NUMBER 13-17-00064-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**IN THE INTEREST OF S.M.T.
AND L.C., MINOR CHILDREN**

**On appeal from the 343rd District Court
of Live Oak County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Contreras**

This appeal concerns the termination of parental rights to minor children S.M.T. and L.C.[1] Appellants are G.C., the biological father of L.C., and B.S., the biological mother of both children. Both appellants contend that the evidence was factually and legally insufficient to support termination. G.C. additionally argues that he "was not

[1] We refer to the children and their parents by their initials in accordance with the rules of appellate procedure. *See* TEX. R. APP. P. 9.8(b)(2).

represented effectively by counsel." We affirm.

I. BACKGROUND

S.M.T. was born to mother B.S. and father D.T. on June 9, 2010. L.C. was born to mother B.S. and father G.C. on August 21, 2014. The Department of Family and Protective Services (the Department) filed a petition seeking termination of both appellants' parental rights on June 17, 2015.[2] Trial took place before a Live Oak County jury over five days in December 2016, during which B.S. was represented by counsel and G.C. appeared pro se.

Department investigator Mary Rojas testified that she was assigned to the case in May of 2015 following a report of physical abuse. According to Rojas, S.M.T. had been absent from her pre-kindergarten class for three days and had returned with "some scabbing on her face, her cheek and her neck." School officials reported that S.M.T. told them she had a "secret" which she could not tell. Rojas testified that, during an interview, S.M.T. "disclosed that [G.C.] had been throwing furniture" and "started talking about how [G.C.] wanted to go outside and shoot himself with the gun." S.M.T. also told Rojas that G.C. "smacked her mouth" and twisted her leg; that G.C. also smacked L.C.'s mouth; and that G.C. would pull B.S. by the ears. S.M.T. also reported that ice was "put on her private" because of "bruising." According to Rojas, school officials advised B.S. of her daughter's injuries but B.S. "wasn't concerned about" the injuries and instead "focused on herself."

Penny Green interviewed S.M.T. at the Children's Advocacy Center in Corpus

[2] The petition also sought to terminate the parental rights of D.T., S.M.T.'s biological father. D.T. filed a counterpetition seeking sole managing conservatorship of S.M.T. At some point before trial, the Department withdrew the part of its petition seeking termination of D.T.'s parental rights.

Christi. Green testified that S.M.T. reported that the "secret" she had was that G.C. had slapped her. S.M.T. did not mention sexual abuse in the interview. On cross-examination, Green agreed that S.M.T. stated that "something like three different people at school touch[ed] her," but Green did not follow up on those reports because she understood that S.M.T. was "identifying other children." A video recording of the interview was entered into evidence. On the recording, S.M.T. said that when she gets in trouble and her mother is at work, G.C. spanks her with his paddle and his belt and twists her leg. S.M.T. further stated that B.S. and G.C. work at the same place. When Green asked S.M.T. what happened to her face, S.M.T. replied: "I can't tell anybody my secret." She stated that B.S. told her to keep the secret, and the secret was that G.C. "hit my face really hard" and that he "used to [hurt me] every day."

Rojas took S.M.T. to Driscoll Children's Hospital, where she was found to have "various bruising" and where she made an outcry of sexual abuse. Hospital records entered into evidence show the following patient history:

> Patient states, "My daddy, [G.C.], twisted it. My leg (patient indicates right leg by pointing) because I didn't like it. I didn't want him to twist my leg. He hits me with his belt because I'm not being-have [sic]. My mom said it's a secret, not to tell anyone. My dad hurt my face and twisted my leg."
>
> Patient also states, "My daddy, [G.C.], put his finger here in my private (patient indicates female sexual organ by pointing) under my clothes, inside and here (patient indicates anus by pointing) with his finger, inside."

According to Rojas, B.S. denied any abuse by G.C. B.S. claimed that G.C. "would never hurt" S.M.T. and that S.M.T. was lying. When asked about S.M.T.'s bruising, B.S. said that S.M.T. "had a disease" that "make[s] her bruise easily"; however, the Department did not find that any such diagnosis had ever been made. The Department then instituted a safety plan requiring B.S. to not allow G.C. to have contact with either

child. The safety plan was signed by both parents and provided that B.S.'s friend, Justina Early, would monitor B.S. and report any contact between G.C. and the children to the Department.

Rojas testified that the Department soon received reports that B.S. was having contact with G.C. In particular, a neighbor of B.S. reported that he heard adult voices yelling from B.S.'s house and saw G.C.'s vehicle parked there. Believing that the safety plan had been violated, Rojas visited B.S. at her workplace and observed that G.C. was there with B.S. At a later meeting at B.S.'s house, B.S. and Early "became defensive" when they were told that G.C. could not have visitation with S.M.T. According to Rojas, B.S. and Early "were saying that [G.C.] could be around [S.M.T.] if they wanted him around" and B.S. refused several requests by Rojas to place the children with another person, such as S.M.T.'s biological father D.T. B.S. told Rojas that G.C. had been more of a father to S.M.T. than D.T. and that she would rather see S.M.T. placed in foster care than with D.T. However, Rojas observed D.T. visit S.M.T. in June of 2015 and, according to Rojas, the visit "went great" and "they seemed to be pretty bonded." Rojas stated that she never had any concerns about D.T.'s relationship with S.M.T. Rojas later explained that B.S. did not want D.T. to have custody of S.M.T. because D.T.'s "grandfather used to beat her" and because D.T. used drugs.

