supp. 2017); Tex. R. App. P. 9.8(b)(2); *In re K.M.*, No. 02-18-00073-CV, 2018 WL 3288591, at *1 n.2 (Tex. App.—Fort Worth July 5, 2018, pet. filed) (mem. op.).

[3]Mother did not appeal the termination of her parental rights to R.S.

(C) the emotional and physical danger to the child now and in the future;

(D) the parental abilities of the individuals seeking custody;

(E) the programs available to assist these individuals to promote the best interest of the child;

(F) the plans for the child by these individuals or by the agency seeking custody;

(G) the stability of the home or proposed placement;

(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and

(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (citations omitted); *see E.C.R.*, 402 S.W.3d at 249 (stating that in reviewing a best interest finding, "we consider, among other evidence, the *Holley* factors"); *E.N.C.*, 384 S.W.3d at 807. These factors are not exhaustive, and some listed factors may be inapplicable to some cases. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Furthermore, undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest of the child. *Id.* On the other hand, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

While evidence might reasonably suggest that a child would be better off with a new family, "the best interest standard does not permit termination merely because a child might be better off living elsewhere," and "[t]ermination should not

be used merely to reallocate children to better and more prosperous parents." *In re W.C.*, 98 S.W.3d 753, 758 (Tex. App.—Fort Worth 2003, no pet.). And the fact that a parent is imprisoned does not automatically establish that termination of his parental rights is in the child's best interest. *In re S.R.L.*, 243 S.W.3d 232, 236 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *In re C.T.E.*, 95 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). That is, while a parent's criminal history is a best interest factor, it is not dispositive, particularly when the type of criminal conduct "is not the type from which it can be inferred that he has endangered the safety of his children." *C.T.E.*, 95 S.W.3d at 466, 469.

A. Standards of Review

In evaluating the evidence for legal sufficiency in parental termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that DFPS proved the challenged ground—here, the child's best interest—for termination. *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. *Id.* 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.* 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.*

We are required to perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support the termination of a parent-child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In reviewing the evidence for factual sufficiency, 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). Here, we determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the termination of the parent-child relationship would be in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b); *C.H.*, 89 S.W.3d at 28. 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 in the truth of its finding, then the evidence is factually insufficient. *H.R.M.*, 209 S.W.3d at 108. When we reverse on factual sufficiency grounds, we must detail in our opinion why we have concluded that a reasonable factfinder could not have credited disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d 256, 266–67 (Tex. 2002).

B. Evidence

1. Testimony

Father, the DFPS conservatorship workers from the first and second cases—respectively, Janine Brannon and Megan Cole—and R.S.'s foster parents Sally and Calvin testified during the trial.

a. DFPS Case 1

Brannon stated that in November 2014, she had monitored the DFPS case as one of two caseworkers for Mother's drug court program. By the time she became involved, R.S. had been returned to Mother on a monitored return and Father was still incarcerated. She did not have the opportunity to visit Father prior to his release from incarceration in April 2014.

Father attended DFPS's April 2014 family group conference, where Brannon went over his service plan with him. He had a visit with R.S. after the conference. Brannon said that Father completed the FOCUS fatherhood program but none of his other services, which included a parenting class, regular visits with R.S., individual counseling to address DFPS's domestic violence concerns, and drug testing. In contrast to Brannon's testimony, Father testified that he had completed all of the services in the first case.

According to Brannon, Father cancelled his May 1 visit with R.S. because of a work conflict, and she did not hear from him again until July 28, when he emailed her to ask for a visit with R.S. Father had visits with R.S. on August 8 and August 22, 2014.

Brannon testified that during her visit to Father's home, which Father told her was his cousin's house, she saw drug paraphernalia and evidence of marijuana use, and there were people living in the house whom Father did not know. Father told her that he had stopped using marijuana, but he tested positive for the drug on August 8 and again on August 23. Brannon also requested drug testing of Father's girlfriend Ariana, who was initially willing to comply but later declined after Father told her not to.

At the September 2014 final hearing, the trial court named Mother as R.S.'s sole managing conservator. In the order, the trial court stated that appointment of Father as R.S.'s joint managing conservator, managing conservator, or possessory conservator would not be in R.S.'s best interest because the appointment would significantly impair R.S.'s physical health or emotional development. Father was granted supervised visitation with R.S. and ordered to pay child support. Brannon testified that DFPS had requested supervised visitation because Father had not mitigated any of DFPS's concerns about drug use and domestic violence with Mother, as we will discuss below.

Brannon testified that at the close of that case, she would not have recommended that R.S. be placed with Father and that it would have concerned her had she learned that Mother had given Father custody of R.S. a month after the case closed "[b]ecause it appeared that [Father] was continuing to use drugs and had not addressed the concerns of domestic violence."

b. Interim between DFPS Case 1 and DFPS Case 2

A month after the trial court named Mother as R.S.'s managing conservator, Mother "got[ ] in trouble" and gave R.S. to Father. Less than half a year later, in March 2015, Father was arrested for assault–family violence, a charge that was dismissed. Father bonded out within twenty-four hours; during that time, he left R.S. with Ariana.

In June 2015, Father was arrested for aggravated assault with a deadly weapon and aggravated assault–family violence involving Ariana, Father's cousin, and a male whose name he did not recognize. Father testified that this arrest caused him to be away from R.S. for four hours. That same month, Father was arrested a second time for the same offenses, but this time he spent eleven days in jail. The charges were not prosecuted based on a plea in bar;[4] Father pleaded guilty to attempted assault–family violence and was sentenced to a year's confinement, which was set to run concurrently with his year's confinement for an August 19, 2015 assault to which he also pleaded guilty. Consequently, Father was incarcerated from October 20, 2015 to April 6, 2016. Ariana kept R.S. while Father was incarcerated.

