Opinion issued June 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00685-CV

IN THE INTEREST OF M.A.J. JR., H.A.J., AND B.D.J., CHILDREN

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Case No. 2018-04197J

OPINION ON REHEARING

Appellee, the Department of Family and Protective Services ("DFPS"), has filed a motion for rehearing of our March 5, 2020 memorandum opinion and judgment.[1] We deny the motion for rehearing, withdraw our opinion and judgment of March 5, 2020, and issue the following opinion and judgment in their stead.

1 *See* TEX. R. APP. P. 49.1.

In this accelerated appeal,[2] appellant, mother, challenges the trial court's order, entered after a bench trial, terminating her parental rights to her minor children, M.A.J. Jr. ("M.A.J."), H.A.J., and B.D.J. (collectively, "the children").[3] In four issues, mother contends that the evidence is legally and factually insufficient to support the trial court's findings that she engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being;[4] she constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months;[5] she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children;[6] and termination of her parental rights was in the best interest of the children.[7]

We affirm in part and reverse in part.

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2 *See* TEX. FAM. CODE ANN. § 263.405(a); TEX. R. APP. P. 28.4.

3 The trial court also terminated the parental rights of the children's father. He is not a party to this appeal.

4 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

5 *See id.* § 161.001(b)(1)(N) (trial court may terminate parental rights if it finds by clear and convincing evidence that parent constructively abandoned child who had been in permanent or temporary managing conservatorship of DFPS for not less than six months and (i) DFPS had made reasonable efforts to return child to parent; (ii) parent had not regularly visited or maintained significant contact with child; and (iii) parent had demonstrated inability to provide child with safe environment).

6 *See id.* § 161.001(b)(1)(O).

7 *See id.* § 161.001(b)(2).

Background

On August 22, 2018, DFPS filed a petition seeking termination of mother's parental rights to the children and managing conservatorship of the children.

DFPS Caseworker Cano

At trial, DFPS caseworker Gabriela Cano testified that M.A.J. was four years old and both H.A.J. and B.D.J. were one year old. H.A.J. and B.D.J. are twins. Cano stated that the children entered the care of DFPS based on an allegation of negligent supervision occurring on June 24, 2018, but she did not provide any additional information regarding that allegation.[8] DFPS records also indicated that there was an incident involving injury to M.A.J. on July 23, 2018, but Cano did not know anything about the incident. Cano did not ever see any injuries on M.A.J. and did not see any photographs of injuries on M.A.J. When asked whether mother was "the alleged perpetrator of the physical abuse against [M.A.J.]," Cano acknowledged that she did not know. Instead, Cano stated that she "believe[d]," but did not know, that it was "a failure to protect on [mother's] part." When questioned regarding "the condition[] of the children . . . when they first came into [DFPS's] care," Cano admitted that the children were "well."

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[8] Cano also testified that any allegations of sexual abuse against M.A.J. had been "ruled out" by DFPS. *See Duffey v. Duffey*, No. 14-16-00144-CV, 2017 WL 6045569, at *2 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, pet. denied) (mem. op.) ("[r]uled [o]ut" means that "it was reasonable to conclude that the alleged abuse or neglect did not occur" (internal quotations omitted)).

The children had been in their current placement, an "adoptive" home, for three months.[9] According to Cano, the home was stable. When asked whether "[t]he current placement [was] doing well," Cano responded, "[y]es." Cano also stated that the children's needs were being met, including "[t]herapeutically." The children did not have any "special needs." H.A.J. and B.D.J. participated in occupational therapy and speech therapy. M.A.J. participated in individual therapy at school. DFPS's goal for the children was an unrelated adoption. M.A.J. attended daycare.

In regard to mother, Cano explained that mother was given a Family Service Plan ("FSP") and Cano discussed the FSP with mother. Mother had completed some of the requirements of her FSP, including completing her psychological evaluation and her substance abuse assessment. Without any specificity, Cano stated that mother had used narcotics in the past and continued to do so.[10] Although mother had been referred to outpatient treatment for her substance-abuse issues, mother had not completed the treatment. According to Cano, mother had not regularly visited the children during the pendency of the case, but this was because the trial court had suspended her visits at the beginning of the case. Cano faulted mother for having

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9 A May 14, 2019 "Permanency Hearing Order Before Final Order," admitted into evidence at trial, states that the children's foster home is also an adoptive home.

10 Cano agreed that "there was . . . a drug test result that dated back in 2016," but there is no testimony, explanation, or detail as to what that "drug test result" may have been. And although Cano also agreed that there were "drug allegations" from "back in 2016," again, no explanation or detail is provided.

her visits with the children suspended. Cano noted that mother was not present at trial.

Finally, Cano summarily testified that mother had engaged in a continuous course of conduct that had endangered the physical and emotional well-being of the children; the children's "circumstances ha[d] substantially improved from the time they came into [DFPS's] care"; and it would be in the best interest for mother's parental rights to the children to be terminated.

Child Advocates Volunteer Clark

Child Advocates Inc. ("Child Advocates") volunteer Kristy Clark testified that the children were doing well in their current home and DFPS's goal was to have the children adopted. Clark opined that M.A.J. needed "a little bit more therapy" and "had some trouble adjusting" to being in DFPS's care. Clark also explained that while the children had been in DFPS's care, they were neglected in a previous foster home.

Mother's FSP

The trial court admitted into evidence mother's FSP, which stated that DFPS received a referral for negligent supervision of M.A.J. on July 3, 2018. The referral also alleged that mother had engaged in narcotics use. According to the FSP, on July 24, 2018, mother tested positive for methamphetamine, amphetamine, and marijuana use. The FSP noted that mother had the support of the family of the

children's father, and DFPS's permanency goal, when the FSP was issued, was family reunification for the children and mother.[11] The FSP states that mother "hopes that the children grow[] up to be healthy, happy, and resilient."

