Opinion issued June 30, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00973-CV

IN THE INTEREST OF M.P.B. AND L.C.B., Children

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2018-04477J

MEMORANDUM OPINION

B.A. (Mother) is appealing a final order terminating her parental rights to her sons, M.P.B. (Max) and L.C.B. (Larry), and appointing the Texas Department of Family and Protective Services (the Department) as the boys' sole managing conservator. In three issues, Mother argues that there is legally and factually insufficient evidence supporting the trial court's findings that: (1) she committed the

predicate act under section 161.001(b)(1)(D); (2) she committed the predicate act under section 161.001(b)(1)(E); and (3) termination of her parental rights is in Max's and Larry's best interests. In her fourth issue, Mother argues that the trial court abused its discretion by naming the Department as the children's managing conservator. Finding no reversible error, we affirm the trial court's decree of termination.

Background

On July 18, 2018, the Department's investigator, Randy Martinez, received a report from the Houston Police Department (HPD) that 13-year-old Max and 10-year-old Larry were at Houston Methodist Hospital's Emergency Room where they were being assessed and treated for injuries. The report indicated that the boys had been physically abused by Mother.

Max and Larry took a bus to the Medical Center by themselves to get help and an HPD officer found them and took them to the ER. Both boys had numerous marks, bruises, and cuts on their arms and legs that needed medical attention. They also brought the bloody extension cord which they reported Mother had hit them with that morning. Max was "visibly fearful" and "shaking and crying" when they arrived at the hospital and both boys appeared afraid of being "released to family or family members." Max reported that Mother caused his and Larry's injuries and "[t]hey left home because they are tired of being hurt." The HPD officer who contacted Randy

told Randy that the boys were "very credible and their injuries are the wors[t] he has seen in many years of working as a police officer."

After Max and Larry were released from the ER, an HPD officer transported them to the Department's office where the boys met with Randy and Frank Pascarelli, the Special Investigator assigned to the case. Randy and Frank interviewed the boys and photographed some of their injuries. The open wounds on the boys' arms, however, were not photographed because they had been bandaged at the hospital. Frank noted during the interview that Larry had extensive marks and bruising to his arms, legs, and hands and he observed two scars on the back of Larry's head that Larry told him were from getting hit with the cord. Randy noted that it appeared that Max had been beaten over an extended period with multiple objects, including a belt and possibly an extension cord. Max claimed that Mother had hit him in the head with a cord.

Max told Randy and Frank that Mother "started hitting him when he was 4 years old" and that she beat him and Larry daily for years. Larry said Mother started beating him when he was 7 years old. According to Max, Mother usually used a belt to beat him, but she also used a tension rod or an extension cord, and today she used a printer cord. Larry said he was hit with the same items.

When asked about the latest incident, Max said Mother had not made dinner for them the night before, so they each took a honey bun to eat that morning. When

Mother noticed that there were only two honey buns left in the package, she assumed that Max and Larry had eaten the rest of them and beat them with a printer cord. Max told Larry to run and hide and took most of the hits to protect his little brother.

The boys said Mother made them wear long sleeves to hide the marks and told them to lie if anyone asked if they were being abused. Max said he was afraid to tell anyone about the abuse because Mother had threatened to "put him in the hospital" if he told anyone. Larry stated that Mother had also told him she was going to buy a "razor cord" and beat him with it until he was bloody. The boys had planned to leave home several years before, but Mother said she was trying to change so they stayed. However, Mother did not change and told the boys she would beat them more if they told anyone about the beatings. Larry said Mother threatened to "break [his] back" if he told anyone about the marks.

The boys also reported that there was not always enough food for them to eat at home because Mother would not leave anything for them when she went to work. According to Larry, Mother would get mad if they touched the food in the refrigerator or ate too much.

Randy interviewed Mother about an hour later. Mother, who denied abusing Max and Larry, also stated that she "believe[d] she went too far this morning." She admitted that "this morning was a mistake, and she could have done something different." Mother gave the Department permission to place Max and Larry with Iris,

the boys' maternal great aunt, on July 19, 2018. The boys remained in Iris's care until trial in October 2019.

On September 13, 2018, the Department filed a petition for child protection. On October 3, 2018, the court named the Department as Larry's and Max's Temporary Managing Conservator.

In April 2019, during the pendency of this case, Mother was charged with a felony, Injury to a Child, and a Protective Order was issued to protect Max and Larry from Mother.