[4]A "plea in bar" allows a criminal defendant, with the consent of the prosecutor, to admit during a sentencing hearing his guilt of an unadjudicated offense and to request that the trial court take the offense into account in determining the sentence for the offense of which he has been adjudged guilty; if the trial court lawfully takes into account the admitted offense, prosecution for that offense is then barred. *See* Tex. Penal Code Ann. § 12.45(a), (c) (West 2011).

c. DFPS Case 2

In February 2017, Father was arrested for unlawful possession of a weapon and possession of marijuana. Father claimed that the firearm belonged to Ariana. According to Father, at the time of the arrest, R.S. had been living with Ariana at her mother's house.

DFPS removed R.S. from Father and filed a new petition to terminate Mother's and Father's parental rights. Cole identified Father's drug and criminal history and domestic violence as the obstacles to returning R.S. to Father when the case was initiated.

(1) Service Plan

DFPS created a service plan for Father, and the trial court incorporated Father's March 2017 service plan into its orders. Father's service plan required Father and Ariana to refrain from any involvement in criminal activities and all illegal acts, to attend all scheduled visitations with R.S., to participate in individual counseling until successfully discharged by a therapist, to maintain steady and legal employment, to attend parenting classes, to submit to a drug assessment, and to comply with all requests for random drug testing. Father was also required to maintain safe, stable, and appropriate housing and to attend and complete classes in the Batterers' Intervention & Prevention Program (BIPP).

During the pendency of the termination case, Father completed a CATS class,[5] the ten-week FOCUS program, the twelve-week BIPP class, and a four-hour parenting class, participated in NA/AA meetings as requested by his counselor, and volunteered at a shelter. Father testified that he received certificates for the parenting and BIPP classes, but these were not offered into evidence. Father and Cole disputed whether he had completed his counseling.

(2) Criminal Activities

Father's criminal history stretched back to 2004. Father acknowledged that since then, he had been convicted of unlawfully carrying a weapon, evading arrest, robbery, and assault–family violence. The portion of Father's criminal record that was admitted into evidence showed that Father was convicted of robbery by threats in August 2008, assault–family violence in April 2012, and possession of a controlled substance in July 2013, in addition to his April 2016 convictions for assault and attempted assault.

Father was participating in his required services when he was arrested in April 2017,[6] and he claimed that R.S. had not been inside his house when the

[5]"CATS" stands for "Community Addiction Treatment Services," a program administered by Mental Health and Mental Retardation (MHMR) services. *See In re L.M.F.*, No. 02-13-00459-CV, 2014 WL 2465137, at *1 (Tex. App.—Fort Worth May 29, 2014, no pet.) (mem. op.).

[6]This was the same month that Mother filed an affidavit of the voluntary relinquishment of her parental rights. Mother did not appear at the termination trial. Cole testified that Mother was in jail when she spoke with her the morning of the first day of trial. Cole told Mother that R.S. had been placed with Sally and Calvin,

police raided it. He pleaded guilty to the charges arising from his April 2017 arrest—evading arrest and possession of marijuana, four ounces to five pounds—which resulted in an eight-year sentence of confinement for each offense, set to run concurrently.[7] Father admitted that the drugs from the April 2017 arrest were his and that having drugs in a home with a child presented a danger to the child.

Cole testified that Father's service plan had required him to refrain from all criminal activity but that, based on his April 2017 arrest, he had failed to do so. Cole said that the marijuana for which Father had been arrested had been out on the kitchen counter and thus accessible to R.S. because any child walking into the kitchen could have accessed it. She said that a gun was also accessible to R.S.,[8] as was methamphetamine that was found in the bathroom. Cole said that Father had been very dismissive of DFPS's concerns about the accessibility of these items and "very adamant about the fact [R.S.] wasn't in danger."

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which Mother had not been aware of. Mother told Cole that she was happy to know that R.S. was in good hands.

[7]Father testified that his appeal was pending at the time of the termination trial. Father's appeal remains pending in this court.

[8]Father disagreed that it was dangerous to have a young child in a home with a firearm as long as the firearm was locked up and kept out of the child's reach. However, he did not address whether the gun was locked up and kept out of R.S.'s reach.

(3) Counseling

Cole said that during counseling, Father was supposed to address DFPS's concerns that had led to R.S.'s removal, how his decisions affected R.S., and how Father's childhood affected his actions. Specifically, Cole said that she had wanted Father to realize that "the life he's living now is mirroring the life that he was raised in." Cole also said that at the beginning of the case, Father had been very adamant that R.S. had not been in any danger and that she "would have just liked for [Father] to realize that that was not a safe environment for a child."

Father testified that he had completed everything else that was asked for on his service plan and that his counselor had initially tried to discharge him but that Cole told the counselor to keep him in counseling. Father said that he did not understand why Cole had told the counselor not to discharge him, adding, "Because I wasn't admitting that I was doing any crimes I guess." When asked what his counselor had wanted him to admit, Father replied, "That the drugs in the house were [his] and that the firearm was [his] and that everything that's being said against [him] was true basically." Father said that the firearm was Ariana's, that he had not known Ariana's firearm was in his house,[9] and that it had been on top of a high dresser, not a nightstand.

[9]Father appeared to contradict his own testimony on this point, as set out below.

Cole said that Father had not been upfront in counseling "about the things he had actually done" and the actions that he should have been addressing, such as his criminal activities in April 2017. Cole admitted that Father had told her that he had been instructed by his counsel not to discuss criminal activity due to his pending criminal charges. Cole said that Father did not finish his counseling because he was being referred to a new counselor.

Father's counseling records were not offered into evidence.