Narcotics-Testing Results

The trial court admitted into evidence the results from mother's narcotics-use testing before and during the pendency of this case. Mother tested negative for narcotics use in April 2016 (hair follicle test), on November 8, 2018 (urinalysis), on November 28, 2018 (urinalysis and hair follicle test), and on December 11, 2018 (urinalysis).[12]

Mother tested positive for amphetamine, methamphetamine, and marijuana use on July 24, 2018 (urinalysis), positive for marijuana use on September, 6 2018 (hair follicle test), positive for marijuana use on November 8, 2018 (hair follicle test), positive for marijuana use on December 11, 2018 (hair follicle test), positive for marijuana use on January 16, 2019 (urinalysis and hair follicle test), positive for marijuana use on February 13, 2019 (urinalysis), positive for marijuana use on March 14, 2019 (urinalysis), and positive for marijuana use on May 14, 2019 (hair follicle test).

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[11] An October 11, 2018 "Status Hearing Order," admitted into evidence at trial, states that DFPS's goal was "to return the children to the[ir] parent."

[12] Mother also tested negative for alcohol use on March 27, 2019 (urinalysis).

Mother did not submit to narcotics-use testing on October 15, 2018 or on February 8, 2019.

Incident/Investigation Report

The trial court admitted into evidence a Harris County Sheriff's Office ("HCSO") incident/investigation report dated July 23, 2018 related to an incident of injury to a child. The report classifies mother as the "[r]eportee" of an incident during which M.A.J. was injured. When a law enforcement officer arrived at mother's home, he saw M.A.J., who was three years old at the time, wearing a shirt, shorts, and no shoes. M.A.J. had redness and swelling around both of his eyes, minor scrapes on the right side of his chin and along his forehead, and swollen wrists. Mother reported that M.A.J. had been playing with a neighbor, a five-year-old child, D.G., in the yard when the two children began fist-fighting. D.G. hit M.A.J., and M.A.J. fell to the ground. M.A.J. got back up, and the children continued fighting. M.A.J. eventually knocked D.G. to the ground. D.G.'s mother then approached the two children and struck M.A.J. with the back of her hand. This caused M.A.J. to fall to the ground and "scream in pain." Mother stated that she did not intervene in the fight because D.G. had been the aggressor and he was "losing." The law enforcement officer noted that M.A.J.'s injuries were consistent with "being in a fight with a larger child" and were not consistent with being struck by an adult.

In regard to mother's home at the time, the law enforcement officer stated in the report that the property "contained various scrap metal piles and junked vehicles." "Rusted scrap metal and broken glass were found on the ground throughout the property," and there were "numerous safety hazards." However, the officer also noted that "[v]isibility was poor due to nighttime hours."

A follow-up supplemental report states that there was "no further investigation [into the incident] by the Special Victims/Child Abuse Unit." "The allegations of injury to a child were due to[] 3 year old [M.A.J.] and 5 year old [D.G.] engag[ing] in a physical altercation outside their residence." Both parents were present and observed the altercation. D.G.'s mother "broke up the fight," but M.A.J. was struck in his back with her hand. The law enforcement officer reviewing the incident concluded that it involved "mutual combat between 2 children." And the case was closed.

Standard of Review

A parent's right to "the companionship, care, custody, and management" of her children is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (internal quotations omitted). The United States Supreme Court has emphasized that "the interest of [a] parent[] in the care, custody, and control of [her] children . . . is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530

U.S. 57, 65 (2000). Likewise, the Texas Supreme Court has concluded that "[t]his natural parental right" is "essential," "a basic civil right of man," and "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (internal quotations omitted). Consequently, "[w]e strictly construe involuntary termination statutes in favor of the parent." *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012).

Because termination of parental rights is "complete, final, irrevocable and divests for all time that natural right . . . , the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent's rights." *Holick*, 685 S.W.2d at 20. Clear and convincing evidence is "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; *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Because the standard of proof is "clear and convincing evidence," the Texas Supreme Court has held that the traditional legal and factual standards of review are inadequate. *In re J.F.C.*, 96 S.W.3d at 264–68.

In conducting a legal-sufficiency review in a termination-of-parental-rights case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which DFPS bore the burden of proof.

Id. at 266. In viewing the evidence in the light most favorable to the finding, we "must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so," and we "should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (internal quotations omitted). However, this does not mean that we must disregard all evidence that does not support the finding. *In re J.F.C.*, 96 S.W.3d at 266. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id.* If we determine that no reasonable trier of fact could form a firm belief or conviction that the matter that must be proven is true, we must hold the evidence to be legally insufficient and render judgment in favor of the parent. *Id.*

In conducting a factual-sufficiency review in a termination-of-parental-rights case, we must determine whether, considering the entire record, including evidence both supporting and contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which DFPS bore the burden of proof. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). We should consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266–67. "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." *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (internal quotations omitted).

Sufficiency of Evidence

In her first issue, mother argues that the trial court erred in terminating her parental rights to the children because the evidence is legally and factually insufficient to support the trial court's finding that she engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). In her fourth issue, mother argues that the trial court erred in terminating her parental rights to the children because the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the best interest of the children. *See id.* § 161.001(b)(2).

In order to terminate the parent-child relationship, DFPS must establish, by clear and convincing evidence, one or more of the acts or omissions enumerated in Texas Family Code section 161.001(b)(1) and that termination of parental rights is in the best interest of the children. *See id.* § 161.001(b). Both elements must be established, and termination may not be based solely on the best interest of the children as determined by the trier of fact. *Id.*; *Tex. Dep't of Human Servs. v. Boyd*,

727 S.W.2d 531, 533 (Tex. 1987). "Only one predicate finding under section 161.001[(b)](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child[ren's] best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

A. Endangering Conduct

In a portion of her first issue, mother argues that the evidence is legally insufficient[13] to support the trial court's termination of her parental rights for engaging, or knowingly placing the children with persons who engaged, in conduct that endangered their physical and emotional well-being because "the record contains insufficient evidence as to any injury to any of the children because of [m]other's acts or omissions," mother was "no longer using methamphetamine" at the time of trial, mother only tested positive for marijuana use prior to trial, and mother's results from the March 2019 narcotics-use testing "show[ed] lower levels of marijuana" in her system.