Because no alternative placement could be agreed upon, the Department took custody of the children in June 2015.[3] According to Rojas, Early resisted surrendering custody and initially refused to open the doors to the car that she and the children were

[3] The notice of removal, which was entered into evidence, states that the reason for the removal was that "Mom is showing non-protective capabilities due to child making outcries of physical and sexual abuse."

in. Eventually, Early complied but she "was very verbally aggressive" and "ended up getting arrested due to the way she was acting." S.M.T. was placed with D.T., and L.C. was placed with G.C.'s mother.

At a full adversary hearing on July 1, 2015, Rojas testified that she believed B.S. endangered the children because she "did not believe her daughter's outcries." On cross-examination, Rojas clarified that B.S.'s neighbors never actually saw G.C. at B.S.'s house following institution of the safety plan. She concluded that the safety plan had been violated because the neighbor heard adult voices yelling at B.S.'s house and saw G.C.'s vehicle parked there.

A service plan requiring, among other things, that appellants undergo counseling and assessments, was adopted as an order of the court. Alejandra Pinon, who replaced Rojas as the Department caseworker, testified that neither appellant complied with the service plan. Pinon explained that, although G.C. and B.S. completed the services required of them, they did not cooperate with the Department because they were not honest as to their relationship with each other. Pinon stated that B.S. had not demonstrated a willingness to protect her children because she continued her relationship with G.C. According to Pinon, both appellants were told repeatedly that, if they continued their relationship with each other, "that would be a problem towards reunification" with the children. Nevertheless, in October of 2015, Pinon's assistant discovered that B.S. had maintained internet social media accounts using both her name and G.C.'s name.

Debra Sublett, S.M.T.'s counselor, testified as follows about a therapy session she had with S.M.T. in September of 2015:

> We play with toys, with sandboxes those kind of things. And I just let them play.

> I never ask any leading questions. I did not ask her about family. I did not ask her about mom. I did not ask her about [G.C.]. And in the medium of play, she began to talk. And I put what I have in my notes in quotes so it is from her and not my words.
>
> She began to say, "[G.C.] touched me." And this is in the middle of play. And so I asked her, "So, what kind of touch?" And she pointed to her genital area and her anal area. She said—and I asked her, "Was this touch inside or outside?" She said, "It was inside." She said, "I was on the bed and he touched me. And it happened lots of times."

At another session in November 2015, D.T. reported to Sublett that S.M.T. had asked him to "take a picture of her while she was in the shower." Sublett asked S.M.T. about this, and S.M.T. reported that "[G.C.] took pictures of me in the shower while mom was at work" and "[h]e looked at my privates."

The next therapy session took place in December 2015. B.S. brought S.M.T. to the session, and Sublett testified:

> As [S.M.T.] came in, she was quieter than she had been. Really reluctant to engage. She did sit down and looked away from me and began to play and use the sand and the toys.
>
> And very quickly she said, regarding [G.C.], "No, he didn't. He didn't touch. It was another girl when I was in kindergarten. She touched my private. She took me to the restroom and pulled my pants down."

Subsequently, D.T. tested positive for cocaine, and S.M.T. was removed from his custody and placed with a foster family.

Clinton Davis, a detective with the Three Rivers Police Department, testified that he was assigned in May 2015 to investigate S.M.T.'s allegations of physical and sexual abuse. Davis stated that, after he learned that S.M.T. accused G.C. of taking pictures of her in the shower, he obtained a warrant to search G.C.'s residence, which he and other officers executed on February 10, 2016. A bodycam video recording of the execution of the warrant was entered into evidence. In the video, police can be seen searching the

residence and seizing various electronic devices. They eventually discovered B.S., who had been hiding under a blanket near a bed. B.S. can be heard saying, "I'm not supposed to be here."

G.C. testified that L.C. sustained a spiral fracture in his arm when he was eight months old. According to G.C., he was watching the children while B.S. was at work, and he had placed L.C. in a "bouncer" on a table. S.M.T. was "running around playing" and bumped into the table, causing L.C. to fall. G.C. stated that he "was in the kitchen washing dishes" at the time but went immediately to the living room and "grabbed [L.C] . . . the first way I could think, by the arm."

G.C. testified that he loved S.M.T. and treated her as if she were his own daughter. He conceded that he disciplined her about five times by spanking her with a belt "on her bottom" with her pants up. He denied ever slapping S.M.T. on the face or twisting her leg.

G.C. stated that D.T. started to have visitation with S.M.T. in April of 2015. G.C. testified that B.S. was happy for D.T. to have visitation. He was "confused" when B.S. told him, in May of 2015, that S.M.T. had made an outcry of abuse against him. G.C. acknowledged that he signed the safety plan and moved out of B.S.'s house. He denied having any contact with the children after signing the safety plan. He also stated that he and B.S. discontinued their relationship, and that he was seen at B.S.'s workplace because he also worked there. According to G.C., he and B.S. resumed their relationship sometime between December 2015 and February 2016. The following colloquy then occurred:

> Q. [Department's counsel] And are you aware—were you aware then that if you-guys continued a relationship, that was

	going to be an obstacle for the children being with you and her?
A. [G.C.]	Yes.
Q.	And y'all still decided to get back together?
A.	Yes.
Q.	Okay. Why did y'all decide to get back together when you knew what it was going to cost you?
[G.C.]:	I am sorry. I am going to have to stop. I don't feel comfortable anymore. . . .
	(Jury left the courtroom.)
THE COURT:	[G.C.], are you invoking your 5th Amendment privilege?
[G.C.]:	Yes.
THE COURT:	You are seeking to have all of your interview terminated at this time?
[G.C.]:	Yes.
THE COURT:	You don't want to be asked any questions by [the attorney ad litem], [D.T.'s attorney] or [B.S.'s attorney]?
[G.C.]:	No.