(4) Employment

Father had been unemployed for four months by the time of the termination trial but said that he had a job "lined up if [he] needed it" through a friend. Father had previously worked as a tattoo artist, noted that he had "always made good money tattooing," and stated that he had been trying to enroll in barber school. He said he did not recall how much money he had earned between 2015 and 2017 but said that it was "enough to get by." He acknowledged that his tattoo clientele involved criminals and drug dealers but said that he had been in that environment since he was a child so "it was normal to [him]."

Cole suspected that Father had continued to engage in criminal activity based on "[j]ust his job history or lack thereof" because he had failed to provide her proof of income and she had "no reason to believe that the income he is receiving is legitimate." Cole described Father as "very dismissive about talking about employment at all."

During the pendency of the termination trial, Father told Cole that he worked for Duerte Cabinet and provided Cole with two check stubs from this employer. The check stubs were not offered into evidence. Father said that his employment at Duerte Cabinet ended when he was in a car accident on September 30 because he was told after the accident not to lift a certain amount of weight or do certain activities. Father said that he had suffered severe whiplash, a concussion, and a bruised wrist that kept him from being able to use his hand during that time.

Cole visited Duerte Cabinet once in September and again in November, after Father had stopped working there. Cole said that the workers at Duerte Cabinet did not speak English and that she did not speak Spanish but that she had brought a Spanish-speaking coworker with her. She was unable to locate a manager when she went in September, and the worker that she spoke to did not know Father.

During the first day of trial, Cole agreed that she had no proof that Father was still involved in criminal activity. But by the second day of the termination trial, which occurred a few months later, Father had a pending federal criminal charge for conspiracy to distribute methamphetamine,[10] for which standard sentencing ranged from ten years' incarceration to life. Father told Cole that he hoped to get a sentence of five to seven years. Cole stated that if Father received a sentence

[10]Father told Cole that the conspiracy case involved thirty people and a conspiracy to distribute 100,000 kilograms of methamphetamine, cocaine, and heroin but that he was only charged for the methamphetamine.

of ten years or more, R.S. would be at least fifteen by the time Father was released. Cole said that her understanding was that this was a new charge, occurring after R.S. was removed from Father in February 2017, but Father testified that the federal charge was from an ongoing investigation into his activities for at least eighteen months before the February 2017 removal. Father said that the conspiracy charge tied him "in with certain things that's been investigated for up to four years" with regard to the overall conspiracy.

(5) Domestic Violence

Father testified that R.S. had seen his "disagreements" with Ariana and Mother and had seen him "put [his] hands on other people." Father acknowledged that he had been charged with physically abusing Ariana but said that "it's never been that far." The law enforcement interview notes with Ariana, which were included along with Father's convictions that were admitted into evidence, indicated that Ariana said that Father never hit her in the face with a gun, that she did get hit in the face but that it was not with a gun, and that she was not sure who hit her because she had been trying to break up a fight between Father and another man.

Father also noted that R.S. had seen "cops jump on [Father], detain [Father]" and that he took responsibility for everything he had done, stating that he had an anger problem. Father said that counseling had helped him identify the triggers for his anger.

Cole said that Father consistently named Ariana as his support but that DFPS had concerns about her because she had not worked most of her assigned services and her relationship with Father was off-and-on. Ariana had been initially willing to work services but then stopped when she and Father ended their relationship. Ariana's drug tests had been positive for marijuana until April, and she stopped taking drug tests in July and never completed the drug assessment or went through drug or alcohol treatment. Cole testified that in August, Father told her that he and Ariana were not together anymore and that Father had told Ariana that she no longer had to participate in DFPS services because they were not together. Thereafter, when Cole asked them to take a drug test, they would tell her that because they were no longer together, Ariana did not have to participate in services, even though she came with Father to each visit.

Although DFPS remained concerned about domestic violence between Father and Ariana, Ariana had completed her assigned domestic violence prevention program, and Father had completed the BIPP classes. Cole testified that she had "no reason to believe" that Father had not mitigated DFPS's concerns about domestic violence.

(6) Drug Testing

Father completed a drug assessment, which was not offered into evidence, and he had complied with random drug testing. From early to mid-March, Father had tested positive for marijuana but he tested negative thereafter until October

2017, when he tested positive for marijuana via a hair strand test.[11] Father's urine was tested for drugs in November and December, and his tests were negative. Cole opined that based on the October drug test, Father had not mitigated DFPS's concerns about drug use.

(7) Other

Father attended visits with R.S. and brought him clothing, toys, games, and snacks.

When asked what he had learned from the classes in his service plan, Father said he had learned that he needed a different environment because "[t]he surroundings really that [he had] kept around [him], the negative energy from people. [He] just believe[d] that that was the main role in . . . the things that [he had] done." Father also acknowledged that drugs and alcohol had caused him to lose focus and make irrational decisions, "such as, you know, doing a lot of arguing, domestic violence, you know, for the most part letting [R.S.] witness a lot of the things." Father said that if he had not been under the influence of drugs and alcohol, he would have been more protective of R.S. and that now that he had met

[11]Father's drug test results were not offered into evidence, and no testimony, expert or otherwise, was provided about how much time was measured by each type of drug test, but we note from a prior case that a hair strand drug test generally measures a ninety-day history, while a urine test usually measures only up to 72 hours. *See In re Z.D.G.*, No. 02-09-00214-CV, 2010 WL 2331393, at *9 n.18 (Tex. App.—Fort Worth June 10, 2010, no pet.) (mem. op.).

some good people through his classes—class facilitators and some of the participants—he had more positive role models.

Father stated that when R.S. was removed from him, that was "the best thing that could ever happen to [Father] and the wors[t] thing" because he had "never felt pain like that but it also made [him] see" the effect that R.S. had on his life. R.S. had made him want to see things differently, to be more responsible, and to be a better person. Father agreed that he was responsible for R.S.'s being in DFPS's care because he was R.S.'s father.