The bench trial began October 2, 2019. Randy testified that this was the third time that the Department had investigated Mother for abusing children in her care.

In August 2009, the Department received a report alleging that Mother was physically abusing her then 3-year old foster child, "Jerry." Three-year old Max, one-year old Larry, and a three-year old girl were also living with Mother at the time. Jerry had scratches on both sides of his head, a C-shaped bruise on the left side of his head, a bruise on the top of his left ear, and red scratch marks behind his left ear. When Jerry was asked what had happened, he told the Department that "he got in trouble and got 'whooped' by [Mother]" with a belt. Mother denied hitting Jerry and claimed that he was injured when he fell off his bunkbed. The Department determined that Jerry's injuries were "consistent with being hit by a belt buckle" and could not have been caused by falling out of his bunk bed, as Mother claimed.

The investigation was closed as "Unable to Determine" because "[t]here is not a preponderance of the evidence that abuse or neglect occurred, nor can abuse or neglect be ruled out." As a result of the investigation, Jerry was placed with a different foster family who subsequently adopted him, and the 3-year-old girl was also removed from Mother's home and placed in a different foster home. Max and Larry were not removed from Mother's care and the caseworker said that she would continue to monitor Larry.

In November 2012, the Department received a report from Max's elementary school that Mother had been physically abusing him. Max, who had gone to school "with what appeared to be bruises on [the] left side of [his] face," had initially refused to answer school officials, but later said that Mother had spanked him because he received a "U" in conduct the day before. A few days later, Max told the Department's investigator that he could not tell her what happens when he gets in trouble because he is "not supposed to tell his mother's business." Max also stated he could not remember what happens when he gets in trouble. The investigator's report noted that Mother had been the subject of previous physical abuse investigations and noted that Max could have been coached about what he could say about those allegations. School officials contacted the investigator two days later because the nurse noticed that Max "had two larger marks on his face that appeared

to be welts and they were red." When he was asked how he had gotten the marks, Max said that Mother had hit him because he could not find his conduct sheet.

The Department sent a worker to conduct a home visit at Mother's home. When the worker got out of her car, she heard screams and thumping noises coming from the house as well as "the sound of someone being beat[en]." "A child was heard saying "'no[,]' 'I won't do it again[,]' 'I'm sorry.'" The worker rang the doorbell and knocked on the door several times but there was no answer. The worker called the police, but before they arrived, Mother and Max drove around to the front of the house and told the worker they would return after they picked up Larry from school.

When Mother, Max, and Larry returned, Mother invited the worker into her home. When the worker told Mother that she had heard Mother "whipping" Max earlier, she said she uses a belt to discipline Max and "he is a runner and a screamer." Mother said she does not spank Max all the time but then conceded she had "whipped [Max] for lying about his conduct sheet." She denied ever slapping Max in the face and denied bullying him. She also claimed Max was passive-aggressive, he lied a lot, and would make things up so someone would think they really happened. The worker also talked to Larry while she was there. Larry told the caseworker that he was whipped with a belt when he got in trouble. Mother signed a Safety Plan which prohibited her from disciplining Max and Larry while the investigation was open.

Even though Max had numerous old marks and bruises on his body, the investigation was closed approximately four months later as "Unable to Determine." According to the report, "the stories provided by [Max] and [Mother] did not match. Also [Max] would not state how he received the marks and bruises as he was not allowed to tell his mother's business." Unlike the 2009 investigation with Jerry, however, this case was referred to Family Based Safety Services (FBSS). Mother agreed to a new safety plan and "stated that she would complete services and anything that is requested of her by the agency."

After the 2012 case, the Department did not receive a referral again until the physical abuse allegation in July 2018. The Department documented that allegation with the disposition: "Reason to Believe."

Dr. Aric Bakshy, the physician who treated Max and Larry in the ER, testified that law enforcement "found [Max and Larry] on the streets between Children's Hospital and Methodist and brought them to us because they had injuries." "[T]hey had been abused." Dr. Bakshy noticed multiple bruises and lacerations on the boys' hands, arms, and thighs. When asked how long the abuse had been occurring, Dr. Bakshy opined that the new contusions and small lacerations had occurred that day and the "old bruising, within probably two weeks." According to Dr. Bakshy, Max and Larry told him that they had been abused by Mother for four to five years.