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[13] When a party presents multiple grounds for reversal, an appellate court should first address those issues that would afford the party the greatest relief. *See Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999); *In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *7 n.4 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.). Because legally insufficient evidence requires a rendition of judgment in favor of the party raising the challenge, we must address a legal-sufficiency challenge first. *See In re A.A.H.*, 2020 WL 1056941, at *7 n.4; *In re L.N.C.*, 573 S.W.3d 309, 315 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

A trial court may order termination of the parent-child relationship if it finds by clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct which endanger[ed] the physical or emotional well-being of the child[ren]" and termination is in the best interest of the children. TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (b)(2). Within this context, endangerment encompasses "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Boyd*, 727 S.W.2d at 533. Instead, "endanger" means to expose the children to loss or injury or to jeopardize their emotional or physical health. *Id.* (internal quotations omitted); *Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (internal quotations omitted).

We must look at a parent's conduct standing alone, including her actions or omissions. *In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). It is not necessary to establish that a parent intended to endanger the children. *See In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996). However, termination of parental rights requires "more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required." *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.); *see also In re J.W.*, 152 S.W.3d at 205.

Mother's FSP states that DFPS received a referral alleging that mother had engaged in narcotics use. The FSP also notes that on July 24, 2018, mother tested positive for methamphetamine, amphetamine, and marijuana use.

Mother's narcotics-use testing results, admitted into evidence at trial, indicate that she tested positive for amphetamine, methamphetamine, and marijuana use on July 24, 2018 (urinalysis).[14] Thereafter, mother tested positive for marijuana use on September 6, 2018 (hair follicle test), positive for marijuana use on November 8, 2018 (hair follicle test), positive for marijuana use on December 11, 2018 (hair follicle test), positive for marijuana use on January 16, 2019 (urinalysis and hair follicle test), positive for marijuana use on February 13, 2019 (urinalysis), positive for marijuana use on March 14, 2019 (urinalysis), and positive for marijuana use on May 14, 2019 (hair follicle test).[15]

This Court has previously stated that illegal narcotics use and its effect on an individual's ability to parent may constitute an endangering course of conduct. *See In re A.A.M.*, 464 S.W.3d 421, 426–27 (Tex. App.—Houston [1st Dist.] 2015, no pet.). And we have concluded that illegal narcotics use may support termination under Texas Family Code section 161.001(b)(1)(E). *See Walker*, 312 S.W.3d at

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14 This appears to be the same testing result referenced in mother's FSP.

15 Mother did not submit to narcotics-use testing on October 15, 2018 or on February 8, 2019.

617–18; *see also Vasquez v. Tex. Dep't of Protective & Regulatory Servs.*, 190 S.W.3d 189, 195–96 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

Thus, viewing the evidence in the light most favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that mother engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). We hold that the evidence is legally sufficient to support the trial court's finding that mother engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being. *See id.*

We overrule this portion of mother's first issue.

Having held that the evidence is legally sufficient to support the trial court's finding that mother engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being, we need not address the portions of mother's second and third issues in which she asserts that the evidence is legally insufficient to support the trial court's findings that she constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months, and that she failed to comply with the provisions of a court order that specifically established

the actions necessary for her to obtain the return of the children. *See id.* § 161.001(b)(1)(N), (O); *In re A.V.*, 113 S.W.3d at 362 (only one predicate finding under Texas Family Code section 161.001(b)(1) necessary to support judgment of termination); *see also* TEX. R. APP. P. 47.1.

Additionally, due to our disposition below,[16] we need not address the portions of mother's first, second, and third issues in which she asserts that the evidence is factually insufficient to support the trial court's findings that she engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being; constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months; and she failed to comply with the provisions of a court order that specifically established the actions necessary for

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[16] Because we reverse the portion of the trial court's order terminating mother's parental rights of the children and remand the case to the trial court for a new trial after concluding that the evidence is factually insufficient to support the trial court's best-interest finding, *see infra*, we do not run afoul of the Texas Supreme Court's decision in *In re N.G.*, 577 S.W.3d 230 (Tex. 2019), by not considering whether the evidence is factually insufficient to support the trial court's finding that mother engaged, or knowingly placed the children with persons who engaged, in conduct that endangered their physical and emotional well-being. *See In re D.T.*, Nos. 07-19-00071-CV, 07-19-00072-CV, 2019 WL 3210601, at *5 n.6 (Tex. App.—Amarillo July 16, 2019, no pet.) (mem. op.); *see also* TEX. FAM. CODE ANN. § 161.001(1)(b)(E); *In re N.G.*, 577 S.W.3d at 237, 239 (explaining that *only* when appellate court "*affirms the termination*" of parental rights under section 161.001(b)(1)(D) or (E) must it address both legal and factual sufficiency of evidence "to support [a] section 161.001(b)(1)(D) and (E) finding[] as grounds for termination" (emphasis added)).

her to obtain the return of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (N), (O). This is because, even were we to sustain any of the factual-sufficiency challenges raised in mother's first, second, or third issues, mother would not be granted any more relief than we have afforded her below. *See In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *18 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.); *see also* TEX. R. APP. P. 47.1.

B. Best Interest of the Children

In her fourth issue, mother argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the best interest of the children because "[t]he record contains evidence that is neutral or weighs against the best interest termination finding" and "DFPS failed to meet its burden of proving that termination of [m]other's parental rights is in the children's best interest."

The best-interest analysis evaluates the best interest of the children. *See In re D.S.*, 333 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.). It is presumed that the prompt and permanent placement of the children in a safe environment is in their best interest. *See* TEX. FAM. CODE ANN. § 263.307(a); *In re D.S.*, 333 S.W.3d at 383.