R.S. was almost five years old when the termination trial began on January 24, 2018. Father acknowledged that R.S. had been under DFPS's managing conservatorship for two years and four months—almost half his life. No one testified that R.S. had any special physical or emotional problems or needs.

(8) Placement Options

Mother and Father each filed child placement resources forms listing relatives who could take R.S.

(a) Father's Relatives

A home study was filed on one of Father's relatives on April 6, 2017, and on April 24, 2017, DFPS filed a motion to modify possessory conservatorship to place R.S. with them. R.S.'s attorney ad litem also filed a motion for placement of R.S. with Father's relative. Both DFPS and R.S.'s attorney ad litem subsequently withdrew their motions, causing Father to file a motion to modify possessory conservatorship to place R.S. with his family.

Father wanted R.S. to be placed with his aunt and uncle while he was incarcerated and said that he did not understand why the trial court had denied his multiple requests to place R.S. with them. Cole stated that Father's aunt and uncle had been considered for placement of R.S. but were not approved because of DFPS's concerns about their honesty and protective capacity. Specifically, Father's aunt and uncle "weren't really upfront in letting [DFPS] know that [Father] was arrested at their home." Cole said that Father had previously denied knowing where his aunt and uncle lived and that they had claimed that Father did not know where they lived. Father's aunt and uncle had continued to visit R.S. during the case at Father's request. Father's aunt and uncle did not testify at the trial.

(b) Sally and Calvin

In June 2017, DFPS filed a motion to place R.S. with Mother's thirty-year-old cousin Sally, a first lieutenant in the U.S. Army, and her forty-seven-year-old husband Calvin after a home study was performed on them. Sally and Calvin had been married since February 2015 but had known each other since 2009. Sally had served in the Army Reserves from 2005 to 2014 and had been on active duty since 2014. When the termination trial began on January 24, 2018, Sally had less than a month left on her first pregnancy. Calvin had two adult children from a prior marriage.

Sally and Calvin had started the process of becoming foster-to-adopt parents in October 2016 and completed the process in April 2017, at which time

two toddlers were placed with them. When Sally learned that R.S. was in foster care, she contacted DFPS to find out if he could be placed with her family.

The trial court granted DFPS's motion on June 29, 2017, and R.S. was placed with Sally and Calvin at the beginning of July. Sally described R.S. as a playful, loving child who had lacked a routine when he first came to live with her family. When he first moved in, R.S. had some issues with authority at school and daycare, such as difficulty listening, following instructions, and respecting authority, and he had kicked, hit, and spit on teachers and other students at school, even choking another child. Sally and Calvin worked with R.S.'s teachers and a play therapist to help R.S. with his behavioral issues, and he no longer hit and spit. R.S. enjoyed gymnastics and would be starting soccer the month after the termination trial began.

In November 2017, Calvin suffered an accident that resulted in the amputation of half of his left hand. Calvin had been working as a cable installation technician, but he went on disability because of his accident; he also remained in the Army Reserves as a drill sergeant.[12] After Calvin's accident, they requested a removal of the two toddlers, whose health issues presented a challenge while Calvin went through rehabilitative services. Calvin described the decision to send

[12]Calvin had served active duty from 1988 to 1992 as a tank mechanic; he joined the Army Reserves in 1993.

the two toddlers to emergency respite care as "very hard" and said that they had kept R.S. because he was family.

Sally stated that she had never contemplated R.S.'s leaving because he was a healthy four-year-old child who knew how to brush his teeth and to dress and feed himself and who went to day care and preschool. Sally acknowledged that at the beginning of R.S.'s stay with them, Calvin had considered returning him to foster care when his behavior was frustrating,[13] but R.S.'s behavior had improved since then. Calvin said that he had reached out to R.S.'s teachers and they had worked together to improve R.S.'s behavior.

Sally said that R.S. was bonded with her and Calvin and that if R.S. "goes into adoption," they would be interested in adopting him and thought it would be in his best interest to stay with them. Their hope for R.S. was for "him to be stable and safe and to keep getting better just as a child," and Sally said that she felt like their home was a good, stable environment in which R.S. could grow and thrive.

Sally anticipated a military transfer in the spring or summer of 2019 because she would be promoted at that time and would have to attend a mandatory program in South Carolina for six months. She wanted parental rights so that they could take R.S. with them.

[13]Sally recalled Calvin's having commented at that time, "[I]f he wasn't part of your family, I probably would have asked for him to go already."

Father had visits with R.S. twice a month. Sally and Calvin both testified that they did not notice any changes in R.S.'s attitude or disposition after visits with Father, and Sally acknowledged that R.S. was bonded with Father. Sally described R.S. as sometimes asking when he would get to see his parents and showing her toys that Father had bought for him. Sally said, "[I]t's kind of clear he loves his dad and misses him." She also acknowledged having concerns about how severing the bond between R.S. and Father might affect R.S. and said that this was a reason they saw a different play therapist.[14] Sally stated that it was important to keep Father as part of R.S.'s life but that if Father's rights were not terminated, it would be hard to conduct visits between Father and R.S. when the Army transferred them.

When asked about whether he wanted to adopt R.S., Calvin answered,

> Well, I just want what's best for [R.S.], and I think that's the main goal here. I mean, I don't want to take [R.S.] from his dad. That's not my goal because I wouldn't want anybody to take my kids from me. I just want what's best for [R.S.] I mean, if that's the best avenue for [R.S.] then I'm all in.

Calvin further testified that R.S. really loved Father and talked about him all the time, so he could not say that keeping R.S. away from Father was for the best but that he was willing to raise R.S.

During cross-examination, Calvin asked what Father's attorney meant by "rights." When she clarified that R.S. would no longer be allowed contact with

[14]R.S.'s therapy notes were not referenced or offered into evidence.

