Affirmed and Memorandum Opinion filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00964-CV

IN THE INTEREST OF M.F. AND M.F., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2018-02334J

MEMORANDUM OPINION

Appellant K.G. ("Mother") appeals the trial court's final order terminating her parental rights and appointing the Department of Family and Protective Services ("Department") as sole managing conservator of her twin children M.F. ("Miguel") and M.F. ("Michelle").[1] The trial court terminated Mother's parental rights on predicate grounds of endangerment and failure to comply with the service plan for reunification. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), and (O). The trial court further found that termination of Mother's parental rights was in the children's best

[1]We use pseudonyms to refer to appellant, the children, and other family members. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

interest. *See* Tex. Fam. Code § 161.001(b)(2). On appeal, Mother asserts nine issues. For the reasons set forth below, we affirm.

I. BACKGROUND

A. Pretrial Proceedings

1. The Initial Referral and Investigation

The Department became involved on April 28, 2018, when it received a referral alleging physical neglect of Miguel and Michelle, physical abuse of Michelle, and medical neglect of Miguel by Mother. Mother had been arrested and charges were pending for child endangerment and possession of a controlled substance after law enforcement responded to a call that a Mother was walking around a motel parking lot with two small children. Mother was taken to Harris County Jail and the children were admitted to Texas Children's Hospital. According to the physician report, Michelle had a one-inch superficial laceration to her left cheek, a healing bruise on her right cheek, bruises to her left thigh, and several bruises and bite marks from insects on her body. Miguel had a swollen knee, cellulitis on his knee and thigh, and a possible leg infection. The doctor noted that Miguel's knee needed to be drained and X-rayed, and an MRI was necessary to determine if an operation was needed. The doctor's report opined that the knee swelling could be a result of fever that caused an infection in Miguel's body.

On April 30, 2018, while the children were hospitalized, the Department filed an emergency petition to take possession or custody of the twins. The petition requested relief against Mother, Kam (the alleged Father),[2] and the unknown father.

[2] DNA later excluded Kam as the father of the twins. There is no father that has registered with the paternity registry of Texas.

At that time, both Mother and Kam were in jail.[3] A Department supervisor contacted the maternal grandmother and noted she would be considered as a potential placement. The trial court granted the Department temporary managing conservatorship of the children. When the children were released from the hospital, they were placed in a foster home where they remained throughout the pendency of the proceedings.

The trial court held additional hearings and determined that May 6, 2019, was the automatic dismissal date for the case. *See* Tex. Fam. Code § 263.401(a).

On June 27, 2018, the court ordered Mother to comply with the family service plan submitted by the Department. The terms of the family service plan required Mother, in pertinent part, to submit to random drug test screening, showing progress by testing negative. The court ordered that Mother "shall have no visits with subject child[ren] until she drug tests."

At some point in October 2018, Mother was released from jail. A permanency order entered on October 10, 2018, noted that Mother has not demonstrated "adequate and appropriate compliance with the service plan." On December 27, 2018 Mother moved to Corpus Christi.

In January 2019, Tracy Ratcliff, a Child Protective Specialist with the Department, filed a follow-up permanency report, noting Mother began substance abuse classes but did not show up for meetings in November and December 2018.[4] Ratcliff also reported that the foster parents wanted to adopt the children. During a

[3] A CPS caseworker discovered Kam was in jail for a pending felony assault on a family member, second offense. The complainant in the domestic violence charge was Mother.

[4] Mother failed to attend substance abuse classes on the following dates: January 28, 2018, December 12, 2018, December 26, 2018, and January 2, 2019.

review hearing on January 23, 2019, Ratcliff testified the placement in the foster home was meeting the children's physical and emotional needs. Ratcliff stated the goal for the children was unrelated adoption, with a concurrent relative adoption; however, the Department had not identified a possible relative for adoption at that time. Ratcliff testified that Mother still had services to complete under her plan, including parenting, individual counseling, and substance abuse classes. According to Ratcliff, Mother visited the children and they were excited to see their mom. Citing Mother's recent behavioral concerns (e.g., becoming extremely agitated and using profanity when exchanging certain information with the caseworker), Ratcliff requested the trial court order Mother to submit to drug screening.

The parties also discussed possible placement with Mother's friend, Dorothea Gordin. Ratcliff testified that she had reached out to Gordin and advised her that the Department would need to conduct a home study and background check. Ratcliff stated that Gordin said she was uncomfortable giving that information because "she didn't know who I [Ratcliff] was." Ratcliff offered to have Gordin call her at Ratcliff's work number, through the switchboard or by email. When Ratcliff called, Gordin did not answer the phone or return Ratcliff's telephone calls.

In March 2019, Ratcliff filed another permanency report. In the report, she noted Mother had not been cooperating with the Department. Mother did not show up for group and individual substance abuse classes in November and December 2018. On January 23, 2019, Mother was a no show for court ordered urinalysis and hair follicle testing. On March 1, 2019, Mother was again a no show for her urinalysis and hair follicle drug screen testing.

2. Family Service Plan

The Department prepared a family service plan for Mother on June 4, 2018, which was subsequently ordered by the court, and included requirements to develop a support group; participate in parenting classes for six to eight weeks, participate in a psychological evaluation and follow all recommendations; participate in individual counseling and follow all recommendations, participate in substance abuse assessment and follow all recommendations, submit to random drug test screening; maintain consistent stable housing with proof of lease, maintain employment and provide proof of employment, and maintain contact with her caseworker.