Mary Senkel, the nurse practitioner who examined and treated Max and Larry on July 20, 2018, also testified at trial. After examining the boys, Senkel diagnosed them both with physical abuse and short stature. Max's and Larry's medical records also contain the note, "Substantial evidence of maltreatment[.] Physical abuse[.]"

According to Senkel, Max and Larry had many old and new marks, scars, and bruises on their hands, arms, legs, and thighs. She determined that "both of the boys had been hit with an object. Definitely looked like a looped cord object like the cable that they had disclosed to [the Department]. And [both boys] had multiple abrasions, healing wounds, and patterned scars to their arms, chest, [and] legs." Senkel also found that the boys' injuries were consistent with their statements that they had been abused, but she could not determine how long the abuse had been occurring based on her observations. Mother told Senkel that the boys were injured when she spanked them with a belt for stealing from her purse.

Senkel testified that Max's height and weight in July 2018 were below the one percentile of boys his age and his BMI was in the twentieth percentile. She noted that Max's BMI and height and weight percentiles increased "tremendously" while he was living with Iris. Larry's BMI, which was in the eighth percentile in July 2018, also improved while he was living with Iris, though not as significantly as Max's.

Olivia Putlow, a licensed clinical social worker, testified that she was Max's and Larry's trauma therapist and that she had seen the boys for fifteen sessions over the course of approximately ten months. Working with the boys' psychiatrist, they diagnosed both boys as having post-traumatic stress disorder (PTSD). Larry was also diagnosed with major depressive disorder, single episode, severe. Olivia described the years of physical abuse that both boys had suffered that caused them to develop PTSD:

> [Mother hit them] with multiple objects: such as extension cords, computer cords, a metal pole. [Max], I believe, told me an iron was thrown at him, multiple objects. And they also described withholding of food. They would often go to bed without being fed. And they would have to sneak down in the middle of the night to get food. And they also told me they would have to steal food from the school because they were going hungry at home. They also told me that they would … have to engage in excessive academic studies.… And there was also excessive exercise…one of them told me he had to stand holding heavy books for 6 or 7 hours without a single break.

Olivia testified when she initially began her therapy sessions with Max and Larry, their visits with Mother had already stopped. Iris told her that the boys had high anxiety and crying spells, and they were very emotional after visits, so the visits were stopped. Max told Olivia he specifically wanted to see Mother, but only if the visit was supervised. Larry, too, said he wanted to see Mother. Neither boy told Olivia they wanted a relationship with Mother, just that they wanted to see her. When asked if she had any concerns if the children were placed back in Mother's home, Olivia testified, "I would have concerns, yes, due to the pattern and severity of the previous abuse, the duration that it occurred, I think it's very high risk."

Mother testified that she had worked as an educator in special education for twenty-six years but was currently working in retail. She had been honorably discharged after serving six and a half years in the military. Mother said she was a foster parent for four years and she fostered approximately twelve children during that time. She said she adopted Max when he was twenty-two months old and Larry when he was eight or nine months old. Mother testified that Max and Larry did well in school and participated in a wide range of extracurricular activities, including sports, piano lessons, and theater and acting groups.

Mother acknowledged that she had been investigated by the Department in 2009 for allegedly abusing Jerry. Although she denied abusing Jerry, Mother

confirmed that he had been removed from her home based on his statement that she "whooped him." She also confirmed that the Department had investigated her in 2012 for allegedly abusing Max and that she had been referred to FBSS to complete services. Mother denied that she had physically abused Max or warned him not to tell anyone "her business."

When asked about her methods of discipline, Mother admitted that she had spanked Max and Larry with belts and the mixer paint stick when they were younger but she denied ever hitting them with metal rods, electric cords, and irons.[1] She also denied using food deprivation to punish Max and Larry, beating the boys for eating a honey bun, ordering Max to wear long sleeves to hide the scars on his body, and threatening to lock Larry in his room for trying to run away from home.

Mother stated she had completed services in this case and said she learned from her services. When asked why the physical abuse was still occurring, even though she had participated in services in 2012, Mother responded: "It was not abuse. It was spanking." Mother also testified she took an online parenting class and anger management on her own initiative "to show [she] was aware that [she] had made a horrible mistake." She attributed her "mistake" to failing to ask for help. Mother testified that she "was just overwhelmed. And I made a very bad choice,

[1] Mother was admonished by her attorney before this testimony that she had a Fifth Amendment right not to testify to anything related to Max's and Larry's case because of the pending criminal charges against her.

very bad choice, very bad choice." She also testified that her brother had promised to help her out with the boys whenever needed.