Father if Father's parental rights were terminated, Calvin said that he did not think that termination would be in R.S.'s best interest because R.S. loved Father and constantly talked and asked about him. Calvin said he had no problem with facilitating some type of contact between R.S. and Father if the court allowed it, such as letters or—subject to their anticipated military transfer—visits. Calvin opined that it was important for the relationship to continue because as soon as R.S. was of age, he was going to try to reunite with Father.

Cole testified that R.S. appeared to be bonded with Sally and Calvin, that his behavior had improved over the last three months, and that he had adjusted to living with them and was comfortable. When trial resumed in April 2018, after Father's circumstances changed with the federal charge, Cole said that Sally and Calvin wanted to adopt R.S. but were willing to maintain a relationship between R.S. and Father.

When trial resumed in April 2018, Sally testified that while she did not personally make the effort to start a phone relationship between R.S. and Father, when Cole told her that Father wanted to have phone contact with R.S., Sally acted as the facilitator. By the April 2018 trial date, Father and R.S. had had three phone calls, and Sally said that they had gone well for R.S. Sally said that she and Calvin were willing to continue with the phone contact as long as it was in R.S.'s best interest. Sally stated that she and Calvin were asking the trial court to terminate Father's rights "[i]f his dad is going to be incarcerated for a long time." On cross-

examination, Sally replied, “I believe so,” when asked whether she could make parental decisions without adopting R.S.

(9) Best Interest

Father admitted during trial that R.S. should not be with him in his present situation, but he did not indicate how he could change or alter his situation to provide for R.S.’s physical and emotional needs. Rather, he stated that if R.S. were returned to him, he would relinquish his parental rights to his aunt and uncle. When asked what the difference would be between relinquishing his rights to his relatives or to Sally and Calvin, Father replied,

> I heard [Calvin] several times say that he didn’t want nothing to do with [R.S.] and I don’t know if -- on the low, like somewhere where no one is watching, he’s mistreating [R.S.] or he’s being mean to [R.S.] and if they’re really going to be there for [R.S.] and my aunt and [uncle], he talks about them all the time. He had a bond with them. She -- you know, that’s my aunt. It’s my family and I know she’s a good person, a real good person . . . .

Father added that he did not want R.S. moving around the way a military family would because he had been moved around a lot as a child and felt like that had triggered him to act out, stating, “It’s not stable being constantly moved everywhere.”

Father expressed his concern that R.S. might follow in his footsteps and said he wanted R.S. to grow up better than he did. Father’s father had been in prison for most of Father’s life, leaving Father to be raised on the street from the time he was twelve years old with a yearning for his father that he described as having “never stopped inside [him] no matter the age [he] was.” Father stated that he had

felt neglected for most of his life. Father stated that he wanted to be the best father that he could be and that his own father had not been. Father said,

> I felt it growing up. I seen other kids with their fathers at an early age and I didn't have that structure. And I had someone trying to be, you know, for a little bit and it just didn't work. I mean, it wasn't my father. I didn't have that bond and I just, I mean, I turned to the street. That's just -- I didn't have no other choice.

Father said that he was stereotyped a lot and judged but agreed that when angered, he became loud. He said that he could have a civil relationship with whomever R.S. was placed and would do "anything [he] would have to do" without question because he would do anything for R.S.

Father said that if he retained his rights, he would get a job while his conviction was on appeal[15] and pay child support if R.S. was not returned to him. He also stated that settlement checks from his car accident would be coming in, that he had been saving money, and that his aunt and uncle were willing to help him with anything he needed.

Father said that it was in R.S.'s best interest to wait for him to be released from prison because "regardless if he's 8 years old or 13 years old, . . . a father is a father." He had waited for his own father all of his life while his father was in prison and had never stopped wanting his father.

[15]On the first day of trial, in January 2018, Father stated that he was out on an appeal bond and expressed his understanding that the appeal could last a year to eighteen months.

Father said that he would be eligible for parole in eight months and that if he did not make it that time, he would have another parole hearing every three to six months. The following dialogue then occurred with DFPS's counsel:

> But you[r] sentence [for the cases on appeal] is still for eight years and the Court has to consider what we have available today. And so you're asking this Court even if we go with your eight months, that's two years that [R.S.] has waited for you.
>
> You think it's in his best interest to continue to sit there and be bonding, having -- involved in sports, developing relationships, gaining stability, to be then removed from that to come back into your home?
>
> A. Of course. I'm his father. Why wouldn't I?
>
> Q. Is there any other reason other than ["]I'm his father["] that it's in his best interest?
>
> A. It is in his best interest to be with his father.

When pressed for any other reason, Father added, "There ain't no other reason that I can see that would amount to that reason."

Cole acknowledged that R.S. was bonded to Father and loved Father but testified that termination of Father's rights was in R.S.'s best interest because Father had been given a chance to show that he had changed but had failed, and "it's time we give [R.S.] a chance to live a life that a four year old deserves." She also recommended termination so that, in the future, Father could not modify the order placing R.S. with Sally and Calvin.

When trial resumed in April, Cole testified that it remained in R.S.'s best interest to terminate Father's rights, even though DFPS anticipated that R.S. would

continue to have a relationship with Father, because it was "important that [Father] understand . . . his legal rights to [R.S.] despite the fact that [Sally] and [Calvin] are willing to keep" R.S. and Father in contact. Cole stated that being raised by Father was not in R.S.'s best interest because he had not proven able to refrain from criminal activity or to effectively parent R.S. when given the chance.