The trial court permitted G.C. to terminate his testimony at that time.

B.S. testified that she grew up in Michigan, where she met D.T. and gave birth to S.M.T. She stated she and D.T. ended their relationship in 2011 when he "forced himself on" her, leading to D.T.'s arrest and incarceration for three months. After D.T. got out of jail, he moved to Texas. B.S. moved to Texas in March of 2013 to try to revive the relationship and to escape a "bad situation" with her family, but "[i]t didn't work out." She met G.C. in August of 2013 and moved in with him in December of that year. She stated that G.C. did not return to her home after the safety plan was instituted. B.S. testified, as

G.C. did, that G.C. was at her workplace only because he also worked there. However, she stated that she reunited with G.C. after December 2015 and that they were still seeing each other at the time of trial. B.S. acknowledged that she was told at a previous court hearing that maintaining a relationship with G.C. was something that would be an obstacle to reuniting with the children. She testified she got back together with G.C. because she believed that "when I stayed away, the Department still proceeded to take my children even when I followed a Safety Plan. I knew that it didn't matter what I did or did not do, the Department was going to decide for themselves what they wanted to do."

According to B.S., L.C. was five months old, not eight months old, when he fractured his arm while she was at work. Around that time, S.M.T. started to have visitation with D.T. B.S. testified that S.M.T.'s teacher advised her that S.M.T. was starting to behave differently. B.S., believing this change in behavior was because of the visits with D.T., sought to change D.T.'s visitation access. She did not recall saying that she would rather see S.M.T. go into foster care than with D.T.

B.S. stated she was aware that G.C. would spank S.M.T. with a belt, but she denied that she herself ever hit the child with a belt. According to B.S., S.M.T. told her that she made the outcry of abuse because she "was upset with [G.C.] because we did not get her a balloon the day before." B.S. stated that she did not learn of the outcry of sexual abuse against G.C. until after S.M.T. went to the hospital and was interviewed at the Child Advocacy Center. B.S. testified that she was "shocked" when she learned of the sexual abuse outcry. B.S. stated that she believed her daughter at first, but that S.M.T. later told B.S. "that [G.C.] didn't do it" and that "[t]hey made me say it."

B.S. testified that Rojas came to her house with law enforcement to take custody

of the children in June 2015. B.S. stated that she asked Rojas to temporarily place the children in the custody of her "mother-in-law," G.C.'s mother, who was "licensed for foster care," as well as her own mother and her neighbors, but Rojas "denied" the requests. She stated that if she is awarded custody, she plans to live by herself with the children and will be able to put the children in school or day care while she works full time.

The foster mother for the children since December 2015, Rebecca Saenz, testified that S.M.T. told her that G.C. "had done some bad things to her and that she was very, very scared." S.M.T. told Saenz that G.C. had "slapped her in the face, then took her to her room and spanked her" and that G.C. "twisted [L.C.]'s arm and hurt him." Saenz testified that, after S.M.T. visited with B.S., S.M.T. reported that B.S. "had taken her and her brother into the bathroom and had showed her a video of [G.C.]" and told her not to tell anyone about it.

Octavio Flores, therapist for both appellants, testified that G.C. and B.S. are very committed to each other and would like to move away from the area with the children "[i]f the case went that way." Suzanne Kirkpatrick, a social worker at Driscoll Children's Hospital, testified that B.S. "reported if she loses [G.C.], that she will have nothing" because she had no support system as her family lives out of state. Kirkpatrick conceded that she had no independent recollection of meeting with and interviewing B.S. but was relying on her notes. B.S. denied speaking to Kirkpatrick or telling anyone that she would have nothing if she loses G.C.

Gwen Morgan, a licensed professional counselor, testified that she provided therapy for S.M.T. in 2013, after the family had moved to Texas. S.M.T. was angry with D.T. and his family. Morgan testified that she was "very impressed" with B.S.'s parenting

skills.

Karen Kibbe, a Court Appointed Special Advocate (CASA) who was appointed as guardian ad litem for the children, testified that she has volunteered over 250 hours on this case between February and December 2016. Kibbe stated that this was one of her first two cases serving as CASA. She monitored visits that S.M.T. had with each of her parents. Kibbe stated that she was concerned that the service plan instituted by the Department did not address the issues that the Department professed to be concerned about. Specifically, Kibbe stated that B.S. "was doing everything that her plan said, but she wasn't staying away from [G.C.], from [the Department's] point of view. And that seemed to be their problem. But there was nothing in her Service Plan that said she should." Regarding G.C., Kibbe stated she agreed with the Department's assessment that he should not be alone with children, given the bruises on S.M.T. and L.C.'s broken arm. However, she questioned whether parenting and anger management classes, which were required by the service plan, were appropriate corrective actions. She also stated that the Department "ignored" her earlier recommendation that B.S. be permitted visitation with the children both separately and together.

