In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00316-CV

IN THE INTEREST OF Z.W.M., A CHILD

On Appeal from the 286th District Court
Hockley County, Texas
Trial Court No. 130723561, Honorable Pat Phelan, Presiding

February 9, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

The father, W.J.M.,[1] appeals the trial court's termination of his parental rights to the child Z.W.M. Through three issues, W.J.M. contends that the trial court erred in terminating his parental rights because the evidence was legally and factually insufficient to show that (1) W.J.M. failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; (2) W.J.M. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child;

[1] Pursuant to Texas Rule of Appellate Procedure 9.8, we will refer to the parties and the child by initials only.

and (3) terminating W.J.M.'s parental rights was in the best interest of the child. We will reverse.

Factual and Procedural Background

The factual and procedural background of this case is somewhat tortured. Although the complete clerk's record was not provided to this Court, W.J.M.'s brief sets forth the purported complete background, and that assertion was not contested by the brief filed by the mother, J.M.P.[2]

According to W.J.M.'s brief, this litigation commenced when J.M.P. filed a modification action in the 137th District Court of Lubbock County, Texas. This modification sought to modify the original divorce decree by allowing W.J.M.'s possession of the child one weekend per month and to increase child support. At the same time, J.M.P. requested the proceedings be transferred to Hockley County, Texas. The proceedings were subsequently transferred to the 286th District Court in Hockley County. The trial court in Hockley County thereafter entered an order appointing an attorney *ad litem* and an order referring the case to mediation on August 20, 2013. Subsequently, on September 16, 2013, the parties signed a Mediated Settlement Agreement.

On May 1, 2015, a First Amended Petition to Modify Parent-Child Relationship and Motion for Enforcement of Child and Medical Support was filed. This pleading requested a termination of the parent-child relationship between W.J.M. and Z.W.M. The attorney *ad litem* filed a motion for the trial court to confer with the child on July 15,

[2] *See* TEX. R. APP. P. 38.1(g); *In re J.B.,* No. 02-15-00040-CV, 2015 Tex. App. LEXIS 12929, at *5 n.6 (Tex. App.—Fort Worth Dec. 23, 2015, no pet.) (mem. op.).

2015. This request was granted and, immediately before the commencement of the trial on July 20, 2015, the trial court conferred with the child in chambers.

The trial on the merits began on July 20, 2015 and concluded on July 22, 2015. The trial court notified the parties via email on July 22, 2015, that it was granting the petition to terminate the parent-child relationship at issue. The final order terminating the parent-child relationship was entered on August 12, 2015. W.J.M. filed a request for findings of fact and conclusions of law on August 11, 2015, and the trial court's findings of fact and conclusions of law were filed on September 8, 2015. W.J.M. perfected his appeal on August 20, 2015.

The mother, J.M.P., was the first witness and testified that W.J.M. had not visited the child in over a year. Additionally, she testified that W.J.M. had not sent a Christmas gift, birthday card, or any type of remembrance to the child in over two years. She then stated that the child has had a cell phone and the number had remained the same for over two years and that her cell number had remained unchanged for over 10 years, the implication being that W.J.M. had always had a means to contact the child or her. J.M.P.'s testimony continued that it had come to the point where the child no longer wanted to visit with W.J.M. J.M.P. testified that the child did not have a bed to sleep in at W.J.M.'s home until she and her husband provided a set of bunk beds to be used as a bed for the child. According to J.M.P.'s testimony, the child played youth football and W.J.M. had been provided a copy of the child's football schedule; however, W.J.M. had not attended a single game and possibly had attended only one practice.

The focus of J.M.P.'s testimony then switched to specific instances of issues that had arisen when W.J.M. attempted visitation with the child. The first instance of problems occurred in 2013 during her family's celebration of one of her other children's birthday at a local pizza restaurant. On the date of this birthday celebration, W.J.M. did have possession of the child for visitation. J.M.P. testified that she had asked W.J.M. to allow the child to attend the birthday celebration and W.J.M. had acceded to this request. However, when the time came for W.J.M. to pick up the child for continued visitation, the child did not want to go with W.J.M, and an argument ensued during which W.J.M. threatened to call the police and have J.M.P. and her husband arrested. This confrontation allegedly occurred within the hearing of the various children at the party. According to J.M.P., the child eventually left with W.J.M.