When asked how many times she had disciplined Max and Larry with a belt, Mother testified that she spanked them "an average of two or three times a year" to discipline them for stealing. She testified that "[she] can't turn back time, but if [she] could, [she] would," and claimed that things would be "totally different" if the boys were returned to her care. Mother also testified that she was willing to make any necessary changes to get the boys back, including participating in more services and family counseling.

Mother acknowledged that her supervised visitation with the boys ended in April 2019 after she was charged with injury to a child and the court issued a protective order that prohibited her from visiting Max and Larry. Mother admitted it was her fault she had not seen the boys for six months. Mother also testified that she knew that the children did not want unsupervised contact with her.

Courtney Pinnekins, a Department caseworker who had been assigned to this case for five months and the Department's custodian of records, also testified at trial. Courtney testified that Max and Larry came into the Department's care in July 2018 "because they went to the hospital with different marks and bruises that allegedly were inflicted by [Mother]." Courtney also confirmed that the Department provided Mother with a family service plan and that Mother had completed services. Courtney explained that Mother's completion of services was not the issue. Rather, the issue was the physical abuse of both boys, her pending felony charges for child endangerment, and her prior history of physical abuse with the Department. Courtney also testified that it was the Department's belief that Mother would likely abuse the children in the future if they were returned to her care because Mother continued to minimize the beatings. Mother repeatedly insisted that she had only spanked the children in the past and that an officer had told her one time that spankings were not illegal.

Courtney confirmed Max and Larry were currently living with Iris, their maternal great aunt, and had been living with her during the pendency of this case. Iris was meeting all of Max's and Larry's physical and emotional needs and she was prepared to take care of and planned to adopt Max and Larry. Iris made sure they got to all of their appointments and they did well in school. Iris was providing Max and Larry with a stable, consistent environment where they were no longer afraid of

being physically abused. Courtney testified that both boys told her that they wanted to stay with Iris.

When asked why the Department wanted Mother's rights to Max and Larry terminated, Courtney testified:

> Well, the main thing is [Mother] continues to minimize the abuse she inflicted upon [Max and Larry]. Every time I've spoken with [Mother], she reiterates that it was just a spanking; it was a singular incident. And according to [Max and Larry], it was not. They had been abused. According to [the Department's] history with the State, this is not [Mother's] first case. She had an FBSS case involving physical abuse in 2012 where she was abusing the boys.

Iris testified that Max and Larry initially had problems at night because of the trauma they endured, and they were still taking medications and receiving therapy to help them deal with their trauma. According to Iris, the boys ate very little when they first came to live with her, but they were eating better now and putting on weight.

Iris said she was planning to adopt both Max and Larry. She testified, "[Children] need to have fun; they need to be a child. They need to be happy. And they don't need to [be] scared. They don't need to be frightened. They don't need to be beaten. … I understand what [Max and Larry] went through; I saw it from the beginning."

Iris testified that Max and Larry told her that they still loved Mother and they wanted to see her. When Iris was asked whether Max and Larry wanted a relationship

with Mother, Iris said "[Max and Larry] want to see their mother. … Mom; that's mom. She adopted them; so, that's all they know." When pressed and asked if it would be difficult on the boys to not to have any sort of relationship with Mother, Iris testified, "I can't say that. You have to ask them."

Iris also testified that Mother often arrived late for visits and she failed to show up for Larry's birthday in January 2019 which upset him because he was looking forward to seeing her. Iris confirmed that she and Mother attended all the scheduled family conferences with Max and Larry. Iris testified that although Mother had completed her services, she was still concerned about the boys being returned to Mother because Mother had not accepted responsibility for what she had done to Max and Larry. According to Iris, "a beating and a spanking is two different things."

After trial, the court signed a Decree for Termination and Decree in Suit Affecting the Parent-Child Relationship in which it terminated Mother's parental rights to Max and Larry pursuant to Texas Family Code section 161.001(b)(1)(D) and (E), and section 161.001(b)(2) and named the Department as the children's sole managing conservator. *See* TEX. FAM. CODE §§ 161.001(b)(1) (D), (E) & 161.001(b)(2).

Standard of Review

Protection of the best interest of the child is the primary focus of the termination proceeding in the trial court and our appellate review. *See In re A.V.*,

113 S.W.3d 355, 361 (Tex. 2003). A parent's rights to the "companionship, care, custody, and management" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Accordingly, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985).