Kibbe testified that, based upon her investigation and analysis, she eventually came to believe that S.M.T. had been "programmed" by D.T. and D.T.'s mother to make the outcries of sexual abuse against G.C. She noted that S.M.T.'s outcries closely resembled accounts in a diary by D.T.'s mother which was provided to the Department. She stated she raised these concerns with the Department but they were not addressed.

Kibbe submitted reports to the court in May and December 2016. The reports indicated that both B.S. and G.C. were complying with the requirements contained in the

service plan. Kibbe expressed concern, however, that the Department and the attorney ad litem for S.M.T. were willing to place her in the custody of D.T., "who has a criminal record for family violence." Kibbe further noted that, whereas B.S. had reported that she was unable to obtain public housing because she correctly told the Alice Housing Authority that she did not have custody of her children, D.T. obtained public housing by incorrectly stating to his local housing authority that he did have custody of the children. Kibbe recommended that the parties' parental rights not be terminated. In particular, she testified that B.S.'s "long-term honesty; i.e., with the Alice Housing Authority and multiple efforts to improve her skills both as a parent and in the workplace should earn her consideration for being reunified with her children." Kibbe recommended that either the Department "return and monitor" the children with B.S., or that G.C.'s mother be given permanent managing conservatorship. She further recommended that the children continue to have supervised visitation with their respective fathers.

On cross-examination, Kibbe conceded that, when she first met with B.S. in February 2016, B.S. informed her that she was not living with G.C. but was "maintaining contact" with him. She also testified that she was unaware that S.M.T. had reported sexual abuse when she was taken to Driscoll Children's Hospital. Kibbe stated she was surprised to learn that B.S. and G.C. were wearing matching rings in the courtroom.

The jury found by clear and convincing evidence that: (1) both appellants knowingly placed or allowed their respective children to remain in conditions or surroundings which endangered their physical or emotional well-being; (2) both appellants engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered their physical or emotional well-being; and (3)

termination of each appellant's parental rights was in the children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (b)(1)(E), (b)(2) (West, Westlaw through Ch. 49, 2017 R.S.). The jury further found that the Department should be appointed permanent managing conservator for both children. The trial court rendered an order reflecting the jury's findings and this appeal followed.[4]

II. EVIDENTIARY SUFFICIENCY

G.C. argues by his second and third issues, and B.S. by her sole issue, that the evidence is legally and factually insufficient to support findings under family code subsection 161.001(b)(1) or to support a finding that termination of parental rights was in the children's best interests.

A. Applicable Law and Standard of Review

Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties and powers normally existing between them, except for the child's right to inherit from the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re L.J.N.*, 329 S.W.3d 667, 671 (Tex. App.—Corpus Christi 2010, no pet.). "Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the 'death penalty' of civil cases."

[4] B.S.'s initial court-appointed appellate attorney filed an *Anders* brief stating that there were no non-frivolous grounds for appeal. *See Anders v. California*, 386 U.S. 738 (1967); *Porter v. Tex. Dep't of Protective & Regulatory Servs*., 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, no pet.). B.S. then filed a pro se response contending that the evidence was legally and factually insufficient to support termination of her parental rights. We found this issue to be arguable and non-frivolous, and we therefore abated the appeal and remanded for appointment of new appellate counsel. The trial court appointed new counsel on May 1, 2017, but counsel moved to withdraw. We abated and remanded to the trial court to determine whether counsel should be granted leave to withdraw; the trial court granted counsel leave to withdraw and appointed new counsel. New counsel filed a brief on behalf of B.S. on June 16, 2017. We have noted throughout this process that we have an obligation to ensure "as far as reasonably possible" that parental termination appeals are brought to final disposition within 180 days of the date the notice of appeal is filed. *See* TEX. R. JUD. ADMIN. 6.2(a).

In re K.M.L., 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring). Accordingly, termination proceedings must be strictly scrutinized. *Id.* at 112. In such cases, due process requires application of the "clear and convincing" standard of proof. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002)). This intermediate standard falls between the preponderance of the evidence standard of civil proceedings and the reasonable doubt standard of criminal proceedings. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *In re L.J.N.*, 329 S.W.3d at 671. It is defined as 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." TEX. FAM. CODE ANN. § 101.007 (West, Westlaw through Ch. 49, 2017 R.S.).

In reviewing the legal sufficiency of evidence supporting termination, 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 that its finding was true." *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005); *In re L.J.N.*, 329 S.W.3d at 671. We assume that the fact finder resolved disputed facts in favor of its finding if it was reasonable to do so, and we disregard all evidence that a reasonable fact finder could have disbelieved or found to be incredible. *In re L.J.N.*, 329 S.W.3d at 671. We must also consider undisputed evidence, if any, that does not support the finding. *In re K.M.L.*, 443 S.W.3d at 113; *see In re J.F.C.*, 96 S.W.3d at 266 ("Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.").

When reviewing the factual sufficiency of the evidence supporting termination, we determine "whether the evidence is such that a factfinder could reasonably form a firm

belief or conviction about the truth of the [Department]'s allegations." *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). In conducting this review, we consider whether the disputed evidence is such that a reasonable finder of fact 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.*

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that: (1) the parent committed an act or omission described in family code subsection 161.001(b)(1); and (2) termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b); *In re J.L.*, 163 S.W.3d at 84.