There is also a strong presumption that the children's best interest is served by maintaining the parent-child relationship. *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Thus, we strictly scrutinize termination proceedings in favor of the parent. *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.). And because of the strong presumption in favor of maintaining the parent-child relationship and the due process implications of terminating a parent's rights to her minor children without clear and convincing evidence, "the best interest standard does not permit termination merely because . . . child[ren] might be better off living elsewhere." *In re J.G.S.*, 574 S.W.3d 101, 121–22 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (internal quotations omitted); *see also In re W.C.*, 98 S.W.3d 753, 758 (Tex. App.—Fort Worth 2003, no pet.). Termination of parental rights should not be used as a mechanism to merely reallocate children to better and more prosperous parents. *In re J.G.S.*, 574 S.W.3d at 121–22; *In re W.C.*, 98 S.W.3d at 758; *see also In re E.N.C.*, 384 S.W.3d at 809; *In re C.R.*, 263 S.W.3d 368, 375 (Tex. App.—Dallas 2008, no pet.).

Moreover, termination is not warranted "without the most solid and substantial reasons." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (internal quotations omitted); *see also In re N.L.D.*, 412 S.W.3d at 822. And in parental-termination proceedings, DFPS's burden is not simply to prove that a parent

should not have custody of her children; DFPS must meet the heightened burden to prove, by clear and convincing evidence, that the parent should no longer have any relationship with her children whatsoever. *See In re K.N.J.*, 583 S.W.3d 813, 827 (Tex. App.—San Antonio 2019, no pet.); *see also In re J.A.J.*, 243 S.W.3d 611, 616–17 (Tex. 2007) (distinguishing conservatorship from termination).

In determining whether the termination of mother's parental rights is in the best interest of the children, we may consider several factors, including: (1) the children's desires; (2) the current and future physical and emotional needs of the children; (3) the current and future emotional and physical danger to the children; (4) the parental abilities of the parties seeking custody; (5) whether programs are available to assist those parties; (6) plans for the children by the parties seeking custody; (7) the stability of the proposed placement; (8) the parent's acts or omissions that may indicate that the parent-child relationship is not proper; and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re L.M.*, 104 S.W.3d at 647. We may also consider the statutory factors set forth in Texas Family Code section 263.307. *See* TEX. FAM. CODE ANN. § 263.307; *In re A.C.*, 560 S.W.3d 624, 631 n.29 (Tex. 2018); *In re C.A.G.*, No. 01-11-01094-CV, 2012 WL 2922544, at *6 & n.4 (Tex. App.—Houston [1st Dist.] June 12, 2012, no pet.) (mem. op.).

These factors are not exhaustive, and there is no requirement that DFPS prove all factors as a condition precedent to the termination of parental rights. *See In re C.H.*, 89 S.W.3d at 27; *see also In re C.L.C.*, 119 S.W.3d 382, 399 (Tex. App.—Tyler 2003, no pet.) ("[T]he best interest of the child does not require proof of any unique set of factors nor limit proof to any specific factors."). The absence of evidence about some of the factors would not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the children's best interest. *In re C.H.*, 89 S.W.3d at 27; *In re J.G.S.*, 574 S.W.3d at 122.

Likewise, a lack of evidence on one factor cannot be used as if it were clear and convincing evidence supporting termination of parental rights. *In re E.N.C.*, 384 S.W.3d at 808; *In re J.G.S.*, 574 S.W.3d at 122. In some cases, undisputed evidence of only one factor may be sufficient to support a finding that termination is in the children's best interest, while in other cases, there could be "more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice" to support termination. *In re C.H.*, 89 S.W.3d at 27; *see also In re J.G.S.*, 574 S.W.3d at 122. The presence of scant evidence relevant to each factor will generally not support a finding that termination of parental rights is in the children's best interest. *In re R.H.*, No. 02-19-00273-CV, 2019 WL 6767804, at *4 (Tex. App.—Fort Worth Dec. 12, 2019, pet. denied) (mem. op.); *In re A.W.*, 444 S.W.3d 690, 693 (Tex. App.—Dallas 2014, pet. denied).

1. Children's Desires

At the time mother's parental rights were terminated, M.A.J. was four years old and both H.A.J. and B.D.J. were one year old. Generally, when children are too young to express their desires, this factor is considered neutral. *See In re A.C.*, 394 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2012, no pet.). And here, there is no evidence indicating that the children did not want to be returned to mother's care. *See In re D.D.M.*, No. 01-18-01033-CV, 2019 WL 2939259, at *5 (Tex. App.—Houston [1st Dist.] July 9, 2019, no pet.) (mem. op.) (considering in determining factor weighed against termination that no evidence indicated children did not want to be placed with parent).

Further, Child Advocates volunteer Clark testified that M.A.J. has "had some trouble adjusting" after being removed from mother's care. The children had been moved from one placement, and at the time of trial, they had only been in their current placement for a short period of time. There is no evidence that the children were bonded to their current foster parents. *Cf. In re L.W.*, No. 01-18-01025-CV, 2019 WL 1523124, at *17–18 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, pet. denied) (mem. op.) (factor weighed in favor of termination where children, although young, were "very close" to foster family and had "bonded" with and relied on foster parents for emotional support; foster family was only family one child had ever

known and he never left foster parents' side (internal quotations omitted)). This factor does not weigh in favor of termination of mother's parental rights.