In a case to terminate parental rights under Texas Family Code section 161.001, the Department must establish, by clear and convincing evidence, that (1) the parent committed one or more of the enumerated acts or omissions justifying termination and (2) termination is in the best interest of the child. TEX. FAM. CODE § 161.001(b). 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." *Id.* § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). 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's best interest. *In re A.V.*, 113 S.W.3d at 362.

When reviewing the legal sufficiency of the evidence in a case involving termination of parental rights, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that there existed grounds for termination under section 161.001(b)(1) and that termination was in the

best interest of the child. *See* TEX. FAM. CODE § 161.001(b)(1), (2); *In re J.F.C.*, 96 S.W.3d at 266. In doing so, we examine all evidence in the light most favorable to the finding, assuming that the "factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so." *In re J.F.C.*, 96 S.W.3d at 266. We must also disregard all evidence that the factfinder could have reasonably disbelieved or found to not be credible. *In re J.F.C.*, 96 S.W.3d at 266

When conducting a factual sufficiency review, we consider and weigh all the evidence including disputed or conflicting evidence. *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009). "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.* (quoting *In re J.F.C.*, 96 S.W.3d at 266). We give due deference to the factfinder's findings and we cannot substitute our own judgment for that of the factfinder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Predicate Acts

In her first and second issues, Mother argues that there is legally and factually insufficient evidence supporting the trial court's findings that she committed the predicate acts under subsection 161.001(b)(1)(D) and (E). *See* TEX. FAM. CODE §§ 161.001(b)(1)(D), (E).

A. Applicable Law

Section 161.001(b)(1)(E) requires the trial court to find by clear and convincing evidence 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).[2] As used in section 161.001, "'endanger' means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

Endangerment under subsection (E) arises when a parent's course of conduct exposes a child to loss or injury or jeopardizes the child's emotional or physical health. *See Jordan v. Dossey*, 325 S.W.3d 700, 723 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). This course of conduct includes acts, omissions, and failures to act, but it must be based on more than a single act or omission—the evidence must demonstrate a voluntary, deliberate, and conscious course of conduct by the parent. *See id.*

Direct physical abuse is endangering conduct. *See In re P.M.B.*, No. 01-17-00621-CV, 2017 WL 6459554, at *8 (Tex. App.—Houston [1st Dist.] Dec. 19, 2017,

[2] Section 161.001(b)(1)(D) requires the trial court to find by clear and convincing evidence that the parent knowingly placed or allowed the child to remain in conditions or surroundings which endangered the child's physical or emotional well-being. TEX. FAM. CODE § 161.001(b)(1)(D).

pet. denied) (mem. op.); *see also In re C.A.G.*, No. 14-18-00930-CV, 2019 WL 1523114, at *8 (Tex. App.—Houston [14th Dist.] Apr. 9, 2019, pet. denied) (mem. op.) (holding child's statements that his mother "whooped" him and caused bruise under his eye and father "whoops" him with knife sufficient to support endangerment finding); *In re G.P.*, No. 01-16-00346-CV, 2016 WL 6216192, at *11–12 (Tex. App.—Houston [1st Dist.] Oct. 25, 2016, no pet.) (mem. op.) (holding slapping and yelling at child multiple times, as well as "whoop[ing]" another child with belt, sufficient to support endangerment finding). A parent's past endangering conduct may support an inference that past conduct may recur and further jeopardize the child's present or future physical or emotional well-being. *See In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). A parent's conduct regarding one child can also support a finding of endangerment with respect to other children. *See Jordan*, 325 S.W.3d at 724; *see also In re D.T.*, 34 S.W.3d 625, 636–37 (Tex. App.—Fort Worth 2000, pet. denied).

B. Analysis

There is evidence that Mother physically abused Max and Larry for several years, and thus, engaged in an ongoing course of conduct that endangered the boys' physical well-being. Specifically, Max and Larry took themselves to the ER after Mother beat them with a cord for taking food without permission. The boys

brought the bloody extension cord with them. Photographs, medical records, and witness testimony reflect that both boys had many marks, bruises, and open wounds on their arms and legs that required medical attention when they arrived at the hospital.