B. Endangerment

1. G.C.

Under part (E) of family code subsection 161.001(b)(1), the Department was required to show by clear and convincing evidence that G.C. engaged in conduct or knowingly placed L.C. with persons who engaged in conduct which endangered L.C.'s physical or emotional well-being. TEX. FAM. CODE ANN. § 161.001(b)(1)(E). "Endanger" 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). The term means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment," but "it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *Id*. Danger to a child need not be established as an independent proposition and may be inferred from parental misconduct. *Walker v. Tex. Dep't of Family & Protective Servs.*,

312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The relevant inquiry is whether evidence exists that a parental course of conduct endangered the child's physical or emotional well-being. *Id*.

The evidence established that L.C., when an infant, suffered a spiral fracture in his arm while in the sole care of G.C. According to G.C.'s own testimony, he placed L.C. in a "bouncer" on a table, left the room, and then caused the fracture when he "grabbed" L.C. by the arm as he was falling off the table. The evidence in this case also included S.M.T.'s outcries to several adults that G.C. slapped or smacked her, and twisted her leg. According to hospital records, S.M.T. had various bruises on her body, repeated her reports of physical abuse by G.C., and made an outcry of sexual abuse by G.C. S.M.T. also made an outcry of sexual abuse to Sublett, her counselor. Sublett additionally testified that S.M.T. reported that G.C. took pictures of her in the shower and looked at her "privates." Although G.C. denied the allegations of sexual abuse, the jury was entitled to disbelieve his testimony and instead to believe S.M.T.'s outcries as relayed through the testimony of Rojas and Sublett. *See In re L.J.N.*, 329 S.W.3d at 671. The jury was also entitled to disbelieve Kibbe's theory that S.M.T. was coached by D.T. to make the allegations of sexual abuse. *See id*.

G.C. contends that there was "[n]o evidence except hearsay evidence" to support the allegations of sexual and physical abuse against S.M.T. But he did not object to the admission of the evidence. Even if we assume that the hearsay testimony of Rojas and others did not fall under an exception to the hearsay rule and was therefore technically inadmissible, it still contains probative value. *See* TEX. R. EVID. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it

is hearsay.").

G.C. further contends that "[a]ll evidence considered by the jury was regarding [his] relationship with [S.M.T.]" and that there was no evidence that he "ever endangered or neglected" L.C. This contention is immaterial—evidence of abuse or neglect of one child may be used to support a finding of endangerment as to another child. *See In re C.E.K.*, 214 S.W.3d 492, 497 (Tex. App.—Dallas 2006, no pet.) ("If a parent abuses or neglects the other parent or children, that conduct can be used to support a finding of endangerment."); *In re C.J.F.*, 134 S.W.3d 343, 351 (Tex. App.—Amarillo 2003, no pet.). This contention is also false—as noted, L.C. suffered a broken arm while in G.C.'s sole custody. Additionally, S.M.T. reported to Rojas that G.C. slapped L.C. in the mouth and she reported to Saenz that G.C. twisted L.C.'s arm and hurt him.

From all of this evidence, a reasonable juror could have formed a firm belief or conviction that G.C. engaged in conduct which endangered L.C.'s physical or emotional well-being. *See In re J.L.*, 163 S.W.3d at 85; *In re L.J.N.*, 329 S.W.3d at 671. Further, in light of the entire record, the contrary evidence was not so significant as to preclude the jury from making such a finding. *See In re J.F.C.*, 96 S.W.3d at 266. We therefore conclude that the evidence was legally and factually sufficient evidence to support a finding as to G.C. under part (E) of subsection 161.001(b)(1).[5] G.C.'s second issue is overruled.

2. B.S.

Under part (E) of family code subsection 161.001(b)(1), the Department was

[5] Because of this conclusion, we need not address whether the evidence was sufficient to support a finding as to G.C. under part (D) of that statute. *See In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003) ("Only one predicate finding under section 161.001(1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest."); *see also* TEX. R. APP. P. 47.1.

required to show by clear and convincing evidence that B.S. engaged in conduct or knowingly placed L.C. and S.M.T. with persons who engaged in conduct which endangered the physical or emotional well-being of the children. TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

B.S. contends that "no evidence was introduced to show L.C. was ever in any physical harm nor that B.S. ever harmed either child." However, the question is not whether B.S. personally harmed the children, but rather, whether she knowingly placed the children with someone who endangered them. *See id.* As set forth above, the record is replete with evidence that both children were physically endangered by G.C. The record further contains ample evidence that B.S. was aware of the danger that G.C. posed but was indifferent to it, and even took steps to conceal it. *See In re M.R.J.M.*, 280 S.W.3d 494, 502 (Tex. App.—Fort Worth 2009, no pet.) ("A child is endangered when the environment creates a potential for danger that the parent is aware of but disregards."). In particular, according to Rojas, B.S. "wasn't concerned" about S.M.T.'s injuries and B.S. believed that S.M.T.'s accusations of abuse by G.C. were untrue. B.S. also stated that S.M.T. had a medical condition that caused her to bruise easily, but medical records did not reflect any such diagnosis. S.M.T. stated during her interview at the Children's Advocacy Center that G.C. hit her face "really hard" and that B.S. told her to keep that a secret; this was consistent with the medical history given by S.M.T. according to hospital records. B.S. testified herself that she knew that G.C. would spank S.M.T. with a belt. Despite all of this, the evidence established that B.S. knowingly placed the children in G.C.'s care while she went to work.

