In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-20-00087-CV

IN THE INTEREST OF C.G., C.G., AND C.G., CHILDREN

On Appeal from the 323rd District Court
Tarrant County, Texas
Trial Court No. 323-110024-19

Before Kerr, Birdwell, and Bassel, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

After a bench trial, the trial court terminated Father's and Mother's parental rights to their three children David, Edward, and Felicia.[1] Both Father and Mother have appealed.

Father's Issues[2]

Father raises two issues:

(1) There was insufficient evidence to support the trial court's finding that terminating Father's parental rights was in the children's best interest.

(2) The court committed harmful error by admitting into evidence two drug-test reports, specifically,

- Exhibit 5 (December 2019 report showing that Father's urine sample tested outside the temperature range, Father left without providing another sample, and he had no hair for a hair sample) and

- Exhibit 13 (February 2019 report showing that Father's urine sample tested positive for marijuana and his hair sample tested positive for cocaine and marijuana).

Mother's Issues

Mother raises four issues:

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[1]We use pseudonyms to protect the children's identities, and we refer to their family members by their relationship to the children. *See* Tex. R. App. P. 9.8(b); *see also* Tex. Fam. Code Ann. § 109.002(d).

[2]Father's brief uses the old term "ground of error," but current procedural rules provide that a brief must "state concisely all issues or points presented for review." Tex. R. App. P. 38.1(f); *see Knox v. State*, 722 S.W.2d 793, 794 n.1 (Tex. App.—Amarillo 1987), *pet. dism'd*, 769 S.W.2d 244 (Tex. Crim. App. 1989).

(1) The trial court abused its discretion by denying her motion for continuance and to extend the dismissal date.

(2) Factually insufficient evidence supports the trial court's Section 161.001(b)(1)(O) finding.

(3) The trial court abused its discretion by admitting two drug-test reports, specifically,

- Exhibit 4 (December 2019 report showing that Mother tested positive for cocaine) and

- Exhibit 5 (Father's December 2019 report).

(4) Factually insufficient evidence supports the trial court's finding that terminating Mother's parental rights to her children was in her children's best interest.

We will discuss these issues out of order and combine Father's and Mother's issues where appropriate.

Holdings

We hold that (1) the trial court did not abuse its discretion by denying Mother's motion to continue the trial or to extend the dismissal date; (2) the admission of the drug-test reports, even if an abuse of discretion, was harmless because the same evidence came in elsewhere without objection; (3) because the trial court terminated Mother's parental rights on three grounds (Sections 161.001(b)(1)(D), (E), and (O)) and because Mother has attacked only one of those three grounds (Section 161.001(b)(1)(O)), we can affirm the trial court's judgment on those grounds that Mother does not contest and deny Mother's attack on Section 161.001(b)(1)(O) as moot; and (4) the evidence both legally and factually sufficed to support the trial

court's findings that terminating Father's and Mother's parental rights was in their children's best interest. We thus overrule Father's and Mother's issues and affirm the trial court's judgment.

I.
The trial court did not abuse its discretion by denying Mother's motion for continuance or to extend the dismissal deadline.

In Mother's first issue, she argues that the trial court abused its discretion by denying her motion for continuance and to extend the dismissal date. Our first concern is the scope of her issue.

Mother filed her "Motion for Continuance and Extension of Dismissal Date" on January 2, 2020. At that time, the case was set for trial January 7. The case did not go to trial on January 7 but went to trial instead on February 11, and on that date, the trial court indicated on three occasions that the only motion before it was Mother's motion to extend the dismissal date. The trial court even referred to it as Mother's January 7 motion, but there was no January 7 motion.

From this, we conclude that on January 7, the trial court granted Mother a trial continuance (from January 7 to February 11) but reserved ruling on her motion to extend the dismissal date.[3] But because granting Mother a dismissal-date extension on February 11 without granting Mother a corresponding trial extension would not have benefited Mother at all, why Mother would pursue and why the trial court would

[3]The trial court's docket sheet skips from December 19, 2019, to February 25, 2020, with no intervening entries.

entertain only a motion to extend the dismissal date leaves us confused. In any event, because the standard of review for both a continuance and a dismissal-date extension is the same, we review both.