B. Trial Testimony

The trial court conducted a bench trial which commenced in May 2019 and was completed in November 2019. The witnesses at trial were Candace Mouton, (the Department's investigator), Bruce Jeffries (owner of the National Drug Screening Center), Mother, Dr. Angela Bachim (medical doctor with subspecialty in child abuse pediatrics at Texas Children's Hospital), Officer Nallely Gonzales (officer with Houston Police Department), Mark Stanley (brother to Mother's paramour), Stephanie Jones (kinship specialist with the Department), Diana Villareal (caseworker in Corpus Christi), Alexa Reyes (the Department caseworker from June 2019 through November 2019), Foster mom, and Dorothea Gordin (friend of Mother).

1. May 2, 2019

On May 2, 2019, the parties appeared for trial: the assistant district attorney representing the Department, Mother and Mother's counsel, the ad litem for the children, the unknown father's counsel, and counsel for intervenor Scot Stanley (Mother's boyfriend). The parties confirmed that the case would begin that day but

then would continue on a future date. The trial court and counsel discussed exhibits to be admitted.

After being sworn, Mother briefly testified that she had three children (an older son and the twins), none of whom were in her care. The twins, Miguel and Michelle, the subject of this proceeding, were born in 2015. Mother acknowledged that she thought Kam was the father of the twins, but DNA testing proved otherwise; Mother did not know of another possible father. After Mother testified, the trial court asked the parties if anyone had any objection to recessing the trial and resuming at a later date. There were no objections, and the trial court recessed the trial.

2. August 23, 2019

In the record, there is evidence of several trial settings between May 2 and November. Many of these settings were reset without taking up substantive matters. On August 23, 2019, however, the court received evidence and heard testimony from witnesses without the Mother or her counsel present.

3. November 1 and 5, 2019

Trial recommenced on November 1, 2019. Mother's counsel moved for dismissal and/or mistrial, arguing trial was not timely commenced under the statute. Mother's counsel argued, in the alternative, if the trial court determined trial timely commenced, then a mistrial should be declared because Mother was unfairly prejudiced and her due process rights were violated by not having representation of counsel for a long period during trial. The court denied both motions.

C. Termination

After hearing the evidence and arguments of counsel, the trial court stated it was terminating Mother's parental rights to the twins on the predicate grounds of Subsections D, E, and O of Section 161.001(b)(1) of the Family Code. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), and (O). The trial court further found that termination of Mother's parental rights was in Miguel and Michelle's best interests. The trial court signed a Decree for Termination on November 14, 2019, terminating Mother's parental rights. Thereafter, the trial court entered Findings of Fact and Conclusions of Law, restating the grounds for termination. Mother timely appealed.

II. ISSUES

In issues one, two, three, and six, Mother contends the evidence is legally and factually insufficient to support the termination of her parental rights under Tex. Fam. Code § 161.001(b)(1)(D), (E), and (O). In issues four, five, and seven, Mother asserts that the evidence is legally and factually insufficient to support that termination is in the child's best interest. Tex. Fam. Code § 161.001(b)(2). In issue eight, Mother asserts that she was deprived of her right to adequate legal counsel during the trial phase of the case. In issue nine, Mother contends that the trial did not comply with the intent of the statute and that trial was actually commenced over five months after the deadline for trial.

III. ANALYSIS

A. Standards of Review

Involuntary termination of parental rights is a serious matter implicating fundamental constitutional rights. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re D.R.A.*, 374 S.W.3d 528, 531 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Although parental rights are of constitutional magnitude, they are not absolute. *In re A.C.*, 560 S.W.3d 624, 629 (Tex. 2018); *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002) ("Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.").

Due to the severity and permanency of terminating the parental relationship, Texas law requires clear and convincing evidence to support such an order. *See* Tex. Fam. Code § 161.001; *In re J.F.C.*, 96 S.W.3d 256, 265-66 (Tex. 2002). "Clear and convincing evidence" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code § 101.007; *In re J.F.C.*, 96 S.W.3d at 264. This heightened burden of proof results in a heightened standard of review. *In re C.M.C.*, 273 S.W.3d 862, 873 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Parental rights can be terminated upon proof by clear and convincing evidence that (1) the parent has committed an act prohibited by section 161.001(1) of the Family Code; and (2) termination is in the best interest of the child. Tex. Fam. Code § 161.001(1), (2); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). Only one predicate finding under section 161.001 is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest. *In re A.V.*, 113 S.W.3d at 362.

Mother challenges the legal and factual sufficiency of the evidence to support the trial court's findings. In reviewing the legal sufficiency of the evidence in a parental termination case, we must consider all evidence in the light most favorable to the finding to determine whether a reasonable fact finder could have formed a firm belief or conviction that its finding was true. *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). We assume that the fact finder resolved disputed facts in favor of its

finding if a reasonable fact finder could do so, and we disregard all evidence that a reasonable fact finder could have disbelieved. *Id*.; *In re G.M.G.*, 444 S.W.3d 46, 52 (Tex. App.—Houston [14th Dist.] 2014, no pet.). However, this does not mean that we must disregard all evidence that does not support the finding. *In re D.R.A.*, 374 S.W.3d at 531. Because of the heightened standard, we also must be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id*.