Moreover, B.S. and G.C. each acknowledged that they resumed their relationship

after all of the accusations came to light. B.S. is correct that the safety plan instituted by the Department did not prohibit her from having contact with G.C.; instead, it merely required her to keep G.C. away from the children. Nevertheless, "a parent's failure to remove himself and his children from a violent relationship endangers the physical and emotional well-being of the children." *In re I.G.*, 383 S.W.3d 763, 770 (Tex. App.—Amarillo 2012, no pet.); *In re M.R.*, 243 S.W.3d 807, 818–19 (Tex. App.—Fort Worth 2007, no pet.); *Sylvia M. v. Tex. Dep't of Human Servs.*, 771 S.W.2d 198, 203–04 (Tex. App.—Dallas 1989, no writ).

The foregoing evidence allowed a reasonable juror to form a firm belief or conviction that B.S. knowingly placed L.C. and S.M.T. with persons who engaged in conduct which endangered the children's physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E); *In re J.L.*, 163 S.W.3d at 85; *In re L.J.N.*, 329 S.W.3d at 671. And when viewed in light of the entire record, the contrary evidence was not so significant as to preclude that finding. *See In re J.F.C.*, 96 S.W.3d at 266. We therefore conclude that the evidence was legally and factually sufficient evidence to support the jury's findings as to B.S. under part (E) of subsection 161.001(b)(1).[6] This part of B.S.'s issue on appeal is overruled.

C. Best Interest

There is a strong, though rebuttable, presumption that keeping a child with a parent is in the child's best interest. TEX. FAM. CODE ANN. § 153.131 (West, Westlaw through Ch. 49, 2017 R.S.); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). Factors that we

[6] Because of this conclusion, we need not address whether the evidence was sufficient to support a finding as to B.S. under part (D) of that statute. *See In re A.V.*, 113 S.W.3d at 362; *see also* TEX. R. APP. P. 47.1.

consider in determining whether termination of parental rights is in the child's best interest include: (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 parenting abilities of the parties seeking custody; (5) the programs available to assist the parties seeking custody; (6) the plans for the child by the parties seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions committed by the parent which may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions committed by the parent. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976).

The party seeking termination is not required to prove all nine factors; in some cases, undisputed evidence of just one factor may be sufficient to support a finding that termination is in the best interest of the child. *In re C.H.*, 89 S.W.3d at 25, 27. Evidence that proves one or more statutory grounds for termination may also constitute evidence illustrating that termination is in a child's best interest. *Id*. at 28.

1. G.C.

G.C. admitted that he left the infant L.C. unattended in a "bouncer" on a table, left the room, then grabbed the child's arm when he fell, causing a fracture. S.M.T. told Rojas that G.C. slapped L.C. in the mouth, and S.M.T. told Saenz that G.C. twisted L.C.'s arm and hurt him. This indicates that G.C. presents a physical danger to L.C. and has poor parenting skills. *See Holley*, 544 S.W.2d at 372. The evidence showing that G.C. physically and sexually abused S.M.T. is also relevant to the consideration of L.C.'s best interests. In particular, it strongly indicates that G.C.'s relationship with the children is improper, that he lacks parenting abilities, and that he would present an ongoing physical

and emotional danger to L.C. should his rights not be terminated. *See id*. As to the other *Holley* factors, L.C. is too young to express his desires, *see In re R.S.D.*, 446 S.W.3d 816, 818, 820 (Tex. App.—San Antonio 2014, no pet.); there was no indication that L.C.'s needs are abnormal; there was no evidence as to any programs available to G.C. or as to G.C.'s plans for the children; and Pinon testified that L.C. is "very bonded" with his current caregiver, G.C.'s mother.

We conclude that the evidence was legally and factually sufficient to rebut the strong presumption that keeping L.C. with his biological father is in L.C.'s best interest. Instead, a reasonable juror could have formed a firm belief or conviction that termination of G.C.'s parental rights was in L.C.'s best interests, and the contrary evidence was not so significant as to preclude such a finding. *See In re J.L.*, 163 S.W.3d at 85; *In re J.F.C.*, 96 S.W.3d at 266. G.C.'s third issue is overruled.

2. B.S.

We next consider whether the evidence supported the best interest finding with respect to the termination of B.S.'s parental rights.

As to the first *Holley* factor, L.C. is too young to express his desires and there is no evidence in the record regarding S.M.T.'s desires. *See Holley*, 544 S.W.2d at 372. Consideration of this factor weighs neither in favor of nor against termination.

As to the second and third factors, there was no evidence that B.S. herself personally presented a physical danger to the children. But the evidence clearly showed that G.C. presented a danger and that B.S. was either unable or unwilling to recognize that danger. Further, B.S. was either unable or unwilling to end her relationship with G.C., even after she was made aware of the various allegations of physical and sexual abuse

made against him. According to hospital notes, B.S. stated that "she will have nothing" if she left G.C. The therapist for both B.S. and G.C. testified that the two are very committed to each other and would like to move away from the area with the children. B.S. was found hiding in G.C.'s trailer when police executed a search warrant there, and she could be heard acknowledging that she was not supposed to be there. She testified that she believes G.C. is a "good person and a wonderful dad." B.S. and G.C. were observed wearing matching rings in the courtroom. It is apparent that B.S. is committed to her relationship with G.C. despite the evidence of abuse. Consideration of the second and third *Holley* factors weighs in favor of termination.