Father said that he thought DPFS was trying to terminate his parental rights to R.S. because of his previous criminal behavior and lifestyle, notwithstanding the changes he had made in his life, stating,

> Your Honor, mostly I'm just asking for some mercy and I'm asking for some understanding. I understand that I'm not a perfect man and I understand I do got a criminal history and I have been a criminal most of my life and I take responsibility for that but my son when he came into my life, it was the best -- best feeling I ever had in my life. I do accept responsibility for my actions and I'm learning. I mean even with these classes before, I'm learning to be a better man and I've been trying since [R.S.] was tooken [sic] to change and be a better man and I feel a lot that's going on in here and the federal rehabilitation that I'm going to get due to the services they have in here.[16] I'm not asking for [R.S.] to be returned to me. I'm not even asking for favoritism by [Sally] or -- I deserve punishment but I'm asking the Court for -- I'm begging for another chance. When I come home I just want to be a better father to my son and a better man to myself. You know without my son I feel like I'm nothing and I got something to prove and I don't want him to grow up and hate me like I did my father. My father wasn't in my life either. He's in prison just as well and I want another chance. I'm not asking for me to be able to see [R.S.] every week. I mean, if I'm blessed with that and appreciate that but my main concern is I want to come home and do everything like I did this time in the courtroom. I want to show the Court that I can do everything a father should for his children. I've been fighting this whole time, but I don't see myself stop fighting. I mean, I was enrolled in barber school. I'm going to continue my

[16]Father testified telephonically during the second day of trial.

> barber schooling in here. I'm going to get a psychology. I want to -- I want to mentor kids when I get out. I want [to] do a lot of big things to help other people. And I feel like I got a lot of lessons coming and I feel like I deserve another chance for the effort that I do put in but I mean, it's your last call, Your Honor. . . . I'm begging the Court to just give me another chance. Just don't take my rights.

Father said that R.S. was the most important thing in his life.

2. Other Evidence

During the trial, Father's counsel asked the trial court to take judicial notice of the filing of business records from Merit Family Services, one of DFPS's service providers. The trial court responded, "I'm not sure if the business records are on file or just an affidavit of them." Although the 58 pages of Merit records referenced in DFPS's rule 902 notice were not on file with the trial court, neither party took any steps to make them part of the record.

In fact, DFPS attached few of the business records for which it filed rule 902 notices and sponsoring affidavits,[17] and none of them were offered or admitted into evidence during the trial. Specifically, while DFPS filed two rule 902 notices and affidavits as to Father's records from the Texas Alcohol and Drug Testing Service, the December 22, 2017 and February 23, 2018 notices' certificates of service made clear that rather than being attached and included in the clerk's records, the referenced records—49 pages and 40 pages, respectively—would "be emailed to

[17]On July 12, 2017, DFPS filed a notice and affidavit to sponsor ten pages of records as to Father from the Tarrant County Sheriff's Department from the inmate visitation computer database and inmate money room computer database, which were attached to the notice and affidavit but not offered into evidence.

the attorneys of record." DFPS also filed rule 902 notices and affidavits for 119 pages of R.S.'s hospital records, 60 pages of Father's records from MHMR of Tarrant County, and 5 pages of Father's records from Recovery Resource Council, but while the notices' certificates of service indicated that the "accompanying records" were served on Father's attorney and R.S.'s ad litem attorney, they were not attached to the notices and affidavits and included in the clerk's record.[18] The only exhibits offered and admitted into evidence pertained to Father's criminal convictions.

C. Arguments

DFPS and R.S.'s ad litem advocated for the termination of Father's parental rights based on his criminal history and failure to show a change in his willingness or ability to care for R.S. At the trial's conclusion, DFPS argued that while Father "did check the boxes and do those services, he didn't demonstrate any change to show that he could care for [R.S.]," citing the fact that Father was in jail on drug charges and that drugs had been in R.S.'s life since before he was born.

R.S.'s ad litem stated that he had been "on the fence" throughout the case because R.S. loved Father and loved to be with him. Based on Father's situation,

[18]Rule of appellate procedure 9.9 defines sensitive data, which includes government issued personal identification numbers like a social security number or driver's license number. *See* Tex. R. App. P. 9.9(a). While we acknowledge that documents containing sensitive data may not be filed with the court unless required by statute, court rule, or administrative regulation or unless the sensitive information is redacted, an exception is made when that evidence is admitted at trial into the record. *See* Tex. R. App. P. 9.9(b). That record can then be sealed.

however, he recommended termination because R.S. was flourishing with Sally and Calvin and he thought that R.S. "would be better off being adopted at this time."

Father ultimately asked the court to grant managing conservatorship to Sally and Calvin but to allow him to retain his parental rights.

D. Analysis

Father directs us to evidence that he and R.S. are bonded and that termination of his rights or separation from R.S. for a long time might negatively affect the child. He further directs us to evidence that although he had been convicted of assault against family members, he had completed the batterer's intervention program, thus "successfully undert[aking] efforts to resolve the causes of his prior acts of violence" and that there is no evidence to suggest that he had ever hurt R.S. He points out that the evidence showed that R.S. was not in the home where the unsecured firearm was located.[19] And he lists the services that he completed, his testimony about his plans for the child's future, and his payment

[19]Father's testimony on this point was unclear. When asked how Ariana's gun came to be found in his house, Father explained that he and Ariana had been living separately and that R.S. had been living with Ariana. Ariana, with R.S., drove to Father's house to pick him up so they could go out to dinner. When she arrived, she went into Father's house to put her firearm away since he was not supposed to be around firearms. Father said that R.S. did not go into the house. Ariana did not testify at trial.

of child support[20] to further support his argument that the evidence is legally and factually insufficient to support the trial court's decision that it was in R.S.'s best interest to terminate his parental rights.