In reviewing the factual sufficiency of the evidence under the clear and convincing standard, we consider and weigh disputed evidence contrary to the finding against all the evidence favoring the finding. *In re A.C.*, 560 S.W.3d at 631; *see In re J.O.A.*, 283 S.W.3d at 345. "If, in light of the entire record, the disputed evidence that a reasonable fact finder could not have credited in favor of the finding is so significant that a fact finder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.O.A.*, 283 S.W.3d at 345. We give due deference to the fact finder's findings and we cannot substitute our own judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

In contrast to termination findings, conservatorship determinations are governed by a preponderance of the evidence standard. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). The appointment of a conservator is subject to review for abuse of discretion and may be reversed only if the decision is arbitrary and unreasonable. *Id*. (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).

B. Procedural Issues

1. The trial was commenced prior to the statutory dismissal deadline.

Effective September 1, 2017, in a parental termination case a trial court automatically loses jurisdiction if the trial on the merits does not begin by the deadline imposed by section 263.401(a) of the Texas Family Code. Section 263.401(a) states:

> (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court's jurisdiction over the suit affecting the parent-child relationship filed by the department that requests termination of the parent child relationship or requests that the department be named conservator of the child is terminated and the suit is automatically dismissed without a court order. Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date.

Tex. Fam. Code § 263.401(a).

It is undisputed the trial court did not grant an extension under subsection (b) or (b-1).[5] Accordingly, the dates relevant to our analysis are: (1) the date the court rendered a temporary order appointing the Department as temporary managing conservator; (2) the first anniversary of that date; (3) the date of the following Monday; and (4) the date the trial on the merits began. *Interest of G.X.H.*, 584 S.W.3d 543, 546 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

In this case, because the Department was appointed temporary managing conservator on April 30, 2018, the applicable deadline on the Monday following the anniversary date of that appointment was May 6, 2019. On May 2, 2019, days before

[5] The Department filed a motion for extension of the dismissal date and Mother sought a continuance, but both were denied.

the dismissal deadline, trial commenced. Witnesses were sworn, parties made their announcements, the court heard several preliminary matters, and evidence was presented and admitted, and the Department began its case by calling Mother as a witness. After testimony of Mother, by agreement of all parties, the court recessed trial. In November 2019, the trial court resumed trial until the parties rested.

To the extent Mother argues the trial court did not comply with the intent of the statute when it commenced trial in May, the record contradicts that argument. On May 2, 2020, the witnesses were sworn, the parties made their announcements, and the court heard several preliminary motions (including the Department's motion to strike the intervention), Mother's motions to compel and for continuance, and issues related to exchanging exhibits. Mother's attorney spoke to the court regarding witnesses she intended to bring from Corpus Christi and about the parties' agreement to allow one witness to testify by telephone. Thereafter, the court proceeded with trial, admitted evidence offered by the Department (Petitioner's Exhibits 1 to 4), and heard testimony from Mother. On the record before us, the court performed acts that satisfy the minimum requirements of "commencing a trial on the merits" under section 263.401. *See, e.g., In re H.B.C.*, No. 05-19-00907-CV, 2020 WL 400162, at *13-14 (Tex. App.—Dallas Jan. 23, 2020, no pet. h.) (mem. op.) (trial commenced when trial court called the case for trial, counsel announced ready, the court considered various pretrial matters raised by counsel, and a witness was sworn and briefly testified); *In re R.J.*, 579 S.W.3d 97, 109 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (trial on the merits commenced when witnesses were sworn, counsel announced ready, pretrial matters were discussed, and the Department called a single witness who testified briefly before the trial court recessed the trial); *In re R.F.*, No. 04-17-00582-CV, 2018 WL 1308542, at *1 (Tex. App.—San Antonio Mar. 14, 2018, no pet.) (mem. op.) (trial commenced even though the father in that

case announced not ready and filed a motion for continuance because the trial court denied the motion and the Department called its first witness who provided brief testimony before trial was recessed); *In re D.S.*, 455 S.W.3d 750, 752-53 (Tex. App.—Amarillo 2015, no pet.) (commencement requires "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.").

We overrule Mother's ninth issue.

2. Trial counsel's representation fell below an objective standard of reasonableness, but Appellant suffered no prejudice as a result.

Mother contends she was deprived of adequate legal counsel for the majority of the trial phase and that this severely impacted her rights. A parent that has a statutory right to counsel in a parental termination case and has the right to "effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). To prevail on a claim of ineffective assistance of counsel, a parent must generally show (1) that trial counsel's performance was deficient, and (2) that the deficient performance was so serious as to deny the parent a fair and reliable trial. *J.O.A.*, 283 S.W.3d 336, 341–42 (Tex. 2009) (following the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668 (1984)); *M.S.*, 115 S.W.3d at 545 (same). In the present case, Mother's failure to identify the rights that were impacted and how they were impacted fails to satisfy the second prong of the *Strickland* test.

When trial commenced in May, Mother was represented by Julie Ketterman.[6] In July, Ketterman requested a continuance because she had a stroke. Ketterman represented to the trial court she would be available for trial on August 23, 2019.

[6] Prior to trial commencing, Mother was represented by Kate Dolan; however, she withdrew her representation, with Mother's agreement, on February 5, 2019.