2. Current and Future Physical and Emotional Needs and Current and Future Physical and Emotional Danger

a. Condition of Home

The children need a safe and stable home. *See* TEX. FAM. CODE ANN. § 263.307(a) (prompt and permanent placement of child in safe environment presumed to be in child's best interest); *In re G.M.G.*, 444 S.W.3d 46, 60 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (parent who lacks ability to provide child with safe and stable home is unable to provide for child's emotional and physical needs). However, there is little evidence regarding the condition of mother's home before the children were removed from her care and no evidence about the conditions inside the home. The only evidence comes from the HCSO incident/investigation report dated July 23, 2018, which states that the property where mother was living at the time "contained various scrap metal piles and junked vehicles," "[r]usted scrap metal and broken glass . . . on the ground," and "numerous safety hazards." Despite this description, there is no evidence that the children were harmed by these conditions. Nor is there evidence regarding the length of time these conditions remained on the property. *See Ybarra v. Tex. Dep't of Human Servs.*, 869 S.W.2d 574, 577–78 (Tex. App.—Corpus Christi–Edinburg 1993, no writ) (for conditions to endanger well-being of children, there must be connection between conditions

and resulting danger to children's emotional or physical well-being). The law enforcement officer who visited the property noted in the report that his visibility of the property's condition was poor due to it being nighttime.

DFPS caseworker Cano testified that the children were "well" when they were removed from mother's care. And even cases involving unsanitary conditions do not uphold termination of parental rights based solely on such conditions. *In re E.C.A.*, No. 01-17-00623-CV, 2017 WL 6759198, at *13 (Tex. App.—Houston [1st Dist.] Dec. 28, 2017, no pet.) (mem. op.); *In re R.W.*, No. 01-11-00023-CV, 2011 WL 2436541, at *12–13 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.) (holding evidence factually insufficient to support termination of parental rights in best interest of children where, although children were dirty and lived in unsanitary home, they appeared healthy).

Additionally, DFPS presented no evidence that mother still lived at the aforementioned property at the time of trial or that any new residence of mother's was unsafe or unstable. *See Ybarra*, 869 S.W.2d at 579–80; *see also Herrera v. Herrera*, 409 S.W.2d 395, 396 (Tex. 1966); *Toliver v. Tex. Dep't of Family & Protective Servs.*, 217 S.W.3d 85, 101 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (DFPS has burden to rebut presumption that best interest of children is served by keeping custody with natural parent). A lack of evidence does not constitute clear and convincing evidence. *In re E.N.C.*, 384 S.W.3d at 808.

The record also does not contain any evidence of the condition of the children's current placement.[17] *See In re A.H.*, 414 S.W.3d 802, 807 (Tex. App.—San Antonio 2013, no pet.) (holding evidence insufficient to support best-interest finding where no information about children's current caregivers or nature of environment caregivers provided children); *see also In re E.N.C.*, 384 S.W.3d at 808. DFPS caseworker Cano opined that the children's current foster home was stable. *See In re D.N.*, No. 12-13-00373-CV, 2014 WL 3538550, at *3–5 (Tex. App.—Tyler July 9, 2014, no pet.) (mem. op.) (holding evidence insufficient to support termination of parental rights and noting DFPS caseworker and children's attorney ad litem did not provide any facts to form basis of opinion). But, conclusory opinion testimony, even if uncontradicted, does not amount to more than a scintilla of evidence; it is no evidence at all. *See In re A.H.*, 414 S.W.3d at 807; *see also City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (opinion is conclusory "if no basis for the opinion is offered[] or the basis offered provides no support"); *Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008) (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to just "take [her] word for it" (internal quotations omitted)); *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999) (witness "must explain the basis of h[er]

[17] The record only reveals that the children were neglected in a previous foster home while in DFPS's care.

statements to link his conclusions to the facts"). This factor does not weigh in favor of termination of mother's parental rights.

b. Children's Needs

DFPS caseworker Cano testified that the children do not have any special needs. At the time of trial, H.A.J. and B.D.J. participated in occupational therapy and speech therapy and M.A.J. participated in individual therapy at school. Child Advocates volunteer Clark stated that M.A.J. needed "a little bit more therapy" because he had been having "trouble adjusting" to being in DFPS's care.

There is nothing in the record to establish that the children's physical and emotional needs differ in any respect to that of other children their age or that their needs would go unmet if they were returned to mother's care. Likewise, the record does not show that mother did not meet the children's physical and emotional needs while they were previously in her care, nor is there evidence that mother would not be able to meet the children's needs in the future. *See In re E.N.C.*, 384 S.W.3d at 808 (no evidence presented indicated that children's needs differ from other children or would go unmet if children were returned to parent); *In re D.D.M.*, 2019 WL 2939259, at *6 (DFPS presented no evidence parent could not meet children's therapeutic needs); *In re E.W.*, 494 S.W.3d 287, 300–01 (Tex. App.—Texarkana 2015, no pet.). DFPS caseworker Cano testified that when the children were removed from mother's care, they were "well." *See In re W.C.*, 98 S.W.3d at 758

(no evidence presented indicated that parent failed to meet children's needs in past); *see also In re R.W.*, 2011 WL 2436541, at *12–13 (holding evidence factually insufficient to support termination of parental rights in best interest of children where, although children were dirty and lived in unsanitary home, they appeared healthy).

And although Cano testified that the children's current placement was meeting their needs, this is nothing more than a conclusory opinion. *See In re A.H.*, 414 S.W.3d at 807; *see also Pollock*, 284 S.W.3d at 818; *Arkoma Basin*, 249 S.W.3d at 389; *Earle*, 998 S.W.2d at 890. In fact, there is no evidence addressing the children's physical and emotional condition at the time of trial. *See In re D.T.*, Nos. 07-19-00071-CV, 07-19-00072-CV, 2019 WL 3210601, at *6–9 (Tex. App.—Amarillo July 16, 2019, no pet.) (mem. op.) (holding evidence factually insufficient to support termination of parental rights in best interest of children where "[n]o caregiver testified" and "no evidence otherwise addressed the children's physical and emotional condition at the time of [the] final hearing"). And the record contains no details regarding the children's specific therapeutic needs, such as the severity of such needs or the amount of therapy believed to be required. This factor does not weigh in favor of termination of mother's parental rights.