A. Standard of Review

1. Continuance

We review the trial court's denial of a motion for continuance for an abuse of discretion. *See In re S.M.H.*, 523 S.W.3d 783, 797 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004)). A trial court abuses its discretion only if its ruling was arbitrary, unreasonable, or without reference to any guiding rules or principles. *See id.* (citing *Daugherty v. Jacobs*, 187 S.W.3d 607, 618 (Tex. App.–Houston [14th Dist.] 2006, no pet.)).

2. Dismissal Deadline

Termination proceedings have a dismissal deadline. *See* Tex. Fam. Code Ann. § 263.401(a). Section 263.401(b) governs extending that deadline. *See id.* § 263.401(b). An appellate court reviews the trial court's decision to grant or deny an extension requested under Section 263.401(b) for an abuse of discretion. *In re D.W.*, 249 S.W.3d 625, 647 (Tex. App.—Fort Worth), *pet. denied*, 260 S.W.3d 462 (Tex. 2008) (per curiam). The focus is on

- the child's needs,

- whether extraordinary circumstances necessitate the child's remaining in the temporary custody of the Texas Department of Family and Protective Services, and

- whether continuing that temporary custody is in the child's best interest.

In re A.J.M., 375 S.W.3d 599, 604 (Tex. App.—Fort Worth 2012, pet. denied) (op. on reh'g).

B. Discussion

Mother wanted a continuance and a dismissal-date extension so that she could show her sobriety. As we explain below, the trial court did not abuse its discretion by denying her motions.

Mother herself did not appear for the February 11, 2020 trial setting. At the preliminary hearing that day on Mother's motion, Mother's counsel acknowledged having lost contact with Mother for about three weeks. Only that morning, Mother had texted her attorney that she was in a drug-treatment program. This was news to the Department's caseworker, who stated that she could not verify whether Mother was really in a drug-treatment program. Even if true, Mother had not entered the program ordered by the court.

Opposing Mother's motion, the State had the caseworker testify, and she explained that in February 2019 (when the Department first removed the children), Mother was in jail, where she remained until March. Mother was not in jail in April, May, June, July, or August, and during that time Mother could have received drug treatment but did not. Then, from the end of August through the end of November,

Mother was again in jail. Released for all of December, all of January 2020, and through February 11 (the date of trial), Mother could have but again had not engaged in any drug treatment.

The caseworker added that even before the present case, the Department had offered Mother help for her drug addiction through Family Based Safety Services. Despite everything, according to the caseworker, Mother had not made any progress.

Acknowledging that giving Mother more time would not harm the children, the caseworker nevertheless asserted that proceeding to trial was in their best interest so that they could have permanency. The caseworker noted that since the previous trial date on January 7, Mother had missed three of four possible visits with the children.

Mother's two incarcerations, standing alone, were not sufficient reason for a continuance. A parent's confinement or incarceration is generally considered to be the parent's fault and not an extraordinary circumstance. *In re M.S.*, No. 06-19-00110-CV, 2020 WL 1312937, at *2 (Tex. App.—Texarkana Mar. 20, 2020, no pet.). And a parent's inability to complete services due to confinement is not an extraordinary circumstance but is instead the consequence of poor choices. *Id.* Generally, parents cannot blunder their way into extraordinary circumstances. *See id.*

Even when not incarcerated, Mother made no progress. The trial court could have viewed Mother's unverified assertion that she was in a drug-treatment program—made just that morning—as a ruse. As the sole arbiter assessing a witness's credibility, the trial court is free to discredit self-serving testimony. *See In re M.T.R.*,

579 S.W.3d 548, 570 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). The caseworker could not verify whether Mother was actually in a drug-treatment program. Under an abuse-of-discretion standard, the trial court judges the witness's credibility and resolves any conflicting testimony. *See In re J.G.*, 412 S.W.3d 83, 89 (Tex. App.—Fort Worth 2013, no pet.) (citing *Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 290 (Tex. App.—Dallas 2012, no pet.)).

We hold that the trial court did not abuse its discretion by denying Mother's motion for a continuance and for a dismissal extension. The children needed permanency, no extraordinary circumstances existed, and proceeding was in the children's best interest. *See A.J.M.*, 375 S.W.3d at 604.