DFPS responds that the evidence is both legally and factually sufficient to support the trial court's best interest finding based on Father's admissions about his criminal history, drug use, and incarceration and his failure to provide a stable home environment for R.S. that was free of drugs and weapons when compared to R.S.'s current placement with a stable, loving foster family that wanted to adopt him and under whose care R.S.'s behavior had improved, demonstrating that his emotional and physical needs were being better met than through a potential return

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[20]While Father argues that the following testimony supports that he made past due child support payments, this is not clear from the record:

> Q. Okay. If your rights aren't terminated and you go into custody pretty soon, what is your plan -- when you get out to get back on your feet and to get [R.S.] returned to you?
>
> A. Well, I have -- the -- some settlement checks coming and I've been saving. *I just recently -- they 10,500 from my account for [R.S.]'s child support which I'm trying to show.* And I have that and also I have the settlement coming up. It's going to be about 15 to 18,000 for me as well. And I mean, I'm pretty sure when I do get out that money being in my account that will give me enough time to get a job and start putting up with that money as well and on top of the money that I have been saving from, you know, my tattoo work and then I also have, you know, my aunt and uncle. They're willing to help me with anything I need. [Emphasis added.]

Father offered no documentary evidence into the record to support his referenced child support payment.

to Father. DFPS also points to Father's own admission that R.S. should not be returned to him at present and that R.S. would need some type of placement while Father was in prison.

Father acknowledges that short-term improved conduct does not conclusively negate the probative value of a long history of drug use and irresponsible choices, *see In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009), but he argues that his circumstances are more akin to cases in which courts, including this one, have found the evidence factually insufficient to support a best interest finding, citing us to *S.R.L.*, 243 S.W.3d at 236, *W.C.*, 98 S.W.3d at 766, *C.T.E.*, 95 S.W.3d at 467–69, and *In re K.C.M.*, 4 S.W.3d 392, 399 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), *disapproved of on other grounds by C.H.*, 89 S.W.3d at 26.

1. Similar cases, similar outcome?

In *W.C.*, we held that the evidence was factually insufficient to support the jury's best interest finding when the appellant completed her service plan and her offending behavior was not egregious enough, on its own, to warrant a finding that termination was in the children's best interest. 98 S.W.3d at 755, 766 (observing that the appellant "ha[d] made significant progress, improvements, and changes in her life, and her insights and coping skills ha[d] improved, as well as her relationship with her family"). We reached this conclusion despite testimony that the children's aggression was worse after visiting with the appellant and that she had placed the children or allowed them to remain in dangerous, harmful

situations, *id.* at 761, relying on the greater weight of the evidence, which showed that she had become a different and better person who was closely bonded with her children, had improved her parenting skills, had brought the children meals, toys, clothes, and other gifts at each visit, had been employed for three months by the time of the trial, felt extreme remorse for the children's injuries caused by her husband, and had made positive plans for the children's future and her own. *Id.* at 762–65.

We also noted, in contrast to the instant case, the lack of any evidence to show that there were plans for the adoption of the children, who had emotional problems. *Id.* at 764–65.

In *S.R.L.*, the court held that the evidence was both legally and factually insufficient to support the best interest finding. 243 S.W.3d at 233. The children's mother had relinquished her parental rights to the children while the appellant was incarcerated for assault—the latest in a long line of misdemeanor crimes, including theft and drug possession, as well as assaults on the children's mother and grandmother, but never the children. *Id.* When he was sentenced to ten years' confinement for his latest assault, DFPS sought to terminate his parental rights. *Id.*

At the termination trial, the appellant presented evidence that he had changed his life and wanted an opportunity to parent his children; he took anger management courses while incarcerated and did as much of his service plan as he could while in prison, along with taking courses that would make him

employable upon his re-entry to society. *Id.* at 234. On appeal, DFPS conceded the insufficiency of the best interest evidence. *Id.* at 235 & n.2. In holding the evidence legally insufficient, the court relied in part on the trial judge's statements, which tended to show that he had been unable to form a firm conviction or belief that the appellant should be deprived of all rights to his children. *Id.* at 235. In holding that the evidence was factually insufficient, the court noted that the appellant had presented substantial and uncontradicted evidence that he had turned his life around, including complying with all portions of the service plan that he could while in prison, and that he had never done anything bad to the children. *Id.* at 236 (referencing *W.C.*, 98 S.W.3d at 766; *C.T.E.*, 95 S.W.3d at 466; *K.C.M.*, 4 S.W.3d at 399).

In *C.T.E.*, the appellant had been convicted of possession of cocaine before either of his children were born and then convicted of burglary of a coin-operated machine after his first child was born, followed by a misdemeanor assault against the children's mother after the second child was born, and then a misdemeanor theft by receiving. 95 S.W.3d at 464 (noting that the undisputed explanation for the assault was that it resulted from an argument with the children's mother "who he was trying to prevent from going into a drug place"). DFPS's predecessor had argued that the appellant had "engaged in a continuous course of criminal activity," resulting in his inability to raise his children for the majority of their lives due to his confinement. *Id.* at 466.

The court held that there was legally sufficient evidence that the children's best interest would be served by termination of the appellant's parental rights because of the children's severe behavioral problems and his inability to provide for their needs due to his imprisonment. *Id.* at 467. However, the children were not in an adoptive placement, had been in and out of several foster homes, were ages eight and ten at the time of the trial, and there was no evidence to show that, given their ages, behavioral problems, and special needs, the children were adoptable or that they were likely to be adopted together by the same family. *Id.* at 467–68. And while in prison, the appellant had completed two parenting courses, a drug program, anger management classes, and job training classes in welding, and since his children's birth, he had been convicted of only misdemeanors, there was no evidence that he was a drug addict or had dealt in drugs since his children's birth, and he expected to be mandatorily released ten months after the termination trial. *Id.* at 468. Accordingly, the court concluded that the evidence was factually insufficient to establish that termination of his parental rights was in the children's best interest. *Id.* at 469.