c. Danger to Children

DFPS caseworker Cano testified that the children entered the care of DFPS based on an allegation of negligent supervision occurring on June 24, 2018, but Cano did not know anything about the allegation and did not testify that it was mother who had allegedly not supervised M.A.J. properly.[18] Further, any allegation of sexual abuse of M.A.J. had also been "ruled out" by DFPS. *See Duffey v. Duffey*, No. 14-16-00144-CV, 2017 WL 6045569, at *2 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, pet. denied) (mem. op.) ("[r]uled [o]ut" means that "it was reasonable to conclude that the alleged abuse or neglect did not occur" (internal quotations omitted)). Cano knew nothing about an incident involving injury to M.A.J. on July 23, 2018, and she only speculated that it was "a failure to protect on [mother's] part." Still yet, Cano only offered conclusory testimony that mother had engaged in a continuous course of conduct that had endangered the physical and emotional well-being of the children. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) ("Opinion testimony that is conclusory or speculative is not relevant evidence . . . ."); *In re D.N.*, 2014 WL 3538550, at *3–5 (holding evidence insufficient to support termination of parental rights and noting

[18] Mother's FSP notes that there was an allegation of negligent supervision of M.A.J. on July 3, 2018, but it provides no details related to this allegation and does not allege that mother was involved. *See In re E.N.C.*, 384 S.W.3d 796, 808 (Tex. 2012).

DFPS caseworker and children's attorney ad litem did not provide any facts to form basis of opinion); *In re A.H.*, 414 S.W.3d at 807; *see also Pollock*, 284 S.W.3d at 818; *Arkoma Basin*, 249 S.W.3d at 389; *Earle*, 998 S.W.2d at 890.

The HCSO incident/investigation report dated July 23, 2018 states that mother reported an incident after M.A.J. was injured while fighting with another child. A law enforcement officer who arrived at mother's home examined M.A.J., who had redness and swelling around both of his eyes, minor scrapes on the right side of his chin and along his forehead, and swollen wrists. Mother told the officer that M.A.J. was playing with a neighbor, a five-year-old child, D.G., in the yard when the two children began fist-fighting. D.G. hit M.A.J., and M.A.J. fell to the ground. M.A.J. got back up, and the children continued fighting. M.A.J. eventually knocked D.G. to the ground. D.G.'s mother then approached the two children and struck M.A.J. with the back of her hand. This caused M.A.J. to fall to the ground and "scream in pain." The law enforcement officer noted that M.A.J.'s injuries were consistent with "being in a fight with a larger child" and were not consistent with being struck by an adult.

A follow-up supplemental report states that there was "no further investigation [into the incident] by the Special Victims/Child Abuse Unit." "The allegations of injury to a child were due to[] 3 year old [M.A.J.] and 5 year old [D.G.] engag[ing] in a physical altercation outside their residence." Both parents were

present and observed the altercation. D.G.'s mother "broke up the fight," but M.A.J. was struck in his back with her hand. The law enforcement officer reviewing the incident concluded that it involved "mutual combat between 2 children." And the case was closed.

The record does not contain evidence that mother acted aggressively or violently toward the children while they were in her care. And there is no evidence that mother negligently supervised the children, abused the children, or exposed them to physical danger. *See In re E.N.C.*, 384 S.W.3d at 808–10 ("A lack of evidence does not constitute clear and convincing evidence."); *In re J.C.*, No. 12-19-00102-CV, 2019 WL 3940803, at *4–5 (Tex. App.—Tyler Aug. 21, 2019, no pet.) (mem. op.); *see also In re E.C.A.*, 2017 WL 6759198, at *13 (noting children had not been abused by parent); *In re J.P.*, No. 02-10-00448-CV, 2012 WL 579481, at *9 (Tex. App.—Fort Worth Feb. 23, 2012, no pet.) (mem. op.) (holding evidence factually insufficient to support finding termination of parental rights in child's best interest where grounds for terminating parent's rights did not involve allegations of physical or sexual abuse of child by parent); *In re R.W.*, 2011 WL 2436541, at *13. In fact, DFPS's initial permanency goal was family reunification for the children and

mother.[19] And the HCSO incident/investigation report indicates that mother reported the incident during which M.A.J. was injured by another child.

Significantly, the record reveals that while the children have been in DFPS's care, they were placed in a foster home where they were neglected. *See In re C.T.E.*, 95 S.W.3d 462, 468 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (considering emotional and physical danger to children while in DFPS's care). This factor does not weigh in favor of termination of mother's parental rights.

d. Narcotics Use

Without providing any explanation or details, DFPS caseworker Cano testified that mother had used narcotics in the past and continued to do so. She also stated that mother had not completed her outpatient treatment related to her substance-abuse issues. Mother did complete her substance abuse assessment.

Mother's FSP states that DFPS received a referral alleging that mother had engaged in narcotics use. The FSP also notes that on July 24, 2018, mother tested positive for methamphetamine, amphetamine, and marijuana use.

Mother's narcotics-use testing results, admitted into evidence at trial, indicate that she tested positive for amphetamine, methamphetamine, and marijuana use on

[19] The October 11, 2018 "Status Hearing Order," admitted into evidence at trial, also states that DFPS's goal was "to return the children to the[ir] parent."

July 24, 2018 (urinalysis).[20] Thereafter, mother tested positive for marijuana use on September 6, 2018 (hair follicle test), positive for marijuana use on November 8, 2018 (hair follicle test), positive for marijuana use on December 11, 2018 (hair follicle test), positive for marijuana use on January 16, 2019 (urinalysis and hair follicle test), positive for marijuana use on February 13, 2019 (urinalysis), positive for marijuana use on March 14, 2019 (urinalysis), and positive for marijuana use on May 14, 2019 (hair follicle test).[21]

However, mother also tested negative for narcotics use in April 2016 (hair follicle test), on November 8, 2018 (urinalysis), on November 28, 2018 (urinalysis and hair follicle test), and on December 11, 2018 (urinalysis).