On August 23, 2019, Ketterman failed to appear on Mother's behalf; Mother also failed to appear. All other parties were present and ready for trial. To the extent Mother asserts that she received ineffective assistance of counsel from Ketterman's failure to appear, she has failed to demonstrate harm. The record shows the court ordered trial to be reset because Ketterman's conflict in another court caused her failure to appear.

Despite the reset and with the trial court recognizing, "I don't know that we can proceed without her [Ketterman] because that would prejudice her client and, you know, would probably result in a reversal," the trial court admitted three exhibits offered by the *ad litem*. The trial court also heard testimony from Villareal (the Corpus Christi caseworker with the Department) regarding the inconvenience of appearing live and allowed the Department to file a motion to appear by telephone. The trial court next heard testimony from Reyes (the caseworker for the Department in Houston). Reyes testified Michelle and Miguel had been in a foster home since May 18, 2018 and were doing well in the placement and in therapy. Reyes testified Mother was visiting the children but had missed three visits (June 21, 28 and July 5, 2019). Mother's last visit to the children was August 17, 2019, and there were no concerns during the visit. Reyes testified that Mother was working on her services (completing parenting classes and individual therapy), but that she was not in compliance because she had not signed a release of information form to allow the caseworker in Corpus Christi to obtain the substance abuse assessment or recommendation. On August 23, 2019, Reyes testified Mother's last drug test was May 2019, and it was positive for amphetamines and methamphetamines. The Department requested that the trial court suspend Mother's visits with the children until she tested clean.

A "cross-examination" of Reyes was then conducted by the *ad litem*. Reyes testified that Mother showed up late for a visit in August and missed a fourth visit. The court admitted Petitioner's exhibits 1 and 2, Mother's positive drug test result testing from June 27, 2018 (positive for amphetamines, methamphetamines, and cocaine), and May 2, 2019 (positive for amphetamines and methamphetamines). The trial court entered a permanency hearing order on August 23, 2019 and found Mother had not demonstrated adequate compliance with her service plan; it then suspended her visits with the children.

Mother secured new counsel (her third) on October 23, 2019. Trial proceeded on November 1 and 5, 2019. When trial resumed, all witnesses who appeared at the permanency hearing in August (including Villareal and Reyes) were subject to cross-examination by Mother's new counsel. Additionally, Mother's counsel objected to Jeffries' testimony regarding drug screening results and accompanying exhibits and the court sustained the objections.

To establish ineffective assistance of counsel, Mother must show by a preponderance of the evidence that (1) her trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. *In re J.O.A.*, 283 S.W.3d 336 (Tex. 2009); *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Under the first prong of the *Strickland* standard, a defendant must show that her counsel's performance was deficient under prevailing professional norms and according to the necessity of the case. *Strickland*, 466 U.S. at 687–88. The defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. "An allegation of ineffective assistance of counsel in a termination proceeding must be

firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness and the resulting harm." *In re M.T.R.*, 579 S.W.3d 548, 574 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (citing *In re L.G.R.*, 498 S.W.3d 195, 209 (Tex. App.—Houston [14th Dist. 2016, pet. denied)). We do not limit our review to a single portion of the representation but examine the totality of the representation to determine counsel's effectiveness. *In re K.L.*, 91 S.W.3d 1, 14 (Tex. App.—Fort Worth 2002, no pet.).

For our examination of Mother's ineffective-assistance claim, we consider the professional norms applicable to different components of a party's representation. Counsel for a party in litigation has a responsibility to appear for all trial settings. *See generally Joyner v. Commission for Lawyer Discipline*, 102 S.W.3d 344, 347 (Tex. App.—Dallas 2003, no pet.) (concluding lawyer neglected a client's legal matter in violation of Texas Disciplinary Rule of Professional Conduct 1.01(b)(1) when he did not respond to a motion for summary judgment, appear at the hearing, or file post-judgment motions or a notice of appeal); *see also* Tex. R. Civ. P. 8 (the ". . .attorney in charge shall be responsible for the suit . . . .) and *In re K.A.R.*, 171 S.W.3d 705, 711 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("Rule 10 of the Regional Rules of Administration for the Second Administrative Region states that an attorney assigned to trial in two different cases on the same day has a duty to notify the affected courts of the conflicting trial settings as soon as they are known.") (citing SEC. ADMIN. JUD. REG., REG. R. ADMIN. 10(b)(1) and HARRIS CTY. FAM. R. 8.7 (stating "[i]t is the duty of counsel to report promptly to the court immediately upon learning of a conflicting engagement that might preclude that counsel's availability for trial. Failure to do so may result in sanctions")).

We conclude Mother's second trial counsel's representation was deficient because (1) she failed to appear for a trial setting after confirming same and (2) there

is nothing in the record tending to show she attempted to have another lawyer cover this known and confirmed trial setting. Although there are often multiple trial settings in cases involving the termination of parental rights (especially where there were multiple witnesses to coordinate), a lawyer cannot provide effective assistance at a trial setting where no lawyer is present and without requesting a continuance. Examining the totality of the trial counsel's representation and counsel's testimony, Mother's second trial counsel's representation fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687–88.

Here, Mother was represented by competent trial counsel for the final trial settings in November 2019 (prior to which no motion for continuance was filed). Any prejudice suffered by Mother due to second counsel's failure to appear and adequately defend her at the August 23 trial setting was cured by, among other things, Mother's third counsel successfully cross-examining the relevant witnesses and excluding the exhibits that had been offered previously. Therefore, we find no harm or prejudice to Mother due to second trial counsel's deficient performance.