Mother raises one other argument that we address briefly. She contends that the trial court, when ruling, improperly relied on Section 263.401(b-2), which requires the trial court to consider whether a parent made a good-faith effort to complete a court-ordered substance-abuse-treatment program. She contends that Section 263.401(b-2) applies only to cases filed after September 1, 2019, and because the Department filed its case in February 2019, Section 263.401(b-2) was inapplicable. *See* Act of May 22, 2019, 2019 Tex. Sess. Law Serv. Ch. 783, §§ 2–3 (codified at Tex. Fam. Code Ann. § 263.401(b-2)).

True enough, the trial court appears to have relied on Section 263.401(b-2) when denying her motion. But the trial court was not alone. We note that in Mother's motion, she too relied specifically on the inapplicable Section 263.401(b-2). The error

about which Mother complains thus appears invited. The invited-error doctrine bars a party from encouraging a court to take a specific action and then faulting the court for taking the specific action that the party requested. *See In re S.T.*, 508 S.W.3d 482, 487 (Tex. App.—Fort Worth 2015, no pet.).

Regardless, even if a trial court reaches the right result for the wrong reason, if the record supports the trial court's ruling on any of the grounds before it, the trial court has not abused its discretion, so we uphold its ruling. *In re Russo*, 550 S.W.3d 782, 790 n.3 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding); *In re Vogel*, 261 S.W.3d 917, 920 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). Having ruled earlier that the trial court did not abuse its discretion, we now hold that its reliance on Section 263.401(b-2) changes nothing.

We overrule Mother's first issue.

II.
Any error in admitting the drug-test results was harmless: the same evidence came in elsewhere without objection.

Father in his second issue and Mother in her third issue complain about the trial court's admission of the drug-test results in Exhibits 4, 5, and 13. We hold that any error in admitting these documents was harmless.

A. Standard of Review

When evidence identical or similar to the objected-to evidence is admitted elsewhere without objection, any error in admitting the objected-to evidence is harmless. *M.T.R.*, 579 S.W.3d at 570.

B. Discussion

1. Exhibit 4

a. What it showed

Exhibit 4 showed that Mother tested positive for cocaine on December 19, 2019.

b. What other, unobjected-to evidence showed

The caseworker testified that Mother took a hair-strand test in December and that Exhibit 4 showed that Mother tested positive for drug use. Later, the caseworker said that Mother took only one drug test, that it was in December, and that she tested positive for cocaine.

Mother herself testified[4] and acknowledged that the December hair-strand test came back positive, but she expressed confusion about how that was possible. She maintained that a urinalysis for the same date was clean.[5]

2. Exhibit 5

a. What it showed

Exhibit 5 showed that on December 19, Father's urine sample tested outside the appropriate temperature range and that although Father was given an opportunity

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[4]Although Mother did not appear when trial started on February 11, the trial court recessed the trial and resumed proceedings on February 25. Mother appeared on February 25 and testified.

[5]The report itself does not reflect that Mother provided a urine sample or that one was analyzed.

to give another sample, he left the facility instead. This exhibit also showed that Father did not have enough hair to collect a hair sample.

b. What other, unobjected-to evidence showed

But the caseworker testified that Father admitted using cocaine in early November and in December for the holidays. The caseworker then explained how Father avoided any drug testing on December 19:

> Well, both of them attended [on December 19]. Mom was the only one that actually did the drug test. Dad did go ahead and go. He was asked to go ahead and stay for a second sample for the UA because it was out of temperature, but he left the facility and then he didn't have enough hair for the hair strand.

Father himself testified and admitted that on December 19, he did not have enough hair for a hair-strand test and that the temperature of his urine was out of the normal range. He also acknowledged leaving the facility but attributed that to a misunderstanding.

3. Exhibit 13

a. What it showed

Exhibit 13 showed that Father tested positive for marijuana and cocaine on February 13, September 27, and October 28, 2019. We address each date in turn.

b. What other, unobjected-to evidence showed

i. February 2019

The Department's investigator testified that at the children's removal, which was in February 2019, Father tested positive for cocaine. Father later admitted to the

caseworker that he had used cocaine before the February removal. And the caseworker stated that Father tested positive for cocaine and marijuana in February 2019 when the case first started.

ii. September 2019

The caseworker testified that Father admitted using cocaine with Mother in August 2019 and acknowledged that he would test positive. Later the caseworker testified that Father tested positive for cocaine and marijuana in September.

iii. October 2019

To explain his October test results, Father admitted to the caseworker that he used cocaine in September, and the caseworker testified that Father tested positive for cocaine and marijuana in October 2019.