Narcotics use by a parent is certainly not desirable. *See In re C.V.L.*, 591 S.W.3d 734, 756 (Tex. App.—Dallas 2019, pet. denied) (agreeing parent's narcotics use constituted factor to be considered in best-interest analysis); *see also In re J.N.*, 301 S.W.3d 429, 434–35 (Tex. App.—Amarillo 2009, pet. denied) (although parent tested positive for narcotics use, holding evidence factually insufficient to support trial court's determination termination of parental rights in best interest of child). However, there is no evidence that mother used narcotics in the presence of the

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[20] This appears to be the same testing result referenced in mother's FSP.

[21] Mother did not submit to narcotics-use testing on October 15, 2018 or on February 8, 2019.

children or while she was caring for them. And there is no evidence that mother was impaired while caring for the children or that the narcotics were accessible to the children. DFPS caseworker Cano's testimony regarding narcotics use by mother is speculative and conclusory at best, and it is unclear at times during her testimony whether she is even referring to narcotics use by mother.

Notably, the results from mother's April 2016 narcotics-use testing, while M.A.J. was in her care, show that mother tested negative for narcotics use. Further, the only time that mother tested positive for amphetamine or methamphetamine use in this case was on July 24, 2018. Thus, mother stopped testing positive for any "hard drugs" a year before trial. *See Campbell v. State*, No. 11-10-00387, 2012 WL 2150739, at *3 (Tex. App.—Eastland June 14, 2012, no pet) (mem. op., not designated for publication) (characterizing methamphetamine as "[a] hard drug[]"); *see also* TEX. HEALTH & SAFETY CODE ANN. § 481.102(6) (methamphetamine constitutes "Penalty Group 1" narcotic). And although mother tested positive for marijuana use at times during the pendency of the case, on several occasions mother tested negative or both positive and negative for marijuana use on the same date.[22] Finally, DFPS sought to return the children to mother's care, even after knowing that

[22] We note that courts' consideration of parental marijuana use in termination-of-parental-rights cases is evolving. *See, e.g.*, *In re N.J.H.*, 575 S.W.3d 822, 836–41 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (Brown, J., concurring).

she had tested positive for narcotics use. *See In re C.V.L.*, 591 S.W.3d at 755–59 (refusing to hold, solely based on evidence of parent's narcotics use, that evidence was sufficient to support termination of parental rights); *In re E.C.A.*, 2017 WL 6759198, at *11–13 (holding evidence factually insufficient to support finding termination of parental rights in children's best interest, although "[m]other was a synthetic marijuana user[,] . . . left the blunts from her drug use within reach of the children[, and] . . . tested positive for cocaine on the same day that the [FSP] was approved by the trial court" and while she was pregnant); *In re J.P.*, 2012 WL 579481, at *8–9 (holding evidence factually insufficient to support termination of parental rights in best interest of trial event though parent "had been abusing drugs for years and had used crack, cocaine, and marijuana during the month prior to trial"); *Turner v. Lutz*, 685 S.W.2d 356, 360–61 (Tex. App.—Austin 1984, no writ) (evidence of parent's "alcohol problem" did not include any evidence showing emotional or physical danger to children); *cf. In re G.N.*, 510 S.W.3d 134, 135, 138–40 (Tex. App.—El Paso 2016, no pet.) (parent had "history of substance abuse, including use of cocaine, marijuana, and opiates" and "a substantial criminal history which include[d] . . . four cases involving possession of drugs"; parent did not address his "substance abuse issues" and "refused to be tested for drugs after a pipe containing cocaine was found in his vehicle"); *In re A.C.*, 394 S.W.3d at 642 ("[M]other admitted she had used drugs during her pregnancy even though she knew

it might harm the child. She tested positive for drugs a month after the child was removed. And she used drugs even though that violated the conditions of her probation, resulting in her going to jail, away from the child."). This factor only weighs slightly in favor of termination of mother's parental rights.

3. Parental Abilities, Plans for Children, Stability of Proposed Placement, and Availability of Assistance

a. Mother

DFPS casework Cano testified that when the children were removed from mother's care, they were "well." Cano also acknowledged that mother had completed some of the requirements of her FSP. Although mother had not visited the children during the pendency of the case, this was because the trial court had suspended her visits at the beginning of the case. *See In re D.T.*, 2019 WL 3210601, at *8–9 (noting limited evidence regarding trial court's suspension of visitation for parent in holding evidence factually insufficient to support termination of parental rights in children's best interest).

As previously noted, there is little evidence regarding the condition of mother's home before the children were removed from her care and no evidence about the conditions inside the home. The only evidence comes from the HCSO incident/investigation report dated July 23, 2018, which states that the property where mother was living at the time "contained various scrap metal piles and junked vehicles," "[r]usted scrap metal and broken glass . . . on the ground," and "numerous

safety hazards." However, there is no evidence that the children were harmed by any of these conditions, and the law enforcement officer who visited the property noted in his report that his visibility of the property's condition was poor due to it being nighttime. *See Ybarra*, 869 S.W.2d at 577–78 (for conditions to endanger well-being of children, there must be connection between conditions and resulting danger to children's emotional or physical well-being).