We overrule Mother's eighth issue.

C. Substantive Issues

Parental rights can be terminated upon proof by clear and convincing evidence that (1) the parent has committed an act prohibited by section 161.001(b)(1); and (2) termination is in the best interest of the child. Tex. Fam. Code § 161.001(b)(1), (2); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009). Mother argues the Department failed to present legally and factually sufficient evidence on the predicate termination grounds and on the issue of best interest.

1. Predicate Grounds

In issues one, two, three, and six, Mother argues the evidence was legally and factually insufficient to support termination under all predicate grounds found by the trial court: sections 161.001(b)(1)(D), (E), and (O). Only one predicate finding under section 161.001(b)(1) established by clear and convincing evidence, along with the best-interest determination, is necessary to support termination. *In re A.V.*, 113 S.W.3d at 362. Further, due to the significant collateral consequences of terminating parental rights under section 161.001(b)(1)(D) or (E),[7] "[a]llowing section 161.001(b)(1)(D) or (E) findings to go unreviewed on appeal when the parent has presented the issue to the court thus violates the parent's due process and due course of law rights." *In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019). When a parent challenges predicate termination grounds under either subsection 161.001(b)(1)(D) or (E), or both of those subsections, we must address and detail our analysis under one of those subsections. *See id.* We will address the trial court's finding of endangerment under subsection E. Accordingly, we do not review the findings regarding subsections D and O. *See In re A.V.*, 113 S.W.3d at 362.

Termination of parental rights is warranted if the fact finder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Tex. Fam. Code § 161.001(b)(1)(E). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm

[7] Section 161.001(b)(1)(M) provides that parental rights may be terminated if clear and convincing evidence supports that the parent "had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state." *Id.* § 161.001(b)(1)(M). Thus, when parental rights have been terminated for endangerment under either section 161.001(b)(1)(D) or (E), that ground becomes a basis to terminate that parent's rights to other children.

belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code § 101.007. "To endanger" means to expose a child to loss or injury or to jeopardize a child's emotional or physical health. *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996); *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). A finding of endangerment under subsection E requires evidence that the endangerment was the result of the parent's conduct, including acts, omissions, or failures to act. *Id*. Termination under subsection E must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id*. A court properly may consider actions and inactions occurring both before and after a child's birth to establish a course of conduct. *Id.* at 360-61; *In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

"While endangerment often involves physical endangerment, the statute does not require that conduct be directed at a child or that the child actually suffers injury; rather, the specific danger to the child's well-being may be inferred from the parent's misconduct alone. *In re S.R.*, 452 S.W.3d at 360 (citing *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987)). A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being. *Id*; *see also In re F.E.N.*, 542 S.W.3d 752, 764 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *In re A.L.H.*, 515 S.W.3d at 92.

Among the types of actions or omissions constituting evidence meeting this standard are criminal activity, convictions, and incarceration. *See In re V.V.*, 349 S.W.3d 548, 554 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Evidence of criminal conduct, convictions, imprisonment, and their effects on a parent's life and ability to parent, may establish an endangering course of conduct. *In re S.M.*, 389 S.W.3d 483, 492 (Tex. App.—El Paso 2012, no pet.). Routinely subjecting children

to the probability that they will be left alone because their parent is in jail endangers children's physical and emotional well-being. *See Walker v. Tex. Dep't of Family and Protective Servs*., 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Imprisonment alone is not an endangering course of conduct but is a fact properly considered on the endangerment issue. *Boyd*, 727 S.W.2d at 533–34.

Also, drug abuse and its effect on the ability to parent can also present an endangering course of conduct. *See In re J.O.A.*, 283 S.W.3d at 345; *In re S.R.*, 452 S.W.3d at 361; *see also In re J.J.W.*, No. 14-18-00985-CV, 2019 WL 1827591 *6 (Tex. App.—Houston [14th Dist.] Apr. 25, 2019, pet. denied) (mem. op.). Drug use can endanger a child "when the environment creates a potential for danger that the parent is aware of but disregards." *In re E.R.W.*, 528 S.W.3d 251, 264 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

2. Endangerment Under Subsection (E)

Clear and convincing evidence proves that Mother engaged in acts and patterns of behavior that endangered her children's emotional and physical well-being and placed them in dangerous surroundings or circumstances. The evidence submitted at trial proves: (1) physical abuse and/or medical neglect of the twins; (2) a pattern of criminal behavior both before and after the twins' birth; (3) illegal drug behavior before and after the twins' birth; a pattern of involvement with men who engage in illicit drug usage or violence; and (4) a pattern of instability for Mother's children.

Evidence proving physical abuse and medical neglect includes Officer Nellely Gonzales testimony that when she responded to a welfare check on children at a hotel, the children had noticeable injuries and HFD was called. Mother had been "walking around the hotel." She admitted to being homeless and unable to afford a hotel room and was observed by Officer Gonzales allowing her two and a half year

old daughter to run around uncontrolled in the driveway of the hotel. After being transported to Texas Children's Hospital, medical personnel confirmed injuries showing medical neglect and possible child abuse. The attending physician concluded permanent physical damage or death could have resulted to Miguel from the failure to obtain immediate medical treatment noting: "worsening of leg infection leading to blood infection, amputation or even death." The physician also concluded the ascending infection from the knee to thigh without medical attention was medical neglect.