4. Conclusion

As shown above, the substance of Exhibits 4, 5, and 13 came in without objection in other testimony and thus the trial court's admitting into evidence the drug-test results contained in those exhibits did not harm Father or Mother. We overrule Father's second issue and Mother's third issue. *See id.*

III. Mother's attack on the sufficiency of the evidence to support the trial court's finding under Section 161.001(b)(1)(O) fails.

In her second issue, Mother attacks the evidentiary sufficiency supporting the trial court's finding under Section 161.001(b)(1)(O). But the trial court based its

termination decree on three grounds—Section 161.001(b)(1)(D), (E), and (O). Conceding that she does not attack the (D) or (E) grounds because the children were admittedly born positive for cocaine, Mother attacks only one of the three grounds. But because only one ground is necessary to terminate parental rights, if the trial court relied on multiple grounds, then an appellate court can affirm the trial court's judgment if any single ground is valid.[6] *In re L.M.*, 572 S.W.3d 823, 832 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Appellate courts are bound by unchallenged findings supporting termination. *In re D.S.*, 333 S.W.3d 379, 388 (Tex. App.—Amarillo 2011, no pet.).

Because Mother does not challenge grounds under Section 161.001(b)(1)(D) or (E), resolving Mother's attack on grounds under Section 161.001(b)(1)(O) is not necessary.[7] *See In re K.A.*, No. 02-19-00099-CV, 2019 WL 4309168, at *11 & n.4 (Tex. App.—Fort Worth Sept. 12, 2019, pet. denied) (mem. op.). We overrule Mother's second issue. *See L.M.*, 572 S.W.3d at 832; *D.S.*, 333 S.W.3d at 388.

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[6]This rule has an important qualification concerning (D) and (E) grounds that does not apply here. *See In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019) (per curiam); *In re T.C.*, No. 02-19-00291-CV, 2019 WL 6606172, at *1 n.3 (Tex. App.—Fort Worth Dec. 5, 2019, pet. denied) (mem. op.).

[7]Nor is addressing Sections 161.001(b)(1)(D) and (E) necessary. *See N.G.*, 577 S.W.3d at 237 ("Allowing section 161.001(b)(1)(D) or (E) findings to go unreviewed on appeal *when the parent has presented the issue to the court* thus violates the parent's due process and due course of law rights." (emphasis added)).

IV.
Sufficient evidence supports the trial court's best-interest findings.

A. Standard of Review

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); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Consequently, "[w]hen the State seeks to sever permanently the relationship between a parent and a child, it must first observe fundamentally fair procedures." *In re E.R.*, 385 S.W.3d 552, 554 (Tex. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92 (1982)).

Termination decisions must be supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001(b), § 161.206(a); *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012). Due process demands this heightened standard because "[a] parental rights termination proceeding encumbers a value 'far more precious than any property right.'" *E.R.*, 385 S.W.3d at 555 (quoting *Santosky*, 455 U.S. at 758–59, 102 S. Ct. at 1397). 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; *E.N.C.*, 384 S.W.3d at 802.

For a trial court to terminate a parent–child relationship, the party seeking termination must establish, by clear and convincing evidence, that (1) the parent's

actions satisfy just one of the many predicate grounds (currently up to 21) that are listed in family code section 161.001(b)(1), and (2) termination is in the child's best interest under section 161.001(b)(2). Tex. Fam. Code Ann. § 161.001(b)(1), (2); *E.N.C.*, 384 S.W.3d at 803; *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

B. Legal Sufficiency

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 the Department proved both the particular ground for termination and that termination is in the child's best interest. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *see In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam). We review all the evidence in the light most favorable to the finding and judgment, and we resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *J.F.C.*, 96 S.W.3d at 266. We also must disregard all evidence that a reasonable factfinder could have disbelieved, in addition to considering 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.* In doing our job, we cannot re-weigh witness-credibility issues that depend on the witness's appearance and demeanor; that is the factfinder's province. *J.P.B.*, 180 S.W.3d at 573. 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.*

C. Factual Sufficiency

We must perform "an exacting review of the entire record" in determining whether the evidence is factually sufficient to support terminating a parent–child relationship. *In re A.B.*, 437 S.W.3d 498, 500 (Tex. 2014). In a factual-sufficiency review, 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) (per curiam). We determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated an alleged ground and that termination is in the child's best interest. Tex. Fam. Code Ann. § 161.001(b); *see In re C.H.*, 89 S.W.3d 17, 23 (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 in the truth of its finding, then the evidence is factually insufficient. *H.R.M.*, 209 S.W.3d at 108.