As to the fourth *Holley* factor regarding parenting skills, and the eighth factor regarding the nature of the parent-child relationship, S.M.T.'s counselor testified that she was "very impressed" with B.S.'s parenting skills. Kibbe, the guardian ad litem for the children, stated in her reports that B.S. had made efforts to improve her parenting skills. Other than the substantial evidence that she allowed and may continue to allow G.C. to have access to the children, there was no other indication that B.S.'s parenting skills were lacking or that the parent-child relationship was improper. Consideration of these factors weighs slightly against termination.

As to the fifth factor, there was no evidence of any programs available to assist B.S. Consideration of this factor weighs neither in favor of nor against termination.

As to the sixth factor, B.S. testified that she planned to live alone with the children, but the jury was entitled to disbelieve that testimony and instead believe B.S.'s therapist, who testified that she planned to move away with the children and G.C. *See In re J.F.C.*, 96 S.W.3d at 266; *In re L.J.N.*, 329 S.W.3d at 671. As to the seventh factor, though

S.M.T. is currently in foster care, Pinon testified that the Department was working toward reuniting her with her biological father, D.T. Pinon agreed that it will be "a slow process" and that the Department would continue to monitor and drug test D.T. The Department concedes on appeal that its plan is not "definitive." Consideration of these factors weighs slightly in favor of termination.

As to the final *Holley* factor, any excuses for acts or omissions, B.S. testified she got back together with G.C. because she believed that "when I stayed away, the Department still proceeded to take my children" and that "I knew that it didn't matter what I did or did not do, the Department was going to decide for themselves what they wanted to do." This may serve as an explanation for why B.S. decided to reunite with G.C., but it has no bearing on the best interest analysis. Regardless of why B.S. made her decision, it was reasonable for the jury to find that this decision made it likely that G.C. would continue to have access to the children should B.S.'s parental rights not be terminated. Consideration of this factor weighs in favor of termination.

Overall, the evidence established that, although B.S. herself may be a capable parent, her unwavering commitment to her relationship with G.C. cast serious doubt over whether she would be able to adequately protect the children on an ongoing basis. Accordingly, considering the entire record, we conclude that a reasonable juror could have formed a firm belief or conviction that termination of B.S.'s parental rights is in the best interests of both S.M.T. and L.C. *See In re J.L.*, 163 S.W.3d at 85. We further conclude that the contrary evidence—such as the testimony of the guardian ad litem Kibbe, who opposed termination—was not so significant as to preclude such a finding. *See In re J.F.C.*, 96 S.W.3d at 266. The evidence was not overwhelming but was legally

and factually sufficient to rebut the strong presumption that keeping the children with B.S. is in their best interest. We overrule the remainder of B.S.'s issue on appeal.

III. Withdrawal of Waiver of Appointed Counsel

By his first issue, G.C. contends the trial court violated his rights under the Sixth Amendment to the United States Constitution by denying the request for counsel he made on the third day of trial. *See* U.S. CONST. amend. VI.

In a suit filed by a Texas governmental entity seeking termination of parental rights, an indigent parent who responds in opposition to the termination is entitled to the appointment of an attorney ad litem to represent his or her interests. TEX. FAM. CODE ANN. § 107.013(a)(1) (West, Westlaw through Ch. 49, 2017 R.S.); *see In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003) (noting that the statutory right to counsel in parental termination cases necessarily embodies the right to effective assistance of counsel at every critical stage of the proceeding). However, there is no similar right recognized in the United States Constitution. *See Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 31 (1981) (declining to find that the Constitution requires the appointment of counsel in every parental termination proceeding).

In any event, the statutory right to counsel in termination proceedings may be waived. *See In re K.L.*, 442 S.W.3d 396, 411 (Tex. App.—Beaumont 2012), *rev'd on other grounds sub nom. In re K.M.L.*, 443 S.W.3d at 101; *see also In re C.L.S.*, 403 S.W.3d 15 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *In re C.T.*, 749 S.W.2d 214, 217 (Tex. App.—San Antonio 1988, no writ) (noting that "[e]ven constitutional rights can be waived"). G.C. waived his right to counsel by stating at a pre-trial hearing on March 22, 2016 that, although he had previously filed an affidavit of indigency, he did not

want an appointed lawyer but instead wished to represent himself.[7] Later, on the second day of trial, counsel for the Department called G.C. as a witness, and the trial court extensively admonished G.C. on his right against self-incrimination. As part of that admonition, the trial court informed G.C. that he had the right to counsel, but G.C. repeatedly affirmed that he was waiving his rights and wished to testify.[8]

Subsequently, as noted above, G.C. asked to terminate his testimony. The trial court allowed G.C. to do so and B.S. was called as the next witness. The next morning, before the jury entered the courtroom, the following colloquy occurred:

> [G.C.]: Your Honor, I wanted to raise some issues with you real quick. I do want to testify. I don't want to assert my Fifth.
>
> THE COURT: When it comes your opportunity to present evidence, you can call yourself as a witness. But, you have—you have invoked your Fifth and I don't intend to interrupt the

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[7] Specifically, the following colloquy occurred:

> THE COURT: . . . [W]hat you're telling me today is you don't have the money to hire a lawyer?
>
> [G.C.]: Yes, sir.
>
> THE COURT: And you want a lawyer?
>
> [G.C.]: No, sir.
>
> THE COURT: Okay. Well, let's—then you're telling—okay. So you're not asking to have an attorney. You're asking to represent yourself?
>
> [G.C.]: Yes, sir.
>
> THE COURT: And you understand that by representing yourself you have to basically be prepared to defend yourself, as best you can, and follow the rules in court that attorneys would follow. Do you understand that?
>
> [G.C.]: Yes, sir.
>
> THE COURT: And that's your desire?
>
> [G.C.]: Yes, sir.