Max told the Department that Mother started hitting him when he was 4 years old and that she had had beat him and Larry every day for years, with a variety of objects including extension cords, computer cords, and a metal pole. Larry told them that Mother started beating him with the same objects when he was seven. The Department's investigators noticed that the boys had old scars and bruises, including two scars on Larry's head, that indicated that they had been beaten over an extended period with multiple objects, including a belt and possibly an extension cord. There is also medical testimony that the boys' most recent injuries were inconsistent with having been hit with a belt, as Mother insists, and indicated that the boys had been hit with "a looped cord object." The record also reflects that Mother had been investigated twice for physically abusing children in her care, including Max. *See Jordan*, 325 S.W.3d at 724; *see also In re D.T.*, 34 S.W.3d at 636–37.

Although she denied it, there is also some evidence that Mother used food deprivation to discipline the children and that both boys were significantly underweight and shorter than other children their age when they came into care. The trial court, as the sole factfinder, was entitled to discredit her testimony and resolve

any conflicts in the evidence against her. *See In re H.R.M.*, 209 S.W.3d at 108; *In re G.M.G.*, 444 S.W.3d 46, 60 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In addition to the evidence of physical abuse, there is also evidence that Mother engaged in an ongoing course of conduct that endangered Max's and Larry's emotional well-being. The record reflects that Mother repeatedly threatened to beat the boys if they told anyone about the abuse. Specifically, Max said that he was afraid to report the abuse because Mother had threatened to "put him in the hospital" if he told anyone. Mother also told Larry that she would beat them with a "razor cord" until they bled. The boys' therapist also testified that the boys had developed PTSD because of the years of abuse they had endured. *See In re J.B.*, No. 03-19-00881-CV, 2020 WL 2183127, at *4 (Tex. App.—Austin May 6, 2020, no pet. h.) (mem. op.) (holding evidence sufficient to support finding of endangerment based in part on therapist's testimony that children "suffered from PTSD as a result of trauma experienced in their lives related to the instability of their living conditions").

Mother contends that the Department failed to prove that she had engaged in a pattern of abusive behavior because Senkel testified that she "had no idea" how long the abuse had been occurring. Mother also argues that she only struck the boys

with a belt two to three times a year and that infrequent spankings do not amount to child abuse. *See In re A.S.*, 261 S.W.3d 76, 88 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("[I]nfrequent spankings of a child that leave 'marks' or visible bruises 24 hours after the spanking do not constitute sufficient evidence to demonstrate that a parent has engaged in conduct that endangered a child's physical or emotional well-being."). Although Senkel did not know how long the boys had been abused, Dr. Bakshy testified that some of the boys' injuries were one or two weeks old. Furthermore, the trial court could disbelieve Mother's testimony about the frequency and severity of the spankings and credit Max's and Larry's statements that Mother had been hitting them with cords, belts, and metal poles for years. *See In re H.R.M.*, 209 S.W.3d at 108; *In re G.M.G.*, 444 S.W.3d at 60 (stating factfinder is "free to make its own credibility assessments, resolve conflicts in the testimony, and decide what weight to give the witnesses' testimony").

Viewing the evidence in the light most favorable to the trial court's finding, we conclude that the trial court could have formed a firm belief or conviction that Mother had engaged in conduct which endangered Larry's and Max's physical or emotional well-being in violation of section 161.001(b)(1)(E). *See In re J.F.C.*, 96 S.W.3d at 266. Further, in view of the entire record, we conclude that the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that Mother had engaged in conduct which endangered Larry's and

Max's physical or emotional well-being in violation of section 161.001(b)(1)(E). *See In re J.O.A.*, 283 S.W.3d at 345 (citing *In re J.F.C.*, 96 S.W.3d at 266).

Because we conclude the evidence is legally and factually sufficient to support the trial court's finding under section 161.001(b)(1)(E), we do not address Mother's arguments that the evidence is legally and factually insufficient to support the trial court's finding under subsection (D). *See In re P.W.*, 579 S.W.3d 713, 728 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

We overrule Mother's first and second issues.

Best Interest

In her third issue, Mother argues that there is legally and factually insufficient evidence supporting the trial court's findings that termination of her parental rights is in Larry's and Max's best interests. *See* TEX. FAM. CODE § 161.001(b)(2).

A. Applicable Law

There is a strong presumption that the best interest of a child is served by keeping the child with a parent. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. TEX. FAM. CODE § 263.307(a).

Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best interest finding: the desires of the

child; the present and future physical and emotional needs of the child; the present and future emotional and physical danger to the child; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent which may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). This list of factors is not exhaustive, and evidence is not required on all the factors to support a finding that terminating a parent's rights is in the child's best interest. *Id.*; *In re D.R.A.*, 374 S.W.3d at 533.

In addition, the Texas Family Code sets out factors to be considered in evaluating the parent's willingness and ability to provide the child with a safe environment, including: the child's age and physical and mental vulnerabilities; whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; whether the child's family demonstrates adequate

parenting skills, including providing the child with minimally adequate health and nutritional care, a safe physical home environment, and an understanding of the child's needs and capabilities; and whether an adequate social support system consisting of an extended family and friends is available to the child. TEX. FAM. CODE § 263.307(b); *In re R.R.*, 209 S.W.3d at 116.

Courts may consider circumstantial evidence, subjective factors, and the totality of the evidence as well as the direct evidence when conducting the best interest analysis. *See In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied). Evidence supporting termination under one of the predicate grounds listed in section 161.001(b)(1) can also be considered in support of a finding that termination is in the best interest of the child. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (holding same evidence may be probative of both section 161.001(b)(1) grounds and best interest). A parent's past conduct is probative of his future conduct when evaluating the child's best interest. *See In re O.N.H.*, 401 S.W.3d 681, 684 (Tex. App.—San Antonio 2013, no pet.); *see also Jordan*, 325 S.W.3d at 724. A factfinder may also infer that past conduct endangering the well-being of a child may recur in the future if the child is returned to the parent when assessing the best interest of the child. *See In re D.M.*, 452 S.W.3d at 471.

B. Analysis

Larry and Max are currently placed with their maternal great aunt, Iris, and they have been living with her during the pendency of this case. The record reflects that the boys' health has improved since they have been living with Iris, and that Iris is meeting all of Max's and Larry's physical and emotional needs and providing Max and Larry with a stable, consistent environment where they are no longer afraid of being physically abused. Iris also plans to adopt Max and Larry. Max and Larry are happy living with Iris and want to live with Iris after they age out of the system. The trial court could also infer from this evidence that Iris is able to provide the boys with a stable, safe, and permanent home, which is a paramount consideration in a court's best-interest determination. *See* TEX. FAM. CODE § 263.307(a).

The evidence supporting the trial court's finding that Mother engaged in a course of conduct endangering to Larry and Max under subsection E, including evidence that Mother had physically abused the boys by striking their arms, legs, and heads with cords, belts, and metal poles for several years, also weighs in favor of termination of Mother's parental rights with respect to both children. *See* *In re C.H.*, 89 S.W.3d at 28 (holding evidence supporting endangerment may be probative of best interest). The trial court could also infer that Mother's past endangering conduct may recur in the future if the boys are returned to her care. *See Boyd*, 727 S.W.2d at 533 (holding danger to child's well-being may be inferred from past

parental misconduct); *see also Walker v. Tex. Dep't Fam. & Protective Servs.*, 312 S.W.3d 608, 619 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (considering parent's past violence in best-interest assessment and noting that evidence of endangering conduct under Subsection (E) is also probative of best-interest analysis) (citing *In re C.H.*, 89 S.W.3d at 28). Although Mother denied the allegations of abuse and claimed that she had only spanked the boys a few times a year for stealing, the trial court, as the sole fact finder, was entitled to discredit her testimony and resolve any conflicts in the evidence against her. *See In re H.R.M.*, 209 S.W.3d at 108; *In re G.M.G.*, 444 S.W.3d at 60.

Although not required, there is also direct evidence that Mother poses a danger to the children's future emotional and physical well-being. Specifically, the boys' psychologist opined: "It is my opinion that if the investigation determines that [Larry] was physically abused by his mother then returning him to live with his mother would likely cause him further psychological harm." When asked if she had any concerns if the children were placed back in Mother's home, the boys' therapist testified, "I would have concerns, yes, due to the pattern and severity of the previous abuse, the duration that it occurred, I think it's very high risk." Courtney also testified that it was the Department's belief that Mother would likely continue to abuse both boys in the future if they were returned to her care.