D. 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) (per curiam).

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). The same evidence may be probative both of the grounds under section 161.001(b)(1) and of best interest under section 161.001(b)(2).

Id. at 249; *C.H.*, 89 S.W.3d at 28. Nonexclusive factors that the factfinder in a termination case may also use in determining the child's best interest include:

- the child's desires;
- the child's emotional and physical needs now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parental abilities of the individuals seeking custody;
- the programs available to assist these individuals to promote the child's best interest;
- the plans for the child by these individuals or by the agency seeking custody;
- the stability of the home or proposed placement;
- the parent's acts or omissions that may indicate that the existing parent–child relationship is not a proper one; and
- the parent's excuse, if any, for the acts or omissions.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976); *see E.C.R.*, 402 S.W.3d at 249; *E.N.C.*, 384 S.W.3d at 807. These factors do not form an exhaustive list, and some factors may not apply to some cases. *C.H.*, 89 S.W.3d at 27. Furthermore, undisputed evidence of just one factor may suffice in a particular case to support a finding that termination is in the child's best interest. *Id.* On the other hand, the presence of paltry evidence relevant to each factor will not support such a finding. *Id.*; *In re J.B.*, No. 02-18-00034-CV, 2018 WL 3289612, at *4 (Tex. App.—Fort Worth July 5, 2018, no pet.) (mem. op.).

E. The Evidence

We set out the evidence in the light most favorable to the judgment and in a manner duly deferring to the trial court's findings. *See J.F.C.*, 96 S.W.3d at 266; *H.R.M.*, 209 S.W.3d at 108.

1. Prelude to the Removal

Mother met Father in 2014.

In 2016, Father and Mother's first child David was born positive for cocaine. Father's drug tests came back negative. The Department thus focused on Mother and offered her services.

In 2017, Father and Mother's second child Edward was born positive for cocaine. Although Mother tested negative, she admitted to the investigator that she had used cocaine once in her second trimester. The investigator stated that she was "going to offer [Mother] services."

Another investigator testified that Father and Mother had a history of not letting the Department know where they were with the children. That investigator described the family as uncooperative, by which she meant that "the family had stopped responding to the caseworker in the open cases and [continued to] allow[] [Mother to have] contact with the children." Because Father worked out of town, the investigator was unable to interview him until the case's end.

Finally, in January 2019, Father and Mother's third child Felicia was born positive for cocaine. The Department opened yet another investigation. Unable to

locate the family, the Department placed Father, Mother, and the children on a CSCAL,[8] which is a database that alerts law enforcement to contact the Department immediately should it come across certain parents or children.

2. The Removal

Then in February 2019 (while the January investigation was still open), Mother and her then-17-year-old son Andrew[9] were arrested at a Walmart for shoplifting and taken to the Tarrant County Jail. The police found Mother and Andrew on the CSCAL and informed the Department where the family could be located; an investigator went to that location where she found Father, Grandmother, David, Edward, Felicia, and Mother's two other children, Betty and Carol.[10] Concerned that Father might have drug issues, the investigator asked him to take a test, and he tested positive for cocaine. When the investigator confronted Father with the results, Father denied using cocaine and asserted that he must have tested positive because of Mother. From this comment, the investigator concluded that Father knew that Mother used cocaine.

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[8]Child Safety Check Alert List, https://www.tcole.texas.gov/sites/default/files/Course CMU/Child%20Safety%20Check%20Alert%20List.pdf (last visited 8/3/20). The other children were already on the list; after Felicia's birth, she was placed on the list as well.

[9]Andrew was not a party to the trial-court suit and is not a party in this appeal.

[10]Betty and Carol were parties in the trial court but are not parties to this appeal. Betty and Carol had a different father, and neither he nor Mother have appealed the order disposing of them.

Because Mother was in jail, because Father was positive for cocaine, and because the Department deemed Grandmother inappropriate, the Department removed all five children.[11]

3. Father, Mother, and Their Service Plans

The caseworker developed service plans for both Father and Mother. After Mother's release from jail in late March, the caseworker went over the service plan with her, and Mother indicated that she understood what was being asked of her and that she was willing to engage in services. The caseworker went over the service plan with Father too. Father was not incarcerated, and he also expressed an interest in the services.

4. Drugs

When the caseworker discussed with Father and Mother how using drugs might impact their children, both denied using drugs when around the children. At least as to Mother, other evidence tended to refute this; when the investigator spoke with the older children, they acknowledged being aware of Mother's drug use and disapproved of it. Regardless, the caseworker noted that David, Edward, and Felicia all tested positive at birth. And as noted, Mother concedes on appeal that her parental

[11]The Department faulted Grandmother for allowing Mother to have access to the children and for thus not being protective. The caseworker described Grandmother as Mother's enabler. The Department also considered Grandmother a flight risk. And during Grandmother's later home study, concerns about Grandmother's alcohol use arose. Any option of placing the children with Grandmother later ended definitively when she suffered a stroke.

rights could be terminated based on Section 161.001(b)(1)(D) or (E) because the children tested positive for cocaine when they were born. For his part, Father did not think that the children's testing positive for cocaine at birth was his problem.

Mother admitted taking cocaine-based anxiety pills (or "happy pills" as she called them) that she purchased in Mexico to help with her depression, and in May Mother further admitted using cocaine in late April or early May. Mother went to a preliminary drug assessment in April, and the result was a recommendation to go for a formal assessment. The caseworker asked Mother to take drug tests in May, July, and August, but Mother did not comply.

Father admitted to the caseworker that he used cocaine before the removal and during the Easter weekend after the removal, and still later, he admitted to her that he was using cocaine on a regular basis. The caseworker asked Father to take drug tests in May, July, and August, but Father failed to go to any of the tests.

As the summer wound down, in late August 2019, the court ordered both Father and Mother to go for drug testing. Neither went.

At the end of August, Mother was arrested for theft, "failure to ID," and possession of a controlled substance.

In September, the caseworker personally drove Father to the drug test; Father told her that he had used cocaine in August and would test positive. He was right.

After Mother got out of jail in late November, the caseworker went over the service plan with Mother again in early December. Mother went in December to again

get a preliminary assessment, and the recommendation was again to get a formal assessment, which she was supposed to go for—but did not—in early January 2020.

At the December 19 permanency review hearing, the trial court ordered both Mother and Father to go for drug testing. This time, Mother went and tested positive for cocaine. And Father went but managed to avoid any testing. As noted, Father's urine sample exceeded the acceptable temperature range, and although he was given an opportunity to provide another sample, he left the facility instead. Father did not have enough hair to provide a hair sample.

The last requested drug test was on January 23. Both Father and Mother failed to submit to any testing.

5. The Caseworker's Recommendations

The caseworker did not think that the children should be returned to Mother because Mother had not addressed her substance-abuse issues and did not maintain any stability throughout the case. Mother's criminal conduct was a concern too.

The caseworker did not think that the children should be returned to Father for the same reasons—that is, his drug use and instability. Regarding Father's work, she said, "He's had several employments since the case initiated[; he was] self-employed, [worked as a] construction technician, [and was] employed at a local restaurant." The caseworker also noted a basic lack of cooperation: "[T]hey didn't have -- or they were unwilling to provide me with their -- with his home address up until January . . . ."

If Mother's and Father's parental rights were terminated, the plan was to have the foster parents adopt David, Edward, and Felicia. The foster parents and Betty and Carol, who were 17 and 16 years old respectively at the time of trial, had a good relationship, so Betty and Carol were allowed to see their three younger half-siblings.

6. The Children and Their Foster Home

David, Edward, and Felicia were in the same foster home, were receiving services, and were doing well. All three had developmental delays, but the caseworker could not say whether those delays were attributable to the drug exposure. David, Edward, and Felicia's foster parents made sure that the children got their therapy and that their medical needs were met. The foster home was a loving one, and the three children had bonded to one another and to their foster parents. The caseworker thought that the foster parents could meet the children's future medical, physical, emotional, developmental, financial, and educational needs.

7. Father and Mother's Home

But the caseworker had concerns about whether Father and Mother could meet their children's needs. The caseworker stated that someone under the influence of illegal drugs could not provide stable transportation to and from medical appointments and could not consistently provide meals and nutrition to children who were too small to prepare their own meals. Although both Mother and Father loved their children, the caseworker thought that neither was able to take care of them. Due

to the children's ages, the caseworker opined that they were more vulnerable; adding to their vulnerability was the fact that they had speech delays and were nonverbal.

8. Father's and Mother's Positive Aspects

The investigator described the motel in which the family was living as crowded but clean and safe. The children appeared to be in good condition.

Father asserted that the children were well taken care of and denied that any of them had ever been mistreated or physically abused. Father maintained that he and his stepchildren—Andrew, Betty, and Carol—had a good relationship.

Mother stated that she had done many good things when raising Betty and Carol: "I've always fed their self-esteem . . . and . . . always hugged them. . . . I was always there for them." Both Betty and Carol were bright and taking advanced-placement classes in school. Andrew too showed promise; he was 18, had gotten his GED, and planned to start college that summer.

Both Father and Mother attested to working. Father maintained that although he may have had several jobs, he always worked, and he always supported his family. In December, Father and Mother even managed to rent a three-bedroom, two-bath house. Mother said that she was self-employed processing income-tax returns during the tax season for the past 12 years. During the other months, she had "done insurance" and worked as a hostess and housekeeper for a hotel.

When Mother got out of jail in late March, she attended the supervised visits, and the caseworker described her visits as appropriate. Father testified that he kept up with visiting the children, even though it meant missing work and losing money.

Father completed parenting classes through Love and Logic.

9. Father's and Mother's Other Aspects

Although Mother asserted that she worked, she never provided any verification. The caseworker was thus not able to confirm whether Mother actually worked.

Neither Father nor Mother would tell the caseworker where they were living until January. They thus kept the caseworker in the dark, suggesting that Father and Mother had something to hide.

Father and Mother were still a couple. A positive way to view that fact is that they were mutually supportive; on the other hand, it might be said that they effectively mutually supported or enabled each other's drug habits.

Although Father completed his parenting classes, he did not complete his individual counseling. He followed through in one instance but not in the other.

Father asserted that he was dropped from his drug classes because of his spotty attendance, explaining that work interfered. Later, though, when stating why the court should not terminate his parental rights, he claimed that he would find a way to both work and do the drug classes.

Mother went to the intake at Merit Family Services[12] in late April, did not attend any more sessions, and was discharged without successfully completing the program. For individual counseling, Mother did her intake in May 2019 and attended one session in December, but thereafter she did nothing else. Mother showed an inability to follow through.

Mother said that she had had her drug problem for only the past three years. During roughly that same period, Mother estimated that she had been arrested six times. She admitted getting arrested three times for shoplifting at Walmart.

Mother explained that she was positive for cocaine when she gave birth to Felicia in January 2019 because she had been in Mexico trying to get an immigration permit. Because the immigration permit was taking too long and because she was about to give birth, she decided to enter the United States illegally. When entering, she asserted that her "mule"[13] had given her a tranquilizer.

Father denied being a cocaine addict: "I don't use that daily. It's just sporadically. It's something minor. I don't consider myself addicted to cocaine."

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[12]Merit Family Services offers treatment services for mental health and substance abuse. Merit Family Services, http://www.meritfamilyservices.org/ (last visited 7/7/20).

[13]"Coyote" appears to be the more accurate slang. A "coyote" is "a person who smuggles immigrants, especially Latin Americans, into the U.S. for a fee." Dictionary.com, dictionary.com/browse/coyote?s=ts (last visited 8/4/20). A "mule" is "a person paid to carry or transport contraband, especially drugs, for a smuggler." Dictionary.com, dictionary.com/browse/mule?s=t (last visited 8/4/20).

Father proffered an explanation for his cocaine use: "I'm not an addict because I use it sporadically and . . . last year was a difficult time."