Moreover, Dr. Angela Bachim testified at trial that swelling in Miguel's knee went up the thigh indicating the infection had spread. Miguel did not have full range of motion with his leg. Miguel appeared to be in pain and received morphine in the emergency room for the pain. Miguel's leg was so infected he could not stand on it and it had cellulitis. Miguel's ear had damage from suspected blunt force trauma. A developmental disorder of speech and language was noted. The hospital documented Michelle's right cheek bruise was particularly concerning for inflicted injury because bruising on soft tissues such as cheeks requires significant force to occur. Hospital records further noted abrasions like these could have been caused by skin rubbing against the ground consistent with the EMS' report that they were called because the mother was seen dragging this child down the street. Dr. Bachim testified that Michelle had marks on both cheeks concerning for inflicted injury because it was not over a boney prominence that is very easily bruised in play. *See In re E.W.*, No. 14-19-00666-CV, 2020 WL 742327, at *8 (Tex. App.—Houston [14th Dist.] Feb. 13, 2020, no pet.) (mem. op.) (parent's three-day delay in seeking medical treatment shows medical neglect for finding under subsection E).

Additionally, the undisputed evidence in the record shows Mother engaged in criminal behavior both before and after the twins were born in 2015. In 2010,

Mother had three misdemeanor theft convictions. In 2015, Mother had another theft conviction. The incident that started this underlying termination proceeding was also a criminal action where Mother was arrested in 2018 for child endangerment and possession of a controlled substance, after officers found syringes and what they believed to be methamphetamines in her backpack while in the company of her children.

Mother engaged in illegal drug use during the pendency of this termination suit. Drug tests in July 2018 and May 2019 were positive for drug usage. Mother reported at her drug assessment that her drug of choice was cannabis. Mother's visits with the twins were suspended because of positive drug test results, as well as Mother being late and a no-show to visits. Further, at trial Mother stated she did not recall the last time she used methamphetamines, but acknowledged she tested positive for drugs throughout this case. *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009) ("We… agree that a parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct."); *In the Interest of E.W.*, No. 14-19-00666-CV, 2020 WL 742327, at *9 (Tex. App.—Houston [14th Dist.] Feb. 13, 2020, pet. denied) (mem. op.) ("Continued illegal drug use after a child's removal jeopardizes parental rights and may be considered as establish an endangering course of conduct."); *In re S.R.*, 452 S.W.3d 351, 360 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("A parent's conduct that subjects a child to a life of uncertainty and instability endangers the child's physical and emotional well-being.").

The evidence reflects Mother engaged in a pattern of involvement with men who engage in violence or illegal drugs. Mother continues a friendship with Kam, who went to jail for domestic violence for assaulting her. *See In re E.W.*, 2020 WL 742327, at *7 (abusive or violent conduct can produce a home environment that

endangers a child); *Clark v. Clark*, 705 S.W.2d 218 (Tex. App.—Dallas 1985, writ dism'd w.o.j.) (Violence against another parent, even when not committed in the child's presence, endangers their child's emotional well-being for purposes of subsection E). Mother admitted at trial a Department referral occurred when her twins were eleven months old because Kam was driving erratically while under the influence of drugs with the children in the vehicle. Mother also testified she was in a dating relationship with Scot, living with him off and on, and that he had a relationship with the twins. Scot's brother testified at trial the family discovered crystal methamphetamine at Scot's residence in August 2019 after Mother told them Scot was a heavy crystal meth user. Mother also told them that Scot had put a gun to his head and had overdosed twice in her presence. The family carried Narcan "to bring him back." Yet, Mother claimed Scot did not have a substance abuse problem. Mother testified she planned to marry Scot if her children were returned to her care. *See In re P.N.T.*, 580 S.W.3d 331, 355 (Tex. App.—Houston [14th Dist.] 2019 pet. denied) (Inappropriate, abusive or unlawful conduct by a parent or other persons who live in the child's home can create an environment that endangers the child for a finding under Subsection D); *In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (Evidence of criminal conduct is relevant to review of whether a parent engaged in a course of conduct that endangered the child).

Finally, the evidence before the trial court proved Mother exhibited a pattern of instability as to all her children. Mother's oldest child was the subject of a 2015 Department case that concluded in finding of reason to believe neglectful supervision due to a positive drug screening. The outcome of that case resulted in her son's removal from her custody, placement in a foster home, and finally, placement with his paternal grandparents, with Mother having no access to that child. In July 2017, the Department initiated an investigation because the children

were present during a physical altercation at Mother's friend's house. In October 2017, the Department received another referral that Mother was using drugs. The Department was unsuccessful in contacting Mother for months because she moved from place to place, including Houston, Corpus Christi, and Austin. In February 2018, a hair follicle test result for Mother was positive for methamphetamine. Although Mother was no longer communicating with the Department, it received another referral in April 2018 when the children and Mother were seen walking in a parking lot. On that occasion, Mother was arrested for drug possession and child endangerment. The children were transported to Texas Children's Hospital for medical screening. Mother admitted she tested positive for drugs throughout this case and on such positive drug tests, the court restricted access to the children, which precluded visitation with her children for some time. Mother's lack of effort to ensure the well-being of her children, the potential child abuse, and neglect, coupled with the evidence of drug abuse is sufficient to support a termination finding based on endangerment. *See In re Z.N.M.*, No. 14-17-00650-CV, 2018 WL 358480, at *6 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.) (mem. op.).

