IN THE
TENTH COURT OF APPEALS

No. 10-19-00466-CV

IN THE INTEREST OF S.M.P., D.A.P., AND R.B.P., CHILDREN

From the 74th District Court
McLennan County, Texas
Trial Court No. 2018-3776-3

MEMORANDUM OPINION

Father appeals from a judgment that terminated the parent-child relationship between him and his children, S.M.P., D.A.P., and R.B.P. The mother's parental rights were terminated based on an affidavit of relinquishment signed by her. Neither father nor mother attended the final trial. The trial court granted the termination pursuant to Subsections 161.001(b)(1)(D), (E), (N), and (O) of the Family Code and found that termination was in the best interest of the children. In this appeal, in two issues, father challenges only the legal and factual sufficiency of the evidence pursuant to Section 161.001(b)(1)(D) and (E). Because we find that the evidence was legally and factually

sufficient pursuant to Section 161.001(b)(1)(E), we affirm the judgment of the trial court in its entirety.

The Texas Supreme Court recently held that when a trial court makes a finding to terminate parental rights under section 161.001(b)(1)(D) or (E) and the parent challenges that finding on appeal, due process requires the appellate court to review that finding and detail its analysis regardless of whether other grounds are also challenged. *In re N.G.*, 577 S.W.3d 230, 235-36 (Tex. 2019). This does not alter the premise that only one ground is required to affirm a judgment of termination, even if it is not pursuant to Section 161.001(b)(1)(D) or (E), which remains the law. *In re N.G.*, 230 S.W.3d at 232-33. Because we are required to address the potential collateral consequences in a potential future termination pursuant to Section 161.001(b)(1)(M), we will address the trial court's finding pursuant to Section 161.001(b)(1)(E).

STANDARD OF REVIEW

The standards of review for legal and factual sufficiency in termination cases are well established. *In re J.F.C.*, 96 S.W.3d 256, 264-68 (Tex. 2002) (legal sufficiency); *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (factual sufficiency). In reviewing the legal sufficiency of the evidence, we view all the evidence in the light most favorable to the finding to determine whether a trier of fact could reasonably have formed a firm belief or conviction about the truth of the Department's allegations. *In re J.L.*, 163 S.W.3d 79, 84-85 (Tex. 2005); *J.F.C.*, 96 S.W.3d at 265-66. We do not, however, disregard undisputed evidence that does

not support the finding. *J.F.C.*, 96 S.W.3d at 266. In reviewing the factual sufficiency of the evidence, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id*. We must consider the disputed evidence and determine whether a reasonable factfinder could have resolved that evidence in favor of the finding. *Id*. If the disputed evidence is so significant that a factfinder could not reasonably have formed a firm belief or conviction, the evidence is factually insufficient. *Id*.

FAMILY CODE SECTION 161.001(b)(1)(E)

Section 161.001(b)(1)(E) of the Family Code provides that a parent's rights may be terminated if it is found that the parent has "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." TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Endangerment means to expose to loss or injury, to jeopardize. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Under Section 161.001(b)(1)(E), the relevant inquiry is whether evidence exists that the endangerment of the children's well-being was the direct result of the parent's conduct, which includes acts, omissions, or failures to act. *In re K.A.S.*, 131 S.W.3d 215, 222 (Tex. App.—Fort Worth 2004, pet. denied). It is not necessary, however, that the parent's conduct be directed at the children or that the children actually suffer injury. *Boyd*, 727 S.W.2d at 533. The specific danger to the children's well-being may be inferred from parental misconduct standing alone. *Boyd*, 727 S.W.2d at 533. In making

this determination, a trial court may consider conduct that occurred before and after the children's birth, in the children's presence and outside the children's presence, and before and after removal by the Department. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). A parent's past endangering conduct may create an inference that the parent's past conduct may recur and further jeopardize a child's present or future physical or emotional well-being. *See In re D.M.*, 58 S.W.3d 801, 812 (Tex. App.—Fort Worth 2001, no pet.).

Drug use may constitute evidence of endangerment. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). Domestic violence and a propensity for violence may also constitute evidence of endangerment. *In re C.J.O.*, 325 S.W.3d 261, 265 (Tex. App.—Eastland 2010, pet. denied).

The children were removed based on a report of domestic violence in the home between the father and mother of the children and neglect. The investigator was told by one of the father's older children that he had slapped the mother, although the mother denied recent domestic violence. The mother did admit to the father's overly controlling ways, including cameras placed throughout the home to observe her and the father's refusal to allow the mother to have a cell phone or to leave the residence, other than to pick up the children from school if he could not. The mother wrote in a note that the father was controlling but not violent and that she wanted to leave, presumably because she did not want the father to hear her on the cameras. The investigator helped the mother and her three children to leave and go to a domestic violence shelter.

The father denied the allegations of domestic violence to the Department and claimed that the cameras were in the home so that he could make sure that the mother's mental health issues did not cause harm to the children. During the investigation, the father convinced the mother to leave the shelter and stay with him and the children in a hotel. When the children were removed, the father recommended that the mother allow the Department to take the children so that he and the mother could remain together.

In the early stages of the proceeding, the father participated in drug testing and those tests were negative; however, he stopped taking the tests when he stopped participating in services and therefore, missed several tests, which resulted in presumed positive results. The father stopped participating in services when the mother ended her relationship with him. The father did take a drug test closer to the final trial date, which was positive for marijuana. Using drugs while he knew that abstaining from illegal drug use during the pendency of the proceedings was necessary for him to regain possession of the children can be considered as endangering conduct for purposes of the determination of whether or not the evidence is sufficient pursuant to Section 161.001(b)(1)(E).[1]

[1] The Department cites to documents contained in the Clerk's record such as the affidavit in support of the removal of the children as evidence for this Court to consider in our determination of the sufficiency of the evidence. The trial court did take judicial notice of its file, however, that notice is limited. "[W]hile a court may judicially notice the existence of an affidavit in its file, it may not take judicial notice of the truth of the factual contents contained therein." *Davis v. State*, 293 S.W.3d 794, 797-98 (Tex. App.—Waco, no pet.) (citations omitted); *Guyton v. Monteau*, 332 S.W.3d 687, 93 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Therefore, we have not considered those factual assertions as referenced by the State in our sufficiency analysis.

Reviewing the evidence presented at the final hearing and using the appropriate standards for the review of the legal and factual sufficiency of the evidence, we find that the evidence is legally and factually sufficient for the trial court to have found that the father engaged in endangering conduct pursuant to Section 161.001(b)(1)(E). We overrule issue two. Because we have found the evidence was legally and factually sufficient as to Section 161.001(b)(1)(E), we do not reach issue one regarding Section 161.001(b)(1)(D).

CONCLUSION

Having found that the evidence was legally and factually sufficient pursuant to Section 161.001(b)(1)(E), we affirm the judgment in its entirety.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed July 6, 2020
CV06