The same court reached the same conclusion in *K.C.M.* based on uncontroverted evidence that the court identified as "particularly compelling." 4 S.W.3d at 399. In that case, the appellant had smoked marijuana while pregnant, subsequently becoming addicted to crack cocaine and financing her drug habit through prostitution; she had left her child with the child's paternal grandmother. *Id.* at 396. After her deferred adjudication probation on a drug possession charge

was revoked, she went to state jail for a year and turned her life around, participating in services, writing letters "all the time" to her caseworker to inquire about her child, and taking GED courses. *Id.* at 396–97.

The court listed the compelling evidence as the appellant's drug-free status for the ten months preceding the trial, her letter writing, her participation in various courses, the fact that she had become a jail trustee (a "low risk" inmate position), the state's earlier recommendation of family reunification upon her release from jail, the fact that she would be released from jail only 75 days after the trial, the comparable amount of time to either complete the child's adoption or for the mother to successfully complete her service plan, and the fact that before the child could be returned to her, she would still be expected to attend a parenting course and a drug treatment program and show that she could provide a stable home and environment for the child and the financial ability to provide for the child. *Id.* at 399.

2. Application

The evidence here is legally sufficient to overcome the strong presumption in favor of keeping R.S. with Father because we cannot weigh witness credibility issues that the trial court was tasked with deciding. *See R.R.*, 209 S.W.3d at 116; *J.P.B.*, 180 S.W.3d at 573. The trial court was entitled to find Cole's testimony more credible than Father's when it came to Father's ability to provide for R.S.'s emotional and physical needs and to prevent emotional and physical dangers to R.S. now and in the future, and—with Father's indefinite incarceration pending the federal drug conspiracy charge and his testimony that the drugs found in his

kitchen belonged to him—the trial court could have reasonably formed a firm belief or conviction that Father's home was not sufficiently stable, even if he were not incarcerated, to keep a small, impressionable child safe, particularly when compared to the stability of Sally and Calvin's home and their plans for the child. *See Holley*, 544 S.W.2d at 371–72; *cf. K.C.M.*, 4 S.W.3d at 399 (noting that the child's mother would be released from jail only 75 days after trial). Accordingly, we overrule this portion of Father's sole issue.

However, Sally and Calvin were not opposed to continuing contact between R.S. and Father, and no one disputed that Father and R.S. were closely bonded and loved each other. Although Father had a history of assaultive behavior, there was no evidence that he had ever harmed R.S. and Cole said she had no reason to believe, post-BIPP, that Father had not resolved his domestic violence issue. *See S.R.L.*, 243 S.W.3d at 236. There was no evidence to contradict Sally and Calvin's testimony that R.S.'s behavior did not change after visits and interaction with Father. *Cf. W.C.*, 98 S.W.3d at 761, 766 (holding evidence factually insufficient despite testimony that the children's aggression was worse after visiting with their mother).

There was also no evidence presented to contradict Sally and Calvin's concerns about what separating R.S. from Father might do to R.S.'s emotional state. Father testified that he would be eligible for parole in eight months, and Sally testified that she and Calvin were asking the court to terminate Father's parental rights only *if* he was going to be incarcerated for a long time. *Cf. C.T.E.*,

95 S.W.3d at 468 (holding evidence of best interest factually insufficient when, among other things, parent expected to be released from incarceration ten months after termination trial). At the time of the trial, nothing had been resolved on how long Father might be incarcerated with regard to his then-pending appeal and federal case.

Further, at least part of Cole's testimony—regarding Father's employment and source of income—was speculation based just on "his job history or lack thereof" and his attitude. *See, e.g.*, *In re S.T.*, 508 S.W.3d 482, 492–93 (Tex. App.—Fort Worth 2015, no pet.) (stating, in parent's appeal of DFPS's retention of managing conservatorship, that "[t]he link between the parent's conduct and harm to the child may not be based on evidence that merely raises a surmise or speculation of possible harm"); *see also Fieldtech Avionics & Instruments, Inc. v. Component Control.Com, Inc.*, 262 S.W.3d 813, 833 (Tex. App.—Fort Worth 2008, no pet.) ("Speculation is not evidence." (citing *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 164 (Tex. 2004))). Neither Ariana nor any of the law enforcement officers involved in Father's arrest testified about the circumstances involved in his domestic violence, drug, and gun offenses and, despite the filing of rule 902 notices and business record affidavits, many of the records that might have contradicted the best interest factors in favor of Father's retaining his parental rights were not offered into evidence.

Therefore, notwithstanding the deference that we must give to the trial court's finding, in light of the entire record, we think that the disputed evidence that

a reasonable factfinder could not have credited in favor of the finding—for example, Cole's suspicions rather than facts—and the lack of supporting documentary evidence on so many of the *Holley* factors, despite the rule 902 notices, is so significant that the trial court could not have reasonably formed a firm belief or conviction that it would be in R.S.'s best interest to terminate Father's rights. Combined with the uncertainty as to the duration of Father's incarceration with regard to his then-pending appeal in this court and his federal conspiracy case, the evidence presented at trial is factually insufficient on this record to support termination of his parental rights in R.S.'s best interest. *See H.R.M.*, 209 S.W.3d at 108. This is because, as particularly pertinent here, the "[t]ermination of parental rights should not become an additional punishment for imprisonment for any crime." *C.T.E.*, 95 S.W.3d at 466 (citing *In re D.T.*, 34 S.W.3d 625, 635 (Tex. App.—Fort Worth 2000, pet. denied) (op. on reh'g)). Nor can the best interest standard be met merely with evidence that the child is better off living elsewhere. *See W.C.*, 98 S.W.3d at 758. Accordingly, we sustain this part of Father's sole issue.

III. Conclusion

Having sustained part of Father's sole issue, we reverse this portion of the trial court's judgment and remand this case to the trial court for a new trial on best interest.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DELIVERED: August 31, 2018