Finally, Officer Gonzales testified that after searching Mother's backpack, she found drugs, used syringes, and lighters mixed together with the children's clothes. Mother agreed that syringes and other drug paraphernalia within reach of a child could be dangerous. She further agreed that keeping drug paraphernalia in the close proximity to a child's belongings is dangerous to that child. Further, she conceded that a parent who continues to engage in illegal activity is dangerous to their child. Mother, however, denied having drugs or drug paraphernalia in her backpack when she was arrested; instead, she testified she works in veterinary medicine and administers medications to animals with the syringes.

Mother's course of conduct in this case implies that Mother had a conscious disregard and indifference to her parental responsibilities. Considered in the light most favorable to the trial court's finding, we conclude that the evidence is legally sufficient to support the trial court's determination that termination of Mother's parental rights was justified under section 161.001(b)(1)(E). We also conclude, in view of the entire record, that the evidence is factually sufficient to support the trial court's determination that termination of Mother's parental rights was justified under Family Code section 161.001(b)(1)(E) because the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination was warranted.

Having concluded the evidence is legally and factually sufficient to support the trial court's finding under subsection E, we need not review the sufficiency of the evidence to support the subsections D, or O findings.[8] *See In re A.V.*, 113 S.W.3d at 362. We overrule Mother's first, second, third, and sixth issues.

3. Best Interest of the Children

We turn to Mother's legal and factual sufficiency challenges (issues four, five, and seven) to the trial court's best-interest findings.

The best-interest inquiry is child-centered and focuses on the child's well-being, safety, and development. *In re A.C.*, 560 S.W.3d at 631. The trier of fact may consider several factors to determine the child's best interest, including: (1) the desires of the child; (2) the present and future physical and emotional needs of the

[8] Section 161.001(d) prevents a trial court from ordering termination under subsection (O) where a parent establishes by a preponderance of evidence that she was "unable to comply with specific provisions of a court order" and that she "made a good faith effort to comply with the order and the failure to comply with the order is not attributable to any fault of the parent." Because we do not reach Mother's argument regarding the sufficiency of the evidence supporting subsection (O), it is unnecessary for us to review section 161.001(d), which is a codified defense to section 161.001(b)(1)(O).

child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the persons seeking custody; (5) the programs available to assist those persons seeking custody in promoting the best interest of the child; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and (9) any excuse for the parents' acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re E.R.W.*, 528 S.W.3d 251, 266 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see also* Tex. Fam. Code § 263.307(b) (listing factors to consider in evaluating parents' willingness and ability to provide the child with a safe environment).

Courts apply a strong presumption that the best interest of the child is served by keeping the child with the child's natural parents, and it is the Department's burden to rebut that presumption. *In re D.R.A.*, 374 S.W.3d at 531. Prompt and permanent placement in a safe environment also is presumed to be in the child's best interest. Tex. Fam. Code § 263.307(a). A finding in support of "best interest" does not require proof of any unique set of factors; nor does it limit proof to any specific factors. *See Holley*, 544 S.W.2d at 371–72. We review the *Holley* factors in light of the evidence at trial.

a. The desires of the child

The children were only two and a half years of age when they were placed in foster care. Mother concedes the children are too young to reliably express their desires. *See In re A.C.*, 394 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The only testimony elicited on this issue was that of Mother and Foster mom, who testified that on one occasion the twins stated they missed their mother, and on one Friday they asked if they were going to see Mother.

While recognizing the natural bond of love and affection between a parent and a child, the trial court, and by extension our court, considers of paramount importance the health and welfare of the child by examining what is in the best interest of the child. There is evidence that the children's needs were met in a foster home where they lived since the inception of this case, including improvement in behavior and physical condition. Additionally, the foster mom testified she loved them and wished to adopt them. The Department's caseworker observed the twins in the foster home and testified they had a great bond and relationship, were very comfortable there and had a sibling bond with the foster parents' biological children. While the case was pending, Mother's visitations with the twins was compromised because she would show up late or not show up at all, and because the court suspended visits when Mother tested positive for drug use. These are facts the fact finder was entitled to consider in support of the court's finding that parental termination was in the children's best interest. *See In re J.D.*, 436 S.W.3d 105, 117 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (when children are too young to express their desires, the fact-finder may consider whether the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent). We acknowledge that Mother, testified that she believed the children loved her and missed her. However, based on the testimony and undisputed facts in the record, the trier of fact could have found that despite the bond between Mother and her children, the best interests of the children were to remain with their foster family. The twins have lived with their foster family, including their two biological children, since May 2018. There was testimony that the twins have bonded with the family and all their needs are being met. This factor weighs in favor of the trial court's finding.

b. The present and future emotional and physical danger to the child

A parent's drug use supports a finding that termination is in the best interest of the child. *In re E.R.W.*, 528 S.W.3d at 266. The fact finder can give "great weight" to the "significant factor" of drug-related conduct. *Id*. Mother has an admitted history of drug use. Although there is some of evidence of diminished use, it is not reliably certain to continue. *See In re M.G.D.*, 108 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Mother's drug habits create a risk of instability and danger to the twins' futures.

c. The stability of the home or proposed placement

The stability of the proposed home environment is an important consideration in determining whether termination of parental rights is in the children's best interest. *See In re E.R.W*, 528 S.W.3d at 267. Texas courts recognize that a paramount consideration in the best-interest determination is the children's need for permanence through the establishment of a "stable, permanent home." *See In re K.C.*, 219 S.W.3d 924, 927 (Tex. App.—Dallas 2007, no pet.). The Department documented that the foster family wanted to adopt the children and the caseworker confirmed at trial that the agency's plan was unrelated adoption. Mother testified that she planned to marry Scot and have the children live with her and Scot, even though Mother told Scot's brother that Scot was a crystal meth addict. Such proof supports parental termination.