Additionally, DFPS presented no evidence that mother still lived at the aforementioned property at the time of trial or that any new residence of mother's was unsafe or unstable. There is no evidence regarding the condition of mother's current home at all. *See Ybarra*, 869 S.W.2d at 579–80; *see also In re E.N.C.*, 384 S.W.3d at 808; *Herrera*, 409 S.W.2d at 396; *Toliver*, 217 S.W.3d at 101 (DFPS has burden to rebut presumption that best interest of children is served by keeping custody with natural parent). This factor does not weigh in favor of termination of mother's parental rights.

b. Children's Current Placement

As previously noted, the record contains no evidence of the condition of the children's current placement. There is also no evidence regarding the parental abilities of the children's current foster parents or the environment that they have provided the children. *See In re E.N.C.*, 384 S.W.3d at 808. At the time of trial, the children had only been in their placement for a short period of time. And although

DFPS caseworker Cano testified that the children were residing in an "adoptive" home, there is no evidence that the children's current placement wants to adopt them or wants the children to remain in the home.[23] *See Horvatich v. Tex. Dep't of Protective & Regulatory Servs.*, 78 S.W.3d 594, 601–04 (Tex. App.—Austin 2002, no pet.) (holding evidence insufficient to support finding termination in best interest of children where record not developed concerning current circumstances of children); *see also In re E.N.C.*, 384 S.W.3d at 808–09 (DFPS "presented no evidence that another family wishe[d] to adopt the children, or that the children's foster parents c[ould] provide for them in a way [their parent could] []not"); *In re E.C.A.*, 2017 WL 6759198, at *13 (considering significant in analysis "the fact that DFPS had no evidence about their plans for the children's future").

Additionally, the evidence shows that while in DFPS's care, the children were neglected. *See In re C.T.E.*, 95 S.W.3d at 468. This factor does not weigh in favor of termination of mother's parental rights.

DFPS must support its allegations against a parent, including its allegation that termination of parental rights is in the best interest of the children, by clear and convincing evidence; conjecture or a preponderance of evidence is not enough. *See In re E.N.C.*, 384 S.W.3d at 808–10; *see also In re R.H.*, 2019 WL 6767804, at

[23] Although DFPS caseworker Cano stated that the children's foster parents were in the courtroom at trial, this is not evidence of anything other than their presence.

*4; *In re A.W.*, 444 S.W.3d at 693 (presence of scant evidence relevant to each factor will generally not support finding that termination of parental rights is in children's best interest); *Toliver*, 217 S.W.3d at 101 (DFPS has burden to rebut presumption that best interest of children is served by keeping custody with natural parent). This is a high evidentiary burden that DFPS must meet, especially considering the presumption that the children's best interest is served by maintaining the parent-child relationship. *In re E.C.A.*, 2017 WL 6759198, at *13; *In re R.W.*, 2011 WL 2436541, at *12.

Although we recognize that the trial court and the parties in this proceeding had many hearings before the date of trial, we emphasize that none of the previous hearings constitute evidence that can support the trial court's order terminating mother's parental rights to the children. The only evidence that can support the trial court's order is that evidence admitted at trial.[24] *See In re E.F.*, 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.). We are cognizant of the extraordinary burdens placed on all participants in a termination-of-parental-rights case, but given the constitutional rights of the parent involved in such a proceeding,

[24] The reporter's record from trial in this case is thirty-two pages total, including the cover, list of appearances, table of contents, and court reporter's certificate. Although the trial court admitted twenty-five exhibits into evidence at trial, most of them either do not relate to mother or have no bearing on whether her parental rights should have been terminated. *Cf. In re E.F.*, 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.). To the extent that our dissenting colleague references matters not admitted into evidence at trial, we take exception.

the interests of the children involved, and the effect that placement of the children will have on numerous lives, it is imperative that the parties completely develop the evidence at trial. *See id.* There is a reason the law sets a high evidentiary bar for the termination of parental rights. *See Santosky*, 455 U.S. at 753–54 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . .").

Viewing the evidence in a neutral light, we conclude that a reasonable fact finder could not have formed a firm belief or conviction that termination of mother's parental rights was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is factually insufficient to support the trial court's finding that termination of mother's parental rights is in the best interest of the children.[25] *See id.*

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[25] Due to mother's narcotics use and our prior case law, viewing the evidence in the light most favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that termination of mother's parental rights was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is legally sufficient to support the trial court's finding that termination of mother's parental rights is in the best interest of the children. *See id.*; *see also In re A.A.H.*, 2020 WL 1056941, at *7 n.4 (because legally insufficient

We sustain a portion of mother's fourth issue.

Conclusion

We reverse the portion of the trial court's order terminating mother's parental rights and remand the case to the trial court for a new trial.[26] *See* TEX. R. APP. P. 28.4(c); *In re J.O.A.*, 283 S.W.3d 336, 347 (Tex. 2009). Because mother did not challenge the trial court's appointment of DFPS as the children's sole managing conservator, we affirm that portion of the trial court's order. *See In re J.A.J.*, 243 S.W.3d at 612–13.

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evidence requires rendition of judgment in favor of party raising the challenge, we must address it); *In re L.N.C.*, 573 S.W.3d at 315.

[26] Our dissenting colleague appears to criticize our analysis in this case because "[t]he result of [our] application of the law" purportedly keeps "the children in permanent foster care with no hope of adoption and with very little, if any, prospect of reunion with [their] parent." Contrary to our colleague's assertion, however, we have actually reversed the trial court's order terminating mother's parental rights and remanded the case to the trial court *for a new trial* (of which no one knows the outcome). In doing so, we remain vigilant in abstaining from "results-oriented judging." *See In re V.V.*, 349 S.W.3d 548, 576 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (Jennings, J., dissenting) (internal quotations omitted) ("Judges should decide cases that come before them based upon the facts in evidence and the governing law, not upon their moral preferences, desires, or the dictates of their emotions.").

Further, we recognize that decisions in cases involving termination of parental rights are never easy, but "the law and canons of ethics require that we remain neutral" and impartial and treat all parties with dignity and respect. *See Jordan v. Jefferson Cty.*, 153 S.W.3d 670, 676 (Tex. App.—Amarillo 2004, pet. denied); *see also Barrie v. Costello*, 401 S.W.2d 707, 711 (Tex. App.—Austin 1966, writ ref'd n.r.e.) (recognizing that even when parental rights are terminated, court should not express view "that a mother should never be forgiven for past mistakes or that she should never be permitted to reshape her life").

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman and Countiss.

Keyes, J., dissenting.