J.M.P. then testified about another incident that arose in 2014 when W.J.M. was to pick up the child for visitation. According to her testimony, the parties were to meet at a location around highway 1294. When W.J.M. got out of his vehicle, he was falling and staggering and gave J.M.P. the impression that he might be intoxicated. J.M.P. did admit that she and her husband allowed the child to go with W.J.M., but they were uncomfortable with situation. When asked why she allowed the child to go with W.J.M., she replied that she knew he would get angry if the child was not allowed to go with him. J.M.P. testified that she followed W.J.M. home to make sure they got there safe. J.M.P. did testify that W.J.M. drove his truck home without any incident.

According to J.M.P., the last telephone contact W.J.M. had with the child was around Christmas of 2014. At that time, W.J.M. left a voicemail wishing the child a

merry Christmas and advised he was sending him his Christmas gifts. J.M.P. testified the Christmas gifts never arrived.

While testifying regarding the result of the trial court ordered mediation, J.M.P. testified that W.J.M. was to have initiated therapy with himself and the child. J.M.P. testified that the family therapy was never initiated and W.J.M. never advised her to have the child present for any therapy sessions.

When addressing the issue of child support, J.M.P. testified that W.J.M. was to have paid support of $431 per month. Originally, the child support was to be paid through the Texas Attorney General's office; however, at some point in time, not specified, the payments started being paid directly to J.M.P. J.M.P. testified that according to her calculations, W.J.M. was $14,000 in arrears, a sum which included his portion of the cost of the child's braces. During cross-examination, J.M.P. admitted that, on one occasion, W.J.M. built a desk for her home in lieu of child support. She also admitted that on another occasion, W.J.M. paid her some child support directly in the form of a money order. Initially, J.M.P. did not cash the money order but admitted that she finally did cash the money order.

The testimony then switched to an incident some years ago involving the child and his cousin and a propane tank. J.M.P. testified that the child and his cousin were lighting a bonfire to celebrate the 4th of July. According to the testimony, pictures taken of the event show the two minors lighting the bonfire with a propane torch. The pictures were not admitted until W.J.M. testified. J.M.P. testified that her concern regarding the incident was directed at the overall protection of the child. Her position was that the

children, including the child the subject of the proceedings, appeared to be without any proper supervision or protective clothing.

J.M.P. then testified about an incident on July 4, 2011, when W.J.M. was invited to a family 4th of July celebration. According to J.M.P., W.J.M. had visitation with the child on the 4th, and, at some point in time during the celebration, W.J.M. became intoxicated. She testified that W.J.M. attempted to leave with the child while intoxicated and he and J.M.P.'s new spouse got into a heated argument. As a result, W.J.M. ended up not leaving with the child but slept in his truck. The next day, W.J.M. left with the child.

There was one other incident involving visitation between the child and W.J.M. when, at the conclusion of the visitation period, J.M.P. went to pick the child up and W.J.M. allegedly went to the car where J.M.P. was and used profanity directed at J.M.P.'s mother-in-law regarding her son. J.M.P. testified that the child was present and heard W.J.M.'s tirade.

J.M.P. voiced concerns that in the past when W.J.M. had exercised visitation the child was more often than not placed with his paternal grandmother because W.J.M. had to be at work. If the child was not at the grandmother's house, he was left with his stepmother while W.J.M. was working.

On cross-examination, J.M.P. admitted that she had allowed W.J.M. to babysit her two other children on more than one occasion. Later in the trial, during cross-examination by W.J.M.'s attorney, J.M.P. basically stated that, if the child did not want to see his father, she would not force him to go to visitation.

W.J.M. testified that he had not made child support payments during the period of 2014 and up to the date of trial in 2015 because of an unusual number of expenses he had been forced to incur. These expenses primarily related to his remarriage and birth of a child. In addition, W.J.M. testified that his wife had been through three surgeries and was looking at another surgery. Further, W.J.M. had been hospitalized for a week for an undisclosed illness or condition. According to W.J.M.'s testimony, these were the reasons he was simply not able to pay any support from late 2012 until the date of trial.

During W.J.M.'s testimony, he admitted that he was employed by AT&T sometime in 2012. He testified that originally he was working weekends but that he had acquired some seniority and currently had weekends off. According to his testimony, W.J.M. worked 60 hours per week during the summer.

When testifying regarding the two incidents where J.M.P. accused him of being intoxicated while around the child, W.J.M. testified that, at the time he was picking the child up out near highway 1294, he had not been drinking but slipped on loose soil in the bar ditch where he had parked. W.J.M. pointed out that, despite J.M.P.'s accusation that he was intoxicated, she still allowed the child to get in the vehicle with him. As to the incident on July 4th at the lake, W.J.M. denied being intoxicated; however, he did admit he slept in his truck until the next morning.

W.J.M. testified that prior to his remarriage he had enjoyed a reasonably good relationship with the child. He admitted that the child did not want him to get remarried and the fact of his remarriage seems to have precipitated his problems in visiting with

his child. W.J.M. testified to attempts he had made to contact the child by phone. He testified that his calls were being blocked. According to his testimony, on several occasions when he called on his own personal cell phone he would get a message that "this number has been blocked." He did admit that he simply does not send Christmas cards to anyone.

When testifying regarding visitation, W.J.M. testified that, during the summer when the child was 11 years old, he called the child every week and attempted to set up some visitation with the child. According to W.J.M., on each occasion the child would say that he already had plans and could not come. W.J.M. testified that he had been denied visitation on July 4, 2012; May 30, 2013; June 30, 2013; October 13, 2013; and December 14, 2014. According to W.J.M., there were other occasions; however, these were the only dates he had written down.

Regarding the allegation that he had not attempted to set up any family counseling, as required in the mediation order, W.J.M. testified that he had engaged the services of Johnny Adams, a licensed professional counselor. He testified that he saw the counselor on a number of occasions; however, he did admit that the child was never present for any of the counseling sessions. W.J.M. testified that the child would not go to the counseling sessions because the child reportedly said that he did not need counseling.

Johnny Adams testified that W.J.M. had engaged his services as a counselor. He met with W.J.M. on nine occasions. Adams admitted that the child was never present for any of the counseling sessions.

In connection with W.J.M.'s testimony regarding his phone calls being blocked, W.J.M. offered the testimony of Kellye Edward. Edward testified that W.J.M. had come over and tried calling from his cell phone and the blocked message appeared on his phone. Edward further testified that W.J.M. tried calling on his mother's phone and that call was also blocked. He then used one of Edward's phones, and the child answered. Once the phone number was recognized, when W.J.M. tried to call again from her phone, the call was blocked. Edward testified that she heard and observed the message from her cell phone carrier that the number was blocked.

Bradley McCoy, who is the child's cousin and was present at the bonfire incident on the 4th of July, testified that W.J.M. was present and about 10 feet from the boys when the bonfire was lighted with the propane torch. He testified that he was 15 years old at the time of the bonfire.

At the conclusion of the evidence, the trial court took the matter under advisement. Later the same day, he issued an email to the litigants advising them of his decision to terminate. The Order of Termination was filed on August 12, 2015. A request for findings of fact and conclusions of law was filed on August 20, 2015. The findings of fact and conclusions of law were filed on September 8, 2015. The trial court entered 22 findings of fact and 16 conclusions of law. The pertinent findings and conclusions will be discussed in the sections of this opinion to which they pertain.

W.J.M. brings forth three issues[3] contesting the legal and factual sufficiency of the evidence to support the trial court's order of termination. We will address each issue as necessary to conclude this opinion.

Standard of Review

The natural right existing between parents and their children is of constitutional dimensions. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). A decree terminating this natural right is complete, final, irrevocable, and divests for all time that natural right as well as all legal rights, privileges, duties, and powers between the parent and child except for the child's right to inherit. *Holick*, 685 S.W.2d at 20. That being so, we are required to strictly scrutinize termination proceedings. *In re G.M.,* 596 S.W.2d 846, 846 (Tex. 1980). However, parental rights are not absolute, and the emotional and physical interests of a child must not be sacrificed merely to preserve those rights. *In re C.H.,* 89 S.W.3d 17, 26 (Tex. 2002).

The Texas Family Code permits a court to terminate the parent-child relationship if the petitioner establishes both (1) one or more acts or omissions enumerated under section 161.001(b)(1), and (2) that termination of the parent-child relationship is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2015).[4] Though evidence may be relevant to both elements, each element must be proved, and proof of one does not relieve the burden of proving the other. *See In re C.H.,* 89

[3] W.J.M.'s brief sets out six issues contesting the legal and factual sufficiency of the evidence to support each of the trial court's findings. We have grouped the legal and factual sufficiency issues together as applied to each trial court finding that supports termination.

[4] Further reference to the Texas Family Code will be by reference to "section ____" or "§ ____."

S.W.3d at 28. While both a statutory ground and best interest of the child must be proved, only one statutory ground is required to terminate parental rights under section 161.001(b). *See In re A.V.,* 113 S.W.3d 355, 362 (Tex. 2003). Therefore, we will affirm the trial court's order of termination if legally and factually sufficient evidence supports any one of the grounds found in the termination order, provided the record shows that it was also in the best interest of the child for the parent's rights to be terminated. *See id.*

Due process requires the application of the clear and convincing standard of proof in cases involving involuntary termination of parental rights. *In re J.F.C.,* 96 S.W.3d 256, 263 (Tex. 2002); *see* § 161.206(a) (West 2014). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." § 101.007 (West 2014). This standard, which focuses on whether a reasonable jury could form a firm belief or conviction, retains the deference a reviewing court must have for the factfinder's role. *In re C.H.,* 89 S.W.3d at 26.

In reviewing the legal sufficiency of the evidence supporting an order terminating parental rights, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction as to the truth of the allegations sought to be established. *See In re J.F.C.,* 96 S.W.3d at 266. "To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could

do so." *Id.* In other words, we will disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.*

When reviewing the factual sufficiency of the evidence supporting a termination order, we determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the movant's allegations." *In re C.H.,* 89 S.W.3d at 25. In conducting this review, we consider whether the disputed evidence is such that a reasonable factfinder could not have resolved the disputed evidence in favor of its finding. *In re J.F.C.,* 96 S.W.3d at 266. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

Analysis

Predicate Acts

Although J.M.P. alleged a number of predicate acts she intended to prove to support termination of W.J.M.'s parental rights, the trial court found that J.M.P. had provided sufficient evidence to demonstrate that W.J.M. violated two of the subdivisions of section 161.001(b)(1). Because proof of violation of one predicate act is sufficient to support an order of termination, we will initially concentrate on W.J.M.'s failure to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition. *See In re A.V.,* 113 S.W.3d at 362; *see also* § 161.001(b)(1)(F).

In support of the termination of W.J.M.'s parental rights for failure to support the child, the trial court made the following findings of fact:[5]

> 10. By clear and convincing evidence, [W.J.M.] failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing by [J.M.P.] of the Petition for Termination.
>
> 12. It is undisputed that [W.J.M.] had income and the ability to pay in the relevant time frame but provided no support at all. [W.J.M.] failed to pay child support, provided no Christmas or Birthday gifts, cards or phone calls.
>
> 13. [W.J.M.] had the ability to pay for at least twelve (12) consecutive months.

For purposes of analysis of the section 161.001(b)(1)(F) allegation of failure to support the child, we note that J.M.P's first amended petition for termination was filed on May 1, 2015. The one-year period means twelve consecutive months, and there must be proof of the parent's ability to pay support during each month of the twelve-month period. *In re T.B.D.,* 223 S.W.3d 515, 518 (Tex. App.—Amarillo 2006, no pet.). In the present case, the relevant time period would be a twelve-month period beginning no earlier than November 1, 2013.

When reviewing a termination under section 161.001(b)(1)(F), we first acknowledge that a previous order for child support is not evidence of a parent's ability to pay support for purposes of subsection (F). *In re D.M.D,* 363 S.W.3d 916, 920 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Further, the burden of proof is upon the party seeking termination. *In re L.J.N.,* 329 S.W.3d 667, 672 (Tex. App.—Corpus Christi 2010, no pet.).

[5] We will use the numbers associated with the particular findings in the trial court's filed findings of fact and conclusions of law.

It is W.J.M.'s position that J.M.P. failed to prove he had the ability to pay for the requisite period, much like was the case in *In re L.J.N.* *See id.* at 672-74. W.J.M. further contends that there is no evidence showing what his income was for the applicable period and, in the same vein, there is no evidence showing what his expenses were for the period. Under the analysis presented by W.J.M., these failures result in the evidence being legally insufficient. *See id.* at 672–73. However, we find *L.J.N.* factually, significantly distinguishable from the present case. In *L.J.N.,* the father was incarcerated during the entire termination proceeding. *See id.* at 669. The father filed an affidavit of indigence and requested that the trial court appoint him an attorney. *See id.* In his affidavit of indigence, the father stated that the only income he had was family donations to his commissary fund at the prison of $10.00 per month. *See id.* Further, the father testified by telephone at a hearing on the termination that, aside from the money from friends and relatives for his commissary fund, he had no source of income. *See id.* at 670. Based upon this record, the appellate court found that the evidence was legally insufficient to support termination for failure to support because the movant failed to produce evidence that the father had the ability to support the child. *See id.* at 673–74.

When we contrast that record with the one before the Court, we see significant differences. W.J.M. testified that he was employed by AT&T sometime in 2012. He stated that, in the summer, he worked around 60 hours per week. Further, W.J.M. testified that he had acquired some seniority and was not currently working weekends. The applicable period of time for payment of support was any continuous twelve-month period from November 1, 2013 until May 1, 2015.

The facts presented before us are more closely related to the facts in *In re D.M.D.,* 363 S.W.3d 916 (Tex. App.—Houston [14th Dist.] 2012, no pet.). In *In re D.M.D.*, the mother was receiving $674.00 per month in social security benefits during the applicable period of time. *Id.* at 921. Further, she admitted to not paying any support but said that she had purchased items for the children when she visited. *Id.* Based upon this evidence, the appellate court found that the mother had the ability to pay some amount of support for the applicable period of time. *Id.*

W.J.M. was not unemployed. He was working full time. Based upon this evidence, the trial court could have inferred that W.J.M. had the ability to pay some support. Much like the parent in *D.M.D.,* W.J.M. had the ability to pay some support, but he chose to pay other bills he considered more pressing. When we view this evidence in the light most favorable to the judgment, we find that there was clear and convincing evidence that W.J.M. failed to support the child for the requisite period of time. *See In re J.F.C.,* 96 S.W.3d at 266. Therefore, the evidence is legally sufficient. *See id.*

When reviewing the factual sufficiency of the evidence, we determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the movant's allegations." *In re C.H.,* 89 S.W.3d at 25. In this factual sufficiency review, we must take into account any evidence that disputes the finding of the factfinder. *In re J.F.C.,* 96 S.W.3d at 266. However, there was no disputed evidence in the sense that there was no other evidence regarding W.J.M.'s employment. Rather, W.J.M. contends that the disputed evidence is all of the medical expenses he had during the applicable period. But this evidence is nothing more than

evidence of W.J.M.'s decisions about where to allocate his earnings. *See In re D.M.D.,* 363 S.W.3d at 922. There is no dispute that he was earning money while employed at AT&T. Again, we are faced with the question of whether the trial court could imply an ability to pay some support by clear and convincing evidence. We find that it could so infer. Accordingly, the evidence was factually sufficient to support termination under subsection (F). *See In re J.F.C.,* 96 S.W.3d at 266. Accordingly, we overrule W.J.M.'s issues that the evidence was neither legally or factually sufficient to support termination under subsection (F).

Because proof of only one statutory ground under section 161.001(b)(1) is necessary, we need not review the trial court's findings regarding the second statutory ground for termination. *See In re A.V.,* 113 S.W.3d 355, 362 (Tex. 2003). However, we will consider the evidence of such allegation as it may apply to a review of whether the best interest of the child is served by termination.

Best Interest of the Child

W.J.M. contends that the trial court committed reversible error in finding that the best interest of the child would be served by terminating his parental rights. This is because, according to W.J.M., the evidence is legally and factually insufficient to support the finding.

There is a strong presumption that a child's interest is best served by preserving the conservatorship of the parents; however, clear and convincing evidence to the contrary may overcome that presumption. *See In re R.R.,* 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). The Texas Supreme Court has recognized a non-exhaustive list of

factors that are pertinent to the inquiry whether termination of parental rights is in the best interest of the child: (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by these individuals or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *see also* § 263.307 (West Supp. 2015) (providing extensive list of factors that may be considered in determining child's best interest). In examining the best interest of the child, we may consider evidence that was also probative of the predicate act or omission. *See In re C.H.*, 89 S.W.3d at 28. The best interest determination may rely on direct or circumstantial evidence, subjective facts, and the totality of the evidence. *In re N.R.T.,* 338 S.W.3d 667, 677 (Tex. App.—Amarillo 2011, no pet.).

The movant, J.M.P., need not prove all nine *Holley* factors, and the absence of evidence relevant to some of those factors does not bar a finding that termination is in the child's best interest, especially in the face of undisputed evidence that the parental relationship endangered the child. *See In re C.H.*, 89 S.W.3d at 27. No one *Holley* factor is controlling, and evidence of one factor may be sufficient to support a finding that termination is in the child's best interest. *In re A.P.,* 184 S.W.3d 410, 414 (Tex. App.—Dallas 2006, no pet.) The evidence supporting the predicate grounds for

termination may also be used to support a finding that the best interest of the children warrants termination of the parent-child relationship. *In re D.S.*, 333 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.).

As we have found above, the evidence supports the finding by the trial court of the predicate act which supported the termination of W.J.M.'s parental rights: W.J.M's failure to support the child for the requisite period of time. This evidence is probative of the best interest of the child. *See In re C.H.,* 89 S.W.3d at 28. However, as pointed out in *Holley,* any excuse for the act or omission of the parent may be considered as one of the factors in determining the best interest of the child. *See Holley,* 544 S.W.2d at 371. We will now review the applicable *Holley* factors in light of the evidence produced at trial.

Before going to an analysis of the *Holley* factors, we note that the second ground alleged as a predicate act was section 161.001(b)(1)(E), that is that W.J.M. engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child. "Endanger," for purposes of subsection (E), means more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment, but that endangering conduct need not be directed at the child. *See In re E.N.C.,* 384 S.W.3d 796, 803 (Tex. 2012). We make this notation because the findings of fact and conclusions of law we will address are primarily related to the allegation of subsection (E) that we did not address in the predicate acts portion of this opinion.

Desire of the Child

The first *Holley* factor is the desire of the child. *See id.* at 371–72. In the case before the Court, the record reveals that the trial court conducted an interview of the child before commencing testimony. In its findings of fact, the trial court found that the child wanted his father's rights terminated. Thus, the first factor weighs in favor of termination.

Emotional and physical needs of the child

The second *Holley* factor is the emotional and physical needs of the child now and in the future.[6] *See id.* In reviewing the findings of fact issued by the trial court, with a view of discerning those that might be relevant to this *Holley* factor, we find the following findings to be relevant.

> 3. The [father] last visited with the child over a year ago.
>
> 4. The [father] has not given a Christmas gift or card for over 2 years. The [father] has not given birthday gifts, wishes, or phone calls.
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> 5. The [father] has not attended any football games of the child and has attended only one practice.
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> 6. The [father] became angry at the child's [sic] birthday party on May 4, 2013. The [father] called the police to the restaurant and tried to have the mother and step-father arrested.
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> 8. The [father] had inappropriate relations with his wife on the couch at the child's football coach's house.
>
> 9. The last phone call to the child was a voice message wishing the child Merry Christmas.

[6] In many instances, we review the second and third *Holley* factors together. However, in this case, it seems more appropriate to segregate our review of each.

> 10. The [father] never exercised his extended summer visitation of 30 days.
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> 11. The [father] has never attended any parent teacher conferences.
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> 13. The [father] never initiated family therapy agreed to at Mediation in order to develop a parent child relationship.
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> 14. The [father] used foul language in the presence of the child.

Based upon these findings, the trial court concluded that W.J.M. jeopardized the child's emotional or physical health by not visiting or contacting his child, by not paying child support or providing Christmas and birthday gifts, and by being involved in family confrontations in the presence of the child. These actions by the father directly caused the endangerment to the physical and emotional well-being of the child. Further, the trial court concluded that this conduct by W.J.M. created an environment that endangered the child's physical and emotional well-being because it subjected the child to a life of uncertainty and instability.

In assessing the evidence to support the findings and the resulting conclusions of law, the record reveals the following. Regarding visiting with the child, J.M.P. testified that the child would refuse to visit with his father and she felt that she could not force the child to go with the W.J.M. The child had told his father that he did not want the father to remarry. Further, that the reduction in visitation began with the event of the father's remarriage. The father had attempted to set up weekend visitation with the child, but the child stated that "they already had plans."

The incident at the birthday party was hotly contested. According to J.M.P., the event was the birthday of one of the child's siblings, as opposed to the child's birthday as reflected in the trial court's findings of fact. The child had visitation with W.J.M. on

the date at issue, but J.M.P. had asked that the child be allowed to attend. W.J.M. agreed that the child could attend and the conflict occurred when he attempted to pick the child up for visitation. J.M.P.'s testimony about what precipitated the confrontation was non-existent. However, W.J.M. testified that he was simply attempting to pick the child up and, according to his version, he was cussed at by J.M.P.'s husband, which led to his attempt to call the police to enforce his visitation.

W.J.M. did agree that he had not sent Christmas cards; however, when discussing this, he simply stated that he did not send Christmas cards to anyone. Yet the trial court's findings also state that the last phone call that W.J.M. made to the child was at Christmas of 2014 when W.J.M. left a voice message wishing the child a merry Christmas. The record contains W.J.M.'s assertion that his phone calls were being blocked. To support this, W.J.M. offered the testimony of Kellye Edward. Edward testified to attempts made to call the child on W.J.M.'s telephone and that a message from the carrier denoted that the call was being blocked. Further, Edward testified that W.J.M. then tried calling on one of her cell phones and the call went through. However, when a call was made on the same phone a bit later, that number was shown to be blocked. This unchallenged testimony supports W.J.M.'s assertion that the reason he did not call was because his calls were being blocked. In fact, in finding 12, the trial court found that W.J.M. had testified that his calls were blocked at least 30 times.

The testimony regarding the incident at the child's coach's home was minimal. W.J.M. was present with his wife for an event when game film of the child's football game was shown. The sum of the testimony was that the coach felt W.J.M. was acting inappropriately with some woman who attended the session with him. They, W.J.M.

and the woman, who turned out to be his wife, were seated on the couch. The exact nature of the inappropriate behavior was not testified to. On examination about the incident, W.J.M. testified that he had his arm around his wife and had probably kissed her.

W.J.M. admitted that he did not attend his child's football games and had attended only one practice. The testimony was that W.J.M. was working for AT&T and was not able to attend the games due to work. The trial court entered a finding of fact that W.J.M. was working 60 hours per week. This would support W.J.M.'s testimony that he was unable to attend due to work.

In reference to W.J.M.'s failure to initiate family counseling, the record supports the proposition that he did in fact initiate counseling with Johnny Adams. Adams testified that W.J.M. had nine sessions with him. However, the record also supports the fact that the child never attended. The reasons for the child's failure to attend were only addressed circumstantially; however, the fact remains that the child did not attend. There is some testimony regarding the child's failure to attend that, when advised about the family counseling, the child purportedly said, "Why do I need to go? There's nothing wrong with me."

There was no testimony proffered that the physical needs of the child were not met as a result of any conduct of W.J.M. Further, there is not even a hint that those needs suffered as a result of any action or inaction on the part of W.J.M.

As seen by the recitation of the findings of fact and the record, all of the evidence pointed at the emotional needs of the child. That being said, no one offered any expert

testimony from any psychologist or psychiatrist about any negative effect that the actions or inactions of W.J.M. had on the child's emotional state. In fact, there was only minimal testimony offered from any source regarding the negative effect that W.J.M.'s actions or inactions had on the child's emotional state. Further, J.M.P. testified that it was her goal in this litigation to create a nuclear family, which she defined as herself, her current husband, their children, and the child.

The emotional and physical danger to the child now and in the future

The third *Holley* factor is the emotional and physical danger to the child now and in the future. As relevant to this factor, the trial court made the following findings of fact.[7]

> 7. In 2013, at the exchange of the child[,] the [father] was intoxicated, so the mother followed the [father] to make sure the child was safe.
>
> 8. The father's use of alcohol endangered the child's physical and emotional well-being.
>
> 14. The [father] did not supervise the use of propane at a bonfire involving the child.

Based upon these findings of fact, the trial court entered the following conclusion of law: "[T]he father engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child."

In reviewing the evidence regarding the incident where W.J.M. was accused of being intoxicated when he picked up the child, the record reveals the following. J.M.P.

[7] We note that there is an additional conclusion of law that might appear relevant to this discussion. Conclusion 3 states "By clear and convincing evidence, the father knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." This conclusion is reflective of a predicate act under subsection (D) of the statute. *See* § 161.001(b)(1)(D). There was no pleading for a predicate act pursuant to subsection (D). Therefore, we will not address this conclusion of law.

testified that W.J.M. was falling and staggering when he got out of the vehicle. This gave J.M.P. the impression that he was intoxicated. Yet, J.M.P. allowed the child to get in the vehicle with W.J.M. and proceed to drive off to his home. J.M.P. appears to try to lessen the impact of letting the child go with W.J.M. on that occasion by testifying that she followed W.J.M. to ensure that the child was safe. As might be expected, W.J.M. denied intoxication and testified that he simply slipped in the bar ditch when he exited his vehicle. Of note is the fact that there is no testimony about confronting W.J.M. with his purported intoxication at the time of the incident. Nor was there any testimony about smelling alcohol on his breath or other signs of intoxication.