There is also evidence that Mother poses a threat to the children's present and future physical and emotional needs. *See Holley*, 544 S.W.2d at 372. Specifically, the boys reported to their therapist that there was not enough food in Mother's house for them and they often had to go to bed hungry. The record reflects that both boys were significantly underweight and shorter than other children their age when they came into care, and that their weight increased, and their health improved after they were living with Iris. The trial court could reasonably infer from this evidence that Mother had been either unwilling or unable to provide for the boys' nutritional needs in the past and would continue to do so in the future. *See In re O.N.H.*, 401 S.W.3d at 684 (stating parent's past conduct is probative of his future conduct when evaluating the child's best interest). The boys' therapist also testified that both boys developed PTSD because of Mother's past abusive behavior. *See id.*

Other *Holley* factors that courts consider include the parental abilities of the persons seeking custody and the programs available to assist that person in promoting the best interest of the child. *See Holley*, 544 S.W.2d at 372. Mother completed her service plan and availed herself of the services available to her and claimed that she learned from her services. The record reflects, however, that although Mother participated in services in 2012, she continued to physically abuse the boys for years afterwards, and even after completing services a second time. Mother continues to minimize the beatings, even though the record supports the

inference that some of them were carried out with computer cords and left open wounds. Despite this evidence, she has repeatedly insisted that she had only spanked the children with a belt. The trial court could have disbelieved Mother's claim that she had learned from her services and reasonably inferred that Mother would continue to abuse the boys, despite having completed services in this case. *See In re G.M.G.*, 444 S.W.3d at 60 (stating factfinder is "free to make its own credibility assessments, resolve conflicts in the testimony, and decide what weight to give the witnesses' testimony"); *see generally In re P.M.B.*, 2017 WL 6459554, at *11 (stating factfinder could reasonably infer that mother who had subjected children to physical abuse less than two years after she completed first FSP would physically and emotionally abuse children in future).

The parties agree that Max and Larry were old enough to express their desires and that their wishes should be considered when deciding whether to terminate Mother's parental rights. *See Holley*, 544 S.W.2d at 372 (stating that one factor courts consider is child's desires). Larry was eleven years old and Max was fifteen years old at the time of trial. The boys stated they are happy with Iris, want to be adopted by her, and want to stay with her. The boys told Iris that they love Mother and they told Iris and their therapist that they want

to see Mother. At most, this is some evidence that Larry and Max love Mother and want to see her. *See generally In re T.L.E.*, 579 S.W.3d 616, 627 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (stating child's love of parent "cannot override or outweigh evidence of danger to the child"). This is not evidence that the boys want to live with Mother, as opposed to Iris, or have an ongoing relationship with Mother.

Viewing the evidence in the light most favorable to the trial court's finding, we conclude that the trial court could have formed a firm belief or conviction that termination of Mother's parental rights is in Max's and Larry's best interest. *See In re J.F.C.*, 96 S.W.3d at 266. Further, in view of the entire record, we conclude that the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination of Mother's parental rights is in Max's and Larry's best interest. *See In re J.O.A.*, 283 S.W.3d at 345. Accordingly, we hold that legally and factually sufficient evidence supports the trial court's best interest finding.

We overrule Mother's third issue.

Conservatorship

In her fourth issue, Mother argues that the trial court abused its discretion by naming the Department as the children's managing conservator.

When the parental rights of all living parents of a child are terminated, the trial court must appoint a "competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child." TEX. FAM. CODE § 161.207(a); *see In re J.D.G.*, 570 S.W.3d 839, 856 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

Conservatorship determinations are reviewed for an abuse of discretion and will be reversed only if the decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re J.D.G.*, 570 S.W.3d at 856. An order terminating the parent-child relationship divests a parent of legal rights and duties with respect to the child. *See* TEX. FAM. CODE § 161.206(b). Once we overrule a parent's challenge to an order terminating her parental rights, the trial court's appointment of the Department as sole managing conservator may be considered a "consequence of the termination." *In re A.S.*, 261 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see also In re J.D.G.*, 570 S.W.3d at 856.

Because we have overruled Mother's challenges to the portion of the trial court's order terminating her parental rights, the order has divested Mother of her legal rights and duties related to Max and Larry. *See* TEX. FAM. CODE § 161.206(b); *In re J.D.G.*, 570 S.W.3d at 855–56. Therefore, Mother does not have standing to challenge the portion of the order appointing the Department as the boys' conservator. *See In re J.D.G.*, 570 S.W.3d at 856 (affirming termination of father's

parental rights and holding that father, who had been divested of his legal rights to child, could not challenge conservatorship determination).

We overrule Mother's fourth issue.

Conclusion

We affirm the trial court's decree of termination.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.