Mother also argues that the evidence is factually insufficient to show that the Department made reasonable efforts to identify and evaluate relatives or fictive kin placement. Mother alleges she provided her sister, Rita, and her close family friend Dorothea as possible placement for the children. "[W]here a child will be placed is a factor in evaluating the child's best interest, but it is not a bar to termination that

placement plans are not final or that placement will be with nonrelatives." *In re R.A.*, No. 02-18-00252-CV, 2019 WL 490121, at *9 (Tex. App.—Fort Worth Feb. 7, 2019, no pet.) (mem. op.). "Because [the child] had been in a stable, adoption-motivated foster home for such a long period of time, a [fictive kin] placement could have actually destabilized [her] li[fe]. Why parents would prefer a relative [or fictive kin] placement is self-evident, but determining best interest focuses on the child, not the parent." *Id*. at *10; *see also In re B.C.S.*, 479 S.W.3d 918, 927 (Tex. App.—El Paso 2015, no pet.); *see In re C.M.*, No. 02-17-00381-CV, 2018 WL 2123472, at *5 (Tex. App.—Fort Worth May 9, 2018, no pet.) (mem. op.) (citing *Dupree v. Tex. Dep't of Protective & Regulatory Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ)).

Initially, Mouton testified that Mother did not provide the names of any relatives for possible placement of the children. The only person Mother volunteered was a friend, Gordin. Gordin's home was where an alleged altercation took place in front of the children, resulting in an allegation of endangerment in July 2017. According to Mouton, the Department did not feel that such placement was in the best interest of the children. Subsequently, at the hearing on January 23, 2019, the parties discussed placement with Mother's friend, Gordin, and the trial court ordered a home study. Ratcliff testified that she had reached out to Gordin and advised her that the Department would need to conduct a home study and background check. Ratcliff stated that Gordin said she was uncomfortable giving her that information because "she didn't know who I [Ratcliff] was" and thereafter, would not return Ratcliff's telephone calls. Ratcliff testified that when she advised Mother of how Gordin responded, Mother said Gordin did not want to do it. Reyes testified she telephoned Dorothea twice, but Gordin did not return her calls when she left a voicemail.

Jones testified that Mother did provide her sister, Rita, in Hawaii, as a proposed placement. Jones stated she reached out to Rita, but Rita would not provide her social or sufficient information for a home study. In addition, Reyes testified that between July 2019 and September 2019 she made numerous attempts to obtain the needed documentation and information from Rita to complete a home study between July 2019 and September 2019; however, Rita did not provide the information to Reyes.

Thus, the evidence contradicts Mother's assertion that the Department did not properly evaluate these placements. The best interest of the twins supports the trial court's placement determination.

d. The present and future physical and emotional needs of the child

The twins are well-bonded with their foster parents and siblings. The foster parents are meeting all their needs and testified that they will continue to do so as they want to adopt the twins. Mother, on the other hand, has failed to demonstrate she is clean from using drugs. On numerous occasions Mother failed to comply with the court's order to submit to drug test screening. Mother acknowledged she tested positive for drugs throughout this case. Mother has not submitted any evidence that she is on the road to recovery. As such, Mother's ability to provide for the twins is too tenuous.

We note that the trier of fact is the sole judge of the credibility of the witnesses at trial and that we are not at liberty to disturb the determinations of the trier of fact as long as those determinations are not unreasonable. *J.P.B.*, 180 S.W.3d at 573. We hold that, based on clear and convincing evidence presented at trial and the *Holley* factors, the trial court could reasonably have formed a firm belief or conviction that termination of Mother's parental rights would be in the best interest of both children.

See Holley, 544 S.W.2d at 371–72; *see In re E.R.W.*, 528 at 267–68 (considering the mother's drug history in holding the evidence supported the best-interest finding).

Thus, viewing the evidence in the light most favorable to the judgment for our legal-sufficiency analysis and all of the evidence equally for our factual-sufficiency analysis, we conclude that a reasonable fact finder could have formed a firm belief or conviction that termination of Mother's parental rights was in the twins' best interest. *See* Tex. Fam. Code § 161.001(b)(2).

We overrule Mother's fourth, fifth, and seventh issues.

IV. CONCLUSION

The evidence is legally and factually sufficient to support the predicate termination finding under subsection E. Further, based on the evidence presented, the trial court reasonably could have formed a firm belief or conviction that terminating Mother's parental rights was in Miguel and Michelle's best interest so that they could promptly achieve permanency through adoption. *See In re M.G.D.*, 108 S.W.3d at 513-14.

We affirm the decree terminating Mother's parental rights and naming the Department managing conservator.

/s/ Margaret 'Meg' Poissant
Margaret "Meg" Poissant
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant