TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00825-CV

G. M., Jr. and C. P., Appellants

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF MILAM COUNTY, 20TH JUDICIAL DISTRICT
NO. CV 36,342, HONORABLE JOHN YOUNGBLOOD, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an appeal from a final order, based on jury findings, terminating the parental rights of appellants G.M., Jr., and C.P. to their children.[1] In a single issue on appeal, G.M. asserts that his trial counsel was ineffective in failing to file a motion to dismiss the case. In six issues on appeal, C.P. similarly asserts that her trial counsel was ineffective for failure to move for dismissal, but additionally challenges the legal and factual sufficiency of the evidence supporting the jury's findings that C.P. had committed each of the alleged statutory grounds for termination and that termination of her parental rights was in the best interest of the children. We will affirm the termination order.

[1] C.P. is the mother of J.M. (seven years old at the time of trial), M.T.M. (four years old at the time of trial), and M.L.M. (two years old at the time of trial). G.M. is the father of M.T.M. and M.L.M. The parental rights of a third parent, W.H., the father of J.M., were also terminated by the district court's order. However, W.H. voluntarily relinquished his parental rights and is not a party to this appeal. *See* Tex. Fam. Code § 161.001(b)(1)(K).

BACKGROUND

At the termination hearing, the jury heard evidence tending to show that G.M. had a history of illegal drug use and engaging in criminal activity. Further evidence tended to show that C.P., through her relationship with G.M. and other behavior, had exposed her children to violence, instability, and criminal activity. Other evidence tended to show that C.P. had failed to properly care for one of her children who was suffering from a terminal illness. Based on this and other evidence, which we discuss in more detail below, the district court submitted to the jury, as alternative statutory grounds within broad-form termination issues, whether G.M. and C.P. had: (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered the children's physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the children's physical or emotional well-being; (3) failed to support the children in accordance with the parent's ability during a period of one year; (4) failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children; or (5) used a controlled substance in a manner that endangered the health and safety of the children.[2] In addition to these alternative statutory termination grounds, the broad-form termination question also submitted whether it was in the best interest of the children to terminate G.M.'s and C.P.'s parental rights.[3] The jury found that G.M.'s and C.P.'s parental rights to their children should be terminated, and the district court rendered judgment accordingly. This appeal followed.

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[2] *See id.* § 161.001(1)(D), (E), (F), (O), (P).

[3] *See id.* § 161.001(2).

ANALYSIS

Ineffective assistance of counsel

In G.M.'s sole issue on appeal and C.P.'s first issue, they each assert that their respective trial counsel was ineffective in failing to move for dismissal of the termination suit. The Family Code provides that "the court shall dismiss the suit affecting the parent-child relationship filed by the Department that requests termination of the parent-child relationship," "[u]nless the court has commenced the trial on the merits . . . on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator" of the children.[4] However, "[a] party to a suit under this chapter who fails to make a timely motion to dismiss the suit under this subchapter waives the right to object to the court's failure to dismiss the suit."[5] According to G.M. and C.P., the trial on the merits commenced after the dismissal date, rendering the suit subject to dismissal. By failing to move for dismissal of the suit, G.M. and C.P. contend, trial counsel forfeited their ability to raise that issue on appeal.

"In Texas, there is a statutory right to counsel for indigent persons in parental-rights termination cases."[6] "[T]he statutory right to counsel in parental-rights termination cases embodies the right to effective counsel."[7] The Texas Supreme Court has held that in termination cases, "the appropriate standard for determining whether counsel is effective should be the same as the standard

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[4] *Id*. § 263.401(a).

[5] *Id*. § 263.402(b).

[6] *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003) (citing Tex. Fam. Code § 107.013(a)(1)).

[7] *Id*.

applied in criminal cases."[8] Accordingly, we are to apply the standard set forth by the United States Supreme Court in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[9]

"Thus, an ineffective assistance of counsel claim requires a showing of a deficient performance by counsel so serious as to deny the defendant a fair and reliable trial."[10]

"With respect to whether counsel's performance in a particular case is deficient, we must take into account all of the circumstances surrounding the case, and must primarily focus on whether counsel performed in a 'reasonably effective' manner."[11] "In this process, we must give great deference to counsel's performance, indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' including the possibility that counsel's actions are strategic."[12] "It is only when 'the conduct was so outrageous that no

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[8] *Id*.

[9] 466 U.S. 668, 687 (1984).

[10] *In re J.O.A.*, 283 S.W.3d 336, 342 (Tex. 2009).

[11] *M.S.*, 115 S.W.3d at 545 (citing *Strickland*, 466 U.S. at 687).

[12] *Id*. (citing *Strickland*, 466 U.S. at 689; *Garcia v. State*, 57 S.W.3d 436, 440-41 (Tex. Crim. App. 2001); *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.)).

competent attorney would have engaged in it,' that the challenged conduct will constitute ineffective assistance."[13]

Here, the challenged conduct is trial counsel's failure to move for dismissal of the termination suit on the ground that trial on the merits had not commenced on or before the dismissal date, which in this case was November 20, 2015. Although the dismissal date is undisputed, the parties disagree as to when trial on the merits commenced. According to the Department, trial on the merits commenced on November 16, 2015, prior to the dismissal date, when the district court first called the case, the parties conducted voir dire, and the jury was impaneled and sworn. According to G.M. and C.P., trial on the merits commenced on December 14, 2015, after the dismissal date, when the parties first presented evidence to the jury.[14]

As G.M. acknowledges in his brief, only the Amarillo Court of Appeals has addressed the issue of when trial on the merits commences for the purpose of dismissal of a termination suit

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[13] *Id*. (citing *Garcia*, 57 S.W.3d at 440; *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)).

[14] On November 16, 2015, shortly after the jury was sworn, the district court announced that it was continuing the case to December 14, 2015, due to what it described as "the odd situation we have with the scheduling in this matter." The district court was apparently referring to the dismissal date, as it had earlier provided the following explanation to the jury:

> But at any rate, because it is a CPS case, we are up against a deadline to get this matter heard under the rules that apply, and so the case had to be started today. We've got a situation involving some important witnesses in the matter and their availability to testify, and they aren't going to be able to testify until later in December. And so what we've decided we can do with regard to this issue is start the case today, meaning pick a jury today and swear in the jury that is going to be hearing the case, and then we will break until the 14th of December and pick up with the case itself, the testimony, the presentation of evidence and then, of course, the deliberation.

pursuant to section 263.401. In *In re D.S.*, the Amarillo court considered whether a trial court had abused its discretion when it had denied a father's motion to dismiss a termination suit on the ground that trial on the merits had not commenced by the dismissal date.[15] In that case, the dismissal date was July 12, 2014.[16] On July 10, the parties and counsel appeared before the trial court, and the court, after calling the case, "immediately called the attorneys representing the parties to the bench," "made inquiry into the length of time a trial would take and, upon receiving an answer, immediately 'recessed' the hearing and instructed counsel to obtain a subsequent trial date from the court coordinator."[17] After the dismissal date had passed, the father filed a motion to dismiss the suit, which the trial court denied.[18]

Observing that "[n]o substantive action was taken regarding the case" and "[n]o preliminary matters or motions were heard," the Amarillo court concluded that the motion to dismiss should have been granted.[19] After noting that it had "not found any authority directly on point" and instead relying on what it described as "direction" from an 1876 Texas Supreme Court opinion[20] and a more recent opinion by the Court of Criminal Appeals,[21] the Amarillo court held that "section 263.401 of the Texas Family Code requires more than a putative call of the case and an

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[15] 455 S.W.3d 750, 750-51 (Tex. App.—Amarillo 2015, no pet.).

[16] *Id*. at 751.

[17] *Id*. at 751-52.

[18] *Id*. at 751.

[19] *Id*. at 752-53.

[20] *Watt v. White, Smith & Baldwin*, 46 Tex. 338, 340 (1876).

[21] *Sanchez v. State*, 138 S.W.3d 324, 325, 329 (Tex. Crim. App. 2004).

immediate recess in order to comply with the statute."[22] The court added, "We would suggest that at a minimum the parties should be called upon to make their respective announcements and the trial court should ascertain whether there are any preliminary matters to be taken up. To allow the trial court to use the method set forth in the record to extend the case beyond the mandated dismissal date would completely dismember the statute and make it worthless."[23] No other appellate court has addressed this issue, although Houston's First District Court of Appeals recently cited to the Amarillo court's opinion in dicta.[24]

In this case, the material issue is one step removed from the statutory-construction question in *In re D.S.*—it is not whether the district court was required to dismiss the suit under section 263.401, but whether trial counsel was ineffective in failing to move for dismissal under that authority. It is well established that counsel should not be declared ineffective when counsel's claimed error is based on unsettled law.[25] This is because "basing an ineffective assistance claim on caselaw that is unsettled at the time of counsel's actions 'would be to engage in the kind of hindsight examination of effectiveness of counsel the Supreme Court expressly disavowed in

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[22] *D.S.*, 455 S.W.3d at 753.

[23] *Id*.

[24] *See In re D.W.*, No. 01-15-01045-CV, 2016 Tex. App. LEXIS 5200, at *26 (Tex. App.—Houston [1st Dist.] May 17, 2016, no pet. h.) (op.).

[25] *See, e.g.*, *State v. Bennett*, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013); *Ex parte Smith*, 296 S.W.3d 78, 81 (Tex. Crim. App. 2009); *Ex parte Roemer*, 215 S.W.3d 887, 894 (Tex. Crim. App. 2007); *Ex parte Bahena*, 195 S.W.3d 704, 707 (Tex. Crim. App. 2006); *Ex parte Chandler*, 182 S.W.3d 350, 358-59 (Tex. Crim. App. 2005); *Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App.1998).

Strickland . . . .'"[26] The law is unsettled when, for example, "the issue of the proper construction of [a] statute [is] unresolved and remains unclear."[27]

At the time of trial, and indeed now, the law is unsettled as to whether or not the actions of the district court amounted to commencement of trial for purposes of mandatory dismissal under Section 263.401 of the Family Code. At the time of trial, when G.M. and C.P. contend that trial counsel should have filed a motion to dismiss, neither this Court nor the Texas Supreme Court had addressed the issue, and only the Amarillo Court of Appeals had provided a recent opinion on the matter. In the absence of binding precedent holding otherwise, it would not fall below an objective standard of reasonableness for trial counsel to have concluded that trial on the merits had commenced prior to the dismissal date.[28] Accordingly, on this record, we cannot conclude that

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[26] *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) (quoting *Ex Parte Davis*, 866 S.W.2d 234, 241 (Tex. Crim. App. 1993)).

[27] *Smith*, 296 S.W.3d at 81.

[28] As the Department observes, there are cases concluding that, in other contexts, trial on the merits commences when the jury is impaneled and sworn, as it was here. *See Sanchez v. State*, 138 S.W.3d 324, 329-30 (Tex. Crim. App. 2004) (collecting cases). *Cf. In re Estate of Hill*, 761 S.W.2d 527, 531 (Tex. App.—Amarillo 1988, no writ) (observing that "[i]t is now well established that a criminal trial 'starts' with the swearing in of the trial jury" and concluding that, in civil cases, rule should be similar in order to "implement a desirable consistency between civil and criminal rules . . . which will aid judicial efficiency"). *But see State v. Turner*, 898 S.W.2d 303, 310 (Tex. Crim. App. 1995) (Baird, J., dissenting) ("[T]he phrase 'trial on the merits' designates the stage of trial where the substantive facts of the case are presented to the factfinder.").

trial counsel were ineffective for failing to move for dismissal of the suit.[29] We overrule G.M.'s sole issue and C.P.'s first issue.

Evidentiary sufficiency

We now address C.P.'s remaining issues, in which she asserts that the evidence is legally and factually insufficient to support each of the jury's findings on the termination issue. In her second, third, fourth, and fifth issues, C.P. challenges the sufficiency of the evidence supporting each of the alleged statutory grounds for termination. In her sixth issue, C.P. challenges the sufficiency of the evidence supporting the finding that termination of her parental rights was in the best interest of the children.

Standard of review

In a termination case, we ask whether the Department proved, by clear and convincing evidence, that the parent engaged in conduct that amounts to statutory grounds for termination and that termination is in the children's best interest.[30] Clear and convincing evidence is a heightened burden of proof that requires "the measure or degree of proof that will produce in the mind of the

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[29] *See Chandler*, 182 S.W.3d at 358-59 ("Ignorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel, but the specific legal proposition must be 'well considered and clearly defined.' One problem with claims of ineffective assistance of counsel is that the original lawyer's decisions are invariably challenged in hindsight. . . . But a bar card does not come with a crystal ball attached." (internal citations omitted)); *Vaughn*, 931 S.W.2d at 568 (concluding that counsel should not be found to be ineffective "when the caselaw evaluating counsel's actions and decisions in that instance was nonexistent or not definitive").

[30] *See In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002).

trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."[31] On appeal, we apply a standard of review that reflects this burden of proof.[32]

"In a legal sufficiency review, a court should 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 that its finding was true."[33] "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."[34] "A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible."[35] However, "[t]his does not mean that a court must disregard all evidence that does not support the finding."[36] The reviewing court must consider "undisputed facts that do not support the finding."[37] "If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could

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[31] Tex. Fam. Code § 101.007; *see C.H.*, 89 S.W.3d at 25.

[32] *See In re J.F.C.*, 96 S.W.3d 256, 264-66 (Tex. 2002).

[33] *Id*. at 266.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient."[38]

In a factual sufficiency review, "the inquiry must be 'whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations.'"[39] We "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing," but we also "should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding."[40] "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."[41]

Statutory grounds for termination

Although multiple grounds for termination were submitted to the jury in a standard broad-form question, the jury was required to find only one statutory ground in order to terminate parental rights.[42] Therefore, so long as there is sufficient evidence to support at least one of those grounds, we must uphold the jury's verdict.[43] We will focus our analysis on the ground stated in

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[38] *Id*.

[39] *Id*. (quoting *C.H.*, 89 S.W.3d at 25).

[40] *Id*.

[41] *Id*.

[42] *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); *Spurck v. Texas Dep't of Family & Protective Servs.*, 396 S.W.3d 205, 221 (Tex. App.—Austin 2013, no pet.).

[43] *See A.V.*, 113 S.W.3d at 362.

section 161.001(1)(E), which provides that parental rights may be terminated if the parent "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."

"Under section 161.001(1)(E), the relevant inquiry is whether evidence exists that the endangerment of the child's physical well-being was the direct result of Appellant's conduct, including acts, omissions, or failures to act."[44] "Termination under subsection 161.001(1)(E) must be based on more than a single act or omission; a voluntary, deliberate, and conscious course of [endangering] conduct by the parent is required."[45] "The requisite endangerment may be found if the evidence shows a parent's course of conduct that has the effect of endangering the child's physical or emotional well-being."[46] Although "'endanger' means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury."[47] "Rather, 'endanger' means to expose to loss or injury; to jeopardize."[48] "Endangerment can occur through

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[44] *In re M.E.-M.N.*, 342 S.W.3d 254, 262 (Tex. App.—Fort Worth 2011, pet. denied).

[45] *In re C.A.B.*, 289 S.W.3d 874, 883 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied)).

[46] *Id*.

[47] *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987) (citing *Allred v. Harris Cnty. Child Welfare Unit*, 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)).

[48] *Id*. (citing Webster's New Twentieth Century Dictionary of the English Language 599 (1976)).

both acts and omissions."[49] "[T]he conduct does not have to cause a concrete threat of injury to the child."[50] Nor does the conduct "have to occur in the presence of the child."[51] "And the conduct may occur . . . both before and after the child has been removed by the Department."[52] "If the evidence shows that the parent has engaged in a course of conduct which has the effect of endangering the child, then the finding under subsection E may be upheld."[53] "Intentional criminal activity that exposes a parent to incarceration is conduct that endangers the physical and emotional well-being of a child."[54] This is true even when the criminal activity does not result in a final conviction.[55] "As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child."[56] Therefore, "a parent's use of narcotics and its effect

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[49] *In re W.J.H.*, 111 S.W.3d 707, 715 (Tex. App.—Fort Worth 2003, pet. denied) (citing *Phillips v. Texas Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 348, 354 (Tex. App.—Austin 2000, no pet.))

[50] *Id*. at 716 (citing *In re D.M.*, 58 S.W.3d 801, 811 (Tex. App.—Fort Worth 2001, no pet.); *Director of Dallas Cnty. Child Protective Servs. Unit v. Bowling*, 833 S.W.2d 730, 733 (Tex. App.—Dallas 1992, no pet.)).

[51] *Walker v. Texas Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Bowling*, 833 S.W.2d at 733).

[52] *Id*. (citing *In re S.M.L.D.*, 150 S.W.3d 754, 757-58 (Tex. App.—Amarillo 2004, no pet.); *Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ)).

[53] *W.J.H.*, 111 S.W.3d at 716 (citing *D.M.*, 58 S.W.3d at 811).

[54] *In re V.V.*, 349 S.W.3d 548, 554 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Boyd*, 727 S.W.2d at 533; *Allred*, 615 S.W.2d at 806; *Avery v. State*, 963 S.W.2d at 553).

[55] *See In re T.G.R.-M.*, 404 S.W.3d 7 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *In re S.M.L.*, 171 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

[56] *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied) (citing *In re S.D.*, 980 S.W.2d 758, 763 (Tex. App.—San Antonio 1998, pet. denied)).

on his or her ability to parent may qualify as an endangering course of conduct."[57] Additionally, "[d]omestic violence, want of self control, and propensity for violence may be considered as evidence of endangerment."[58] The violence does not have to be directed toward the child or result in a final conviction—"Texas courts routinely consider evidence of parent-on-parent physical abuse in termination cases without specifically requiring evidence that the conduct resulted in a criminal conviction."[59] Similarly, exposing one's child to the risk of domestic violence from others may also constitute endangering conduct.[60]

Here, the evidence in support of the jury's endangerment finding included testimony tending to show that C.P. had exposed one of her children to domestic violence as a result of her relationship with G.M. C.P. testified that, on one occasion, during a physical altercation with G.M., G.M. had punched her twice and that, during his attempt to flee prior to the arrival of the police,

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[57] *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) (citing *In re S.N.*, 272 S.W.3d 45, 52 (Tex. App.—Waco 2008, no pet.); *Toliver v. Texas Dep't of Family & Protective Servs.*, 217 S.W.3d 85, 98 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *R.W.*, 129 S.W.3d at 739); *see also Walker*, 312 S.W.3d at 618 ("Because it exposes the child to the possibility that the parent may be impaired or imprisoned, illegal drug use may support termination under section 161.001(1)(E).").

[58] *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also In re C.J.O.*, 325 S.W.3d 261, 265 (Tex. App.—Eastland 2010, pet. denied) ("If a parent abuses or neglects the other parent or other children, that conduct can be used to support a finding of endangerment even against a child who was not yet born at the time of the conduct.").

[59] *V.V.*, 349 S.W.3d at 556 (citing *In re K.L.R.*, 162 S.W.3d 291, 305 (Tex. App.—Tyler 2005, no pet.); *In re W.S.M.*, 107 S.W.3d 772, 773 (Tex. App.—Texarkana 2003, no pet.); *In re M.R.*, 975 S.W.2d 51, 55 (Tex. App.—San Antonio 1998, pet. denied); *Allred*, 615 S.W.2d at 805).

[60] *See In re M.R.*, 243 S.W.3d 807, 818-19 (Tex. App.—Fort Worth 2007, no pet.); *Sylvia M. v. Dallas Cnty. Welfare Unit*, 771 S.W.2d 198, 204 (Tex. App.—Dallas 1989, no writ).

he had also hit M.T.M., who was eight months old at the time.[61] Also during that incident, C.P. recounted, M.T.M. was hit by G.M.'s girlfriend, who was also involved in the altercation. C.P. testified that, although this was the only time that M.T.M. had been directly involved in one of her fights with G.M., it was not the first time that G.M. had hit her. According to C.P., G.M. had also assaulted her and the presumed father of one of her other children on another occasion. C.P. admitted that, on at least one occasion, she had failed to report G.M.'s assault of her to the police. On another occasion, C.P. testified, M.T.M. was injured while he was in G.M.'s care. According to C.P., G.M. had told her that M.T.M. had cut himself while carrying a glass cup, but C.P. had observed "some cuts that were on the top of [M.T.M.'s] head that didn't make sense." C.P. testified that she suspected that the injury might have been more serious than what G.M. had described to her.

There was also an allegation (still under investigation at the time of trial) that G.M. had sexually abused C.P.'s daughter., J.M. C.P. testified that, initially, she did not believe that the abuse had occurred. She explained, "I would like to believe he didn't do it. I would hope he didn't do it." There was also evidence presented that, in violation of instructions from the Department, C.P. had discussed the alleged abuse with her daughter and had recorded a conversation with her daughter concerning the abuse.

The evidence also tended to show that G.M. had a history of using illegal drugs and that C.P., by her own admission, had heard of G.M.'s drug use "from numerous people." Despite this history, C.P. acknowledged that she had allowed the children to be in G.M.'s care.

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[61] C.P. characterized G.M.'s hitting of M.T.M. during the altercation as G.M. "accidentally bumping into" the child. C.P. testified that she did not believe that G.M. "would ever physically harm [M.T.M.] on purpose."

C.P. herself had a history of illegal drug use, specifically cocaine and marihuana, which, according to the testimony of her grandmother, had resulted in C.P. losing custody of her two oldest children. C.P. claimed that she was no longer using drugs, other than a prescription for Adderall to treat ADHD, and the evidence tended to show that she had tested negative for drug use on multiple occasions during the pendency of the case. G.M., however, tested positive for drug use while the case was ongoing.

Additionally, there was evidence presented that C.P. was friends with B.W., a man who, according to the testimony of CPS caseworker Kimberly Dodd, had pleaded guilty to injuring his own child and "was still considered to be a risk" to children. Despite this risk, there was evidence presented that, on at least one occasion, C.P. had either knowingly allowed her youngest child to be in B.W.'s care or was unaware that the child had been in B.W.'s care. On another occasion, according to the testimony of Dodd, B.W. had accompanied C.P. to a supervised visit with the children.

The Department also presented evidence tending to show that G.M. and C.P. had together committed the offense of theft of property and that the children were with them in their car at the time they committed the offense. C.P. admitted that she had pleaded guilty to committing this offense and that, as a result, she was currently on probation. While the case was ongoing, G.M. and C.P. had also been arrested for the offense of burglary of a habitation, although C.P. claimed that the charge against her had been "thrown out" after she "took a lie detector test."

There was also evidence presented that C.P. had neglected the medical needs of M.T.M., who had a terminal autoimmune disorder. According to the testimony of K.P. and M.P., the children's current caregivers, C.P. had failed to properly feed M.T.M. while the child was at the

hospital, giving him cereal "straight out of the box" when the doctors had directed that it be prepared with thickened milk and letting the child drink soda out of a straw even though the child had undergone a tracheotomy and was not allowed to drink out of a straw. Also, Dodd testified that C.P. had on one occasion taken action that had delayed the delivery of important medical supplies to K.P. and M.P. Dodd testified that C.P. had refused to give the supplies to a courier who was scheduled to deliver them to K.P. and M.P. and, according to Dodd, when she had later called C.P. to inquire about the whereabouts of the supplies, C.P. had lied about where the supplies were located.

Viewing the above and other evidence in the light most favorable to the jury's finding, it tends to show that C.P. had: (1) engaged in criminal activity on multiple occasions and committed at least one crime in the presence of her children; (2) exposed at least one of her children to domestic violence that had, on one occasion, resulted in the child being hit; (3) exposed her daughter to possible sexual abuse by G.M. and, in violation of Department instructions, discussed the alleged abuse with her daughter; (4) allowed G.M., a known drug user, as well as B.W., a man who had pleaded guilty to injuring his own child, to care for and be in the presence of her children; (5) disregarded instructions regarding the medical care of her terminally ill son and interfered with the delivery of needed medical supplies to his caregivers. This and other conduct, the jury could have reasonably inferred, had endangered the children's physical and emotional well-being. Accordingly, we conclude that the evidence is legally sufficient to support the jury's endangerment finding.

After giving due consideration to the disputed evidence in the case, we reach the same conclusion regarding the factual sufficiency of the evidence. Throughout her testimony, C.P. either denied or attempted to excuse or minimize the seriousness of the above incidents that supported the

jury's endangerment finding. However, the jury, as factfinder, was free to disbelieve C.P.'s version of events. On this record, we cannot say that "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" that C.P. had endangered the physical and emotional well-being of her children.

Because we conclude that the evidence is legally and factually sufficient to support the jury's endangerment finding, we need not consider the sufficiency of the evidence supporting the other alleged statutory grounds for termination.[62] We overrule C.P.'s second, third, fourth, and fifth issues.

Best interest of the children

Finally, we address C.P.'s sixth issue, in which she asserts that the evidence is legally and factually insufficient to support the jury's best-interest finding. When deciding the best-interest issue, we consider the well-established *Holley v. Adams* factors, which include the child's wishes, the children's emotional and physical needs now and in the future, emotional or physical danger to the children now and in the future, the parenting abilities of the party seeking custody, programs available to help that party, plans for the children by the party seeking custody, the stability of the proposed placement, the parent's conduct indicating that the parent-child relationship is improper, and any excuses for the parent's conduct.[63] The Department need not prove all of the *Holley* factors as a "condition precedent" to termination, and the absence of some factors does not bar the factfinder

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[62] *See* Tex. R. App. P. 47.1; *Spurck*, 396 S.W.3d at 221.

[63] *See* 544 S.W.2d 367, 371-72 (Tex. 1976).

from finding by clear and convincing evidence that termination is in a child's best interest.[64] The need for permanence is the paramount consideration when determining the children's present and future physical and emotional needs.[65] Moreover, a parent's statutorily offensive conduct is often intertwined with the best-interest determination.[66]

In addition to C.P.'s statutorily offensive conduct, summarized above, the jury also heard evidence tending to show that C.P. had psychological issues that, the jury could have reasonably inferred, would make her an unsuitable caregiver for the children moving forward. Dr. James Shinder, a psychologist who had performed a psychological evaluation of C.P., testified that C.P. had admitted to him during the evaluation "that she cannot consistently maintain adequate self-control," that she "has no friends and basically felt that she had been abandoned by her own family," and that she was "without any resource[s] at this time." Additionally, Shinder explained, C.P. scored in the high range of what he characterized as "coldheartedness," which Shinder described as "not having that feeling of empathy and sympathy for other people and especially for children." Shinder also testified that C.P. scored in the high range of what he termed "stress immunity," which he described as being unable to see "cues" signaling the potential for "risk, danger, and harm." This was problematic from a parenting perspective, Shinder explained, because "if you don't see the

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[64] *C.H.*, 89 S.W.3d at 27.

[65] *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Dupree v. Texas Dep't of Protective and Regulatory Servs.*, 907 S.W.2d 81, 87 (Tex. App.—Dallas 1995, no writ)).

[66] *Horvatich v. Texas Dep't of Protective & Regulatory Servs.*, 78 S.W.3d 594, 601 (Tex. App.—Austin 2002, no pet.) (citing *Holley*, 544 S.W.2d at 372; *Leal v. Texas Dep't of Protective & Regulatory Servs.*, 25 S.W.3d 315, 321 (Tex. App.—Austin 2000, no pet.)).

cues, then you can't . . . protect yourself [and] you can't protect the children [for whom] you're responsible . . . ." Shinder added that C.P. "has an inflated idea of who she is and what she's able to do" and that "she doesn't concern herself about consequences, not only for herself but also for her children." In Shinder's opinion, C.P. places her own needs ahead of those of her children and therefore is incapable of acting in the best interest of the children. Following his evaluation of C.P., Shinder's "overriding conclusion was that she was not a suitable parent at that time."

There was other evidence tending to show that C.P. would be unable to care for the children on her own. According to the evidence presented, C.P. receives federal supplemental security income as a result of a disability, specifically bipolar disorder.[67] However, CPS caseworker Dodd testified that C.P. "requires a payee over her funds and has been determined by SSI to not be fit to handle her own finances. Therefore, we do not feel that she would be able to take care of those things for [the children]." Dodd added that C.P. "had been deceptive in pretty much all areas" of Department concern, had "excessive paramours," including "three during this case,"[68] and had demonstrated an "inability to maintain stable housing," having moved six times in the past eighteen months. Also, C.P.'s grandmother expressed concern regarding C.P.'s "associating with known criminals" and "allow[ing] her children to live with people that sell drugs or take drugs." The grandmother did not believe that C.P. was capable of changing her lifestyle.

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[67] There was disputed evidence at trial concerning whether C.P. continues to suffer from bipolar disorder or if the condition had been successfully treated.

[68] Moreover, C.P. acknowledged in her testimony that her "main problem is bad choices in men. I have always had bad choices in guys."

The children's current caregivers were C.P.'s aunt, K.P., and K.P.'s husband, M.P. K.P. testified that she is a manager at a convenience store and M.P. testified that he is retired and had served as a law-enforcement officer for 31 years. The couple live in College Station. According to K.P., she and her husband would frequently visit M.T.M. at the hospital after he had been diagnosed with a terminal illness, and they would often be there with him when C.P. and G.M. were unavailable or absent. At some point toward the end of M.T.M.'s hospital stay, K.P. explained, she and her husband were given custody of the children by CPS. K.P. testified that the children had been in their care for approximately 18 months and were doing "wonderful" and "awesome." K.P. added that the children were happy in their new home, with the two girls sharing a bedroom and M.T.M. having his own bedroom. K.P. further testified that she wanted to adopt all three children. M.P. provided similar testimony regarding their involvement in the case, the needs of the children, and their ability to provide for those needs.

Viewing the above and other evidence in the light most favorable to the jury's finding, we conclude that the evidence is legally sufficient to prove that termination of C.P.'s parental rights was in the best interest of the children. The jury could have reasonably inferred that the children were not safe in C.P.'s care, that she did not have the ability to adequately care for the children, and that the children's current placement would provide a more safe and stable environment for them.

After giving due consideration to the disputed evidence in the case, we reach the same conclusion regarding the factual sufficiency of the evidence. C.P. testified that she loved and was able to care for the children and claimed that her life had become more stable in recent years. Additionally, Dr. Shinder, despite believing that C.P. was not "a suitable parent at that time,"

testified that C.P. has "sufficient ability to function as a parent," "can understand what needs to be done," and has "sufficient intelligence to provide care for children." Moreover, Melee Munoz, a licensed professional counselor who had provided counseling services to C.P., testified that C.P. understood what she had done wrong in the past, was currently concerned for the children's well-being, and would be able to put their needs ahead of her own. Nevertheless, in light of the evidence supporting the jury's finding, summarized above, we cannot say that "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" that termination of C.P.'s parental rights was in the best interest of the children.[69]

We overrule C.P.'s sixth issue.

CONCLUSION

We affirm the district court's termination order.

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 23, 2016

[69] *See In re K.M.L.*, 443 S.W.3d 101, 117 (Tex. 2014); *J.F.C.*, 96 S.W.3d at 266.