[8] A waiver of the right to appointed counsel must be "made competently, voluntarily, knowingly, and intelligently." *In re C.L.S.*, 403 S.W.3d 15, 19 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993); *Faretta v. California*, 422 U.S. 806, 835–36 (1975); *Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997)). G.C. does not dispute that his waiver was competent, voluntary, knowing and intelligent; he contends only that counsel should have been appointed when he later attempted to withdraw the waiver.

proceedings in the trial any further at this point in time.

We will address that issue. If and when you still want to testify, you will be the last person on direct evidence to be able to call a witness. And you can call yourself as a witness. But, I am not going to put you back up on the stand right now or right after [B.S.]. We will find another way to deal with that situation.

[G.C.]: Okay. Then, is it possible that I can have immediate counsel, because I don't understand my legal rights.

THE COURT: No, it is too late for that. We have already started the trial. I have been—you have been advised over and over about that, [G.C.], and it is too late for that.

[G.C.]: Okay, I understand.

THE COURT: Okay. Thank you.

G.C. was not called to give any further testimony in the trial.

G.C. argues on appeal that "[t]here is no requirement in the Sixth Amendment, Texas statutory law, or any common law that the request for an attorney must come at a specific time" and that "[c]ounsel should have been appointed to [him] when he requested it, and before trial recommenced" on the third day.

In the criminal context, a defendant "may withdraw a waiver of the right to counsel at any time." TEX. CODE CRIM. PROC. ANN. art. 1.051(h) (West, Westlaw through Ch. 49, 2017 R.S.).[9] But the right to withdraw a waiver of the right to counsel is not without limits. *See Medley v. State*, 47 S.W.3d 17, 23 (Tex. App.—Amarillo 2000, pet. ref'd); *see also Lewis v. State*, No. 02-12-00246-CR, 2014 WL 491746, at *3–4 (Tex. App.—Fort Worth

[9] G.C. does not cite this statute or argue that it is applicable to parental termination proceedings; instead, he argues only that, as an indigent parent in a termination proceeding, he was entitled to appointed counsel. The Department does not address whether G.C. validly withdrew his waiver of the right to appointed counsel; instead, it argues only that G.C. waived that right. Neither party cites any authority regarding the circumstances under which a waiver of the right to appointed counsel may be withdrawn. Nevertheless, we address the issue in our sole discretion out of an abundance of caution. *See Garza v. State*, 290 S.W.3d 489, 492 (Tex. App.—Corpus Christi 2009, pet. ref'd).

Feb. 6, 2014, pet. granted) (mem. op., not designated for publication); *Magness v. State*, No. 01-08-00742-CR, 2010 WL 2431067, at *4 (Tex. App.—Houston [1st Dist.] June 17, 2010, pet. ref'd) (mem. op., not designated for publication). In particular, a trial court may deny a request to withdraw the waiver when doing so would obstruct orderly procedure or interfere with the fair administration of justice. *See Medley*, 47 S.W.3d at 23 ("Trial courts have the duty, and discretion, to maintain the orderly flow and administration of judicial proceedings, including the exercise of a defendant's right to counsel."). Further, a defendant may not use his right to counsel to manipulate the court or to delay his trial, *see Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988), and a defendant "does not have the right to repeatedly alternate his position on the right to counsel and thereby delay trial." *Medley*, 47 S.W.3d at 23; *see Johnson v. State*, 257 S.W.3d 778, 781 (Tex. App.—Texarkana 2008, pet. ref'd) ("Constitutional protections connected with the right to counsel may not be so manipulated as to delay or obstruct the trial process.").

The trial court's decision as to the effect the attempted withdrawal of a defendant's waiver of the right to counsel would have on the orderly administration of justice will not be disturbed on appeal absent an abuse of discretion. *See Medley*, 47 S.W.3d at 24; *see also Lewis*, 2014 WL 491746, at *3. A defendant who has waived the right to counsel but then seeks to reclaim that right bears the burden of showing that his waiver would not (1) interfere with the orderly administration of court business, (2) result in unnecessary delay or inconvenience to witnesses, or (3) prejudice the State. *Medley*, 47 S.W.3d at 23.

Assuming but not deciding that these tenets of law apply equally in the parental termination context, we conclude that there is no abuse of discretion shown. *See id.* at 24. There was no discussion on the record as to whether appointment of counsel for G.C.

on the third day of trial would interfere with the orderly administration of court business, result in unnecessary delay or inconvenience to witnesses, or prejudice any party. *See id.* at 23. But given that two days of trial testimony had already been heard prior to G.C.'s request, we cannot say the trial court erred in implicitly determining that G.C. failed to meet his burden to show that appointment of counsel would not cause such delay or prejudice. We overrule G.C.'s first issue.

IV. CONCLUSION

The trial court's judgment is affirmed as to both appellants.

DORI CONTRERAS
Justice

Delivered and filed the
20th day of July, 2017.