10. Father's and Mother's backup plans for David, Edward, and Felicia

When Mother went to jail in the past, and if Grandmother and Father were not available, Father stated that he would rely on Betty and Carol to watch the younger children. Mother intended to rely on Betty and Carol's current placement—Mother's second cousin and her husband. Relying on Betty and Carol's placement was possible because the plan was not to terminate Mother's parental rights to Betty and Carol but to make their current placement the girls' permanent managing conservators.[14]

F. Discussion

Father and Mother were using cocaine when the case started in February 2019. Mother's cocaine use dated back to at least 2016. Father had been with Mother since 2014, and David, Edward, and Felicia tested positive for cocaine at their births in 2016, 2017, and 2019, respectively; Father could thus not credibly plead ignorance about Mother's use. Indeed, his efforts to blame Mother for his own positive drug test in February 2019 showed his awareness.

When Father's drug use started is not clear. What is clear is that by February 2019, he too was using cocaine. And what is also clear is that after the children's

[14]When faced with paying child support for Betty and Carol, Mother testified that she would rather relinquish her parental rights than pay child support.

removal, Father continued to use cocaine. As late as January 2020, his primary defense appears to have been simply to avoid testing.

After the removal, both Father and Mother bridled and balked at addressing their drug issues. In January 2020, both refused to take drug tests. The trial court could infer that they refused because they knew the results would be positive. *See In re J.M.T.*, 519 S.W.3d 258, 269 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). Given both Father's and Mother's resolute resistance to any treatment, the trial court could have disbelieved their pleas for more time and concluded that more time was not the solution. *See J.P.B.*, 180 S.W.3d at 574 ("It was within the [factfinder's] province to judge [the father's] demeanor and to disbelieve his testimony that he did not know how [his child] was injured.").

Leaving small children in a home in which both parents use cocaine is not in the children's best interest. Parental drug abuse reflects poor judgment and may be considered when determining a child's best interest. *J.M.T.*, 519 S.W.3d at 269. Although both Father and Mother denied using cocaine while around their children, the trial court did not have to believe them. *See J.P.B.*, 180 S.W.3d at 574. After all, Mother's cocaine use was no secret to Mother's teenage daughters Betty and Carol.

Mother could not offer stability. While the case was pending, Mother went to jail twice. After being released from jail a second time in November, she tested positive for cocaine in December. The rational inference is that Mother's cocaine use was ongoing. And Mother never verified her claimed employment status.

Nor could Father offer stability. Father worked, but his work required him to travel. Traveling meant leaving the children with Mother. Even if Father did not travel, he admitted using cocaine, disputing only whether he was an addict. But Father chose the wrong battle to fight. To get his children back, his cocaine use had to stop.

Father's and Mother's backup plan lacked substance. Betty and Carol could not act as their safety net; both were themselves minors. Mother also wanted to rely on Betty and Carol's current placement to act as a backup home for David, Edward, and Felicia. But Betty and Carol's current placement did not testify to voice their accord, and taking care of three small children as well as two teenagers is no easy task. Volunteering the services of others is one thing; others agreeing to serve is another. For such an undertaking, hearing directly from Betty and Carol's current placement was important.

David, Edward, and Felicia all required services for developmental delays. The foster home showed that it could meet the children's needs. In contrast, the Department could not rely on Father and Mother even to take drug tests when requested.

Apart from Father's and Mother's drug use, neither's parenting skills were seriously questioned. Betty's and Carol's academics were impressive, and Andrew showed initiative in completing his GED and getting into college. At least at one time, Mother appears to have been a commendable parent. And Father showed familial loyalty, a dedicated work ethic, and an openness to embrace Mother's other children

Andrew, Betty, and Carol. In this context, negative drug-test results would doubtless have gone a long way toward Father's and Mother's getting David, Edward, and Felicia back. And yet when put to the choice, neither chose to comply.

The foster home provided David, Edward, and Felicia love, support, and stability. Stability and permanence are paramount to children. *In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (per curiam). The foster home also allowed contact between David, Edward, and Felicia and their half-siblings, Betty and Carol. Termination would provide David, Edward, and Felicia safety and continuity while distancing them from the instability and danger inherent in Father's and Mother's cocaine use.

We hold that the evidence suffices both legally and factually to support the trial court's best-interest findings. *See J.F.C.*, 96 S.W.3d at 265–66 (stating the test for legal sufficiency); *C.H.*, 89 S.W.3d at 25 (stating the test for factual sufficiency); *Holley*, 544 S.W.2d at 371–72. We overrule Father's first issue and Mother's fourth issue.

Conclusion

Having overruled all of Father's and Mother's issues, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: August 6, 2020