The incident regarding the bonfire happened some years before the termination proceeding. J.M.P. offered no testimony about when the incident occurred, and W.J.M. testified that it was some four or five years before the proceedings. The incident was portrayed in a Facebook posting showing pictures of the bonfire being lighted with a propane torch. The sum of the testimony was that the child and his cousin were allowed to light a bonfire with a propane torch. W.J.M.'s testimony, which was not contradicted, was that he lit the torch and let the child and his cousin hold the torch to set the bonfire material on fire. He testified that he was no more than 10 feet from the child the entire time the bonfire was being lighted. Finally, J.M.P. testified that she knew of the bonfire incident because her son told her of it. From this information, it is rational to infer that J.M.P. knew of the incident shortly after it occurred, yet nothing in the record supports any conclusion that it was a significant enough event to confront W.J.M. with the incident until the trial. That would be some four to five years after it occurred.

Regarding the father's use of alcohol, the testimony regarding his use of alcohol was limited to two instances throughout the entire period covered by the testimony. One of those was discussed above. The second incident happened at a 4th of July celebration at a lake in 2011. W.J.M. had been invited to attend the celebration, and, apparently, he became intoxicated. When W.J.M. decided he needed to leave he attempted to take the child with him. He was asked not to do so, due to his intoxication. W.J.M. ended up spending the night in his truck and left the next day with the child. Those incidents are the sole references in the record to W.J.M.'s use of alcohol.

The *Holley* factors four through seven are not relevant to these proceedings. This is so because W.J.M. is not seeking custody and the Department of Family and Protective Services is not involved in these proceedings.

The acts or omissions of parent and any excuses offered for the act or omissions

The eighth and ninth *Holley* factors are the act or omissions of W.J.M. indicating that the parental relationship should be terminated and any excuses for those acts or omissions. This analysis is focused on the predicate act previously found by this Court to have been proven by clear and convincing evidence and the excuses W.J.M. offered regarding his failure to support the child. Without going back through the entirety of the evidence supporting our conclusion regarding the predicate act, suffice it to simply repeat that we have found that the evidence supports the conclusion that W.J.M. failed to support the child to his ability for the requisite period.

That being said, the evidence also showed a number of circumstances that we must, at this time, review. W.J.M. testified that when he obtained employment with

AT&T in 2012, he was substantially in the hole financially, due to the failure of his previous business. Shortly thereafter, he married his current wife. The couple had a child, and this required payment of certain hospital bills. However, according to the record, W.J.M. then had a number of medical expenses related to three surgeries that his wife went through. W.J.M. was also hospitalized for a week during this time period. Finally, his father-in-law moved in with him and his wife for the simple reason that the father-in-law was in bad health and had no other place to live. While we have found that these events did not relieve W.J.M. from trying to meet his support obligations, they are relevant to the question of whether the predicate act was such that it supports the proposition that termination is in the best interest of the child. *See id.* at 372. Further, we note that there is no testimony about the child wanting for anything as a result of the failure of W.J.M. to support him according to his ability.

In the final analysis, the review of the *Holley* factors reveals that the child who is 14 years of age wants his father's parental rights terminated. However, the evidence to support the conclusion that termination is in the best interest of the child is otherwise, at best, inconclusive. In reviewing the evidence for legal sufficiency we must we look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction as to the truth of the allegations sought to be established. *See In re J.F.C.,* 96 S.W.3d at 266. Under this review standard, and giving the factfinder's resolutions of credibility and weight determination the type of deference due them, we find the evidence is legally sufficient to support the trial court's determination that termination is in the best interest of the child. *See id.*

However, in a factual sufficiency review, we view the evidence without the prism of "in the light most favorable to the finding" and are asking the question of whether a reasonable factfinder could form a firm belief in the movant's allegations. *See In re C.H.,* 89 S.W.3d at 25. While conducting this review, we must determine whether the disputed evidence is such that a reasonable factfinder could not have resolved the evidence in favor of its finding. *See In re J.F.C.,* 96 S.W.3d at 266. Our review of the entire record leads to the conclusion that, in light of the disputed evidence, the evidence is factually insufficient to overcome the strong presumption that a child's interest is best served by preserving the conservatorship of the parents. *See In re R.R.,* 209 S.W.3d at 116. Therefore, a reasonable factfinder could not have formed a firm belief or conviction that termination of W.J.M.'s parental rights is in the best interest of the child. Accordingly, we sustain his contention that the evidence is factually insufficient to support the best interest ground.

Conclusion

Having sustained W.J.M.'s issue regarding the factual sufficiency of the evidence to sustain a finding that termination is in the best interest of the child, we reverse the trial court's judgment and remand this cause to the trial court for a new trial.

Mackey K. Hancock
Justice