Affirmed in Part, Reversed in Part, and Remanded; and Memorandum Majority Opinion and Dissenting and Concurring Opinion filed July 24, 2020.

In The

Fourteenth Court of Appeals

NO. 14-20-00084-CV

IN THE INTEREST OF A.J.A.R. AND M.J.R., CHILDREN

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2018-01872J

MEMORANDUM MAJORITY OPINION

The trial court terminated Mother's and Father's parental rights to Daughter A.J.A.R. and Son M.J.R and appointed the Department of Family and Protective Services as sole managing conservator of the children. Mother filed an *Anders* brief,[1] and Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings regarding the termination and conservatorship.

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[1] *See Anders v. California*, 386 U.S. 738 (1967); *In re D.E.S.*, 135 S.W.3d 326 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

We hold that the evidence is legally and factually sufficient to support the trial court's finding that Father failed to comply with a court order under Section 161.001(b)(1)(O) of the Family Code. Although the evidence is legally sufficient to support the trial court's finding that termination of Father's parental rights would be in the children's best interests, the evidence is factually insufficient. Finally, the trial court did not abuse its discretion by appointing the Department as sole managing conservator of the children.

Accordingly, the trial court's final order of termination is affirmed in part and reversed in part, and we remand the case to the trial court for further proceedings.

I. PROCEDURAL BACKGROUND

Mother and Father had two children together: Daughter born in 2015 and Son born in 2016. In 2017, the Department received a referral alleging physical abuse of Daughter by Mother. The children were placed with a maternal aunt while the case was "transferred to Family Based Safety Services" (FBSS). In April 2018, the maternal aunt allowed the children to stay overnight with a paternal aunt. The paternal aunt allowed Mother to have unsupervised access to the children, and Mother was later "found under the influence on the side of the highway" with one child outside of the car on the shoulder of the road. Both children were very dirty and had diaper rashes. Son had a bruise and lump over his eye and scratches on his face and neck. Daughter had bruises and a broken toe. Mother had no explanation for the children's injuries.

The Department then filed its original petition for protection of a child for conservatorship and for termination in a suit affecting the parent-child relationship. The trial court appointed the Department as the temporary managing conservator of the children. The children were placed in foster care.

Mother and Father each signed family service plans in May 2018. The trial court incorporated the service plans as orders of the court. The final hearing was held over the course of three days in February and December 2019. Ultimately, the trial court terminated both parents' rights to the children and appointed the Department as the children's sole managing conservator.[2] In the final order, the court found that Mother and Father:

> knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children, pursuant to § 161.001(b)(1)(D), Texas Family Code; [and]
>
> engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children, pursuant to § 161.001(b)(1)(E), Texas Family Code.

The court also made the requisite findings under Section 161.001(b)(1)(O) regarding Father's failure to comply with a court order that established his actions necessary for him to obtain the return of the children. *See* Tex. Fam. Code § 161.001(b)(1)(O). The court found that termination of the parents' rights would be in the best interests of the children.

Mother and Father appealed.

II. TERMINATION OF FATHER'S PARENTAL RIGHTS

In his second, third, and fourth issues, Father contends that the evidence is legally and factually insufficient to support the trial court's three predicate findings in support of the termination under Sections 161.001(b)(1)(D), (E), and (O). In his

[2] In his first issue on appeal, Father contends that the trial court did not terminate his parental rights to Daughter in the final order. However, after Father filed his brief, the record was supplemented with a modified final order that terminated Father's rights to both children. Thus, Father's first issue is overruled.

fifth issue, Father contends that the evidence is legally and factually insufficient to support the trial court's finding that termination was in the children's best interests.

A. General Legal Principles and Standard of Review

A court may terminate the parent-child relationship if the court finds by clear and convincing evidence that the parent has engaged in at least one statutory predicate act and that termination is in the best interest of the child. *In re N.G.*, 577 S.W.3d 230, 230 (Tex. 2019); *In re L.C.L.*, 599 S.W.3d 79, 83 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) (en banc); *see* Tex. Fam. Code § 161.001(b).

"Termination of parental rights is traumatic, permanent, and irrevocable." *In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003). Termination is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by clear and convincing evidence. *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002); *see also In re L.G.R.*, 498 S.W.3d 195, 201 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Termination proceedings are strictly scrutinized, and involuntary termination statutes are strictly construed in favor of the parents. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985). Any significant risk of erroneous termination is unacceptable. *In re M.S.*, 115 S.W.3d at 549. The Supreme Court of Texas "cannot think of a more serious risk of erroneous deprivation of parental rights than when the evidence, though minimally existing, fails to clearly and convincingly establish in favor of [the factfinder's] findings that parental rights should be terminated." *Id.*

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 § 101.007. This heightened burden of proof results in a heightened standard of review when evaluating the sufficiency of the evidence. *In re L.G.R.*, 498 S.W.3d at 202.

Under a legal sufficiency review, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We assume the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible, but we do not disregard undisputed facts. *Id.*

Under a factual sufficiency review, we also consider disputed and conflicting evidence. *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009); *see also In re A.C.*, 560 S.W.3d 624, 630–31 (Tex. 2018). Even when a trial court may disbelieve a witness's testimony, we must consider all the evidence equally. *See In re A.S.*, 261 S.W.3d 76, 87 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *In re J.F.C.*, 96 S.W.3d at 266). "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d at 266.

B. Section 161.001(b)(1)(O)

In his fourth issue, Father contends that there is legally and factually insufficient evidence to support the trial court's finding that appellant failed to comply with the terms of the family service plan adopted by the court. Father contends that, although he tested positive for drugs while the children were in the Department's custody, "[t]he plain language of the service plan does not require that Father test negative."

To prove a statutory predicate for termination under Section 161.001(b)(1)(O), the Department had to prove that Father failed to comply with a

court order that specified what he had to do to get the children back. *See In re E.C.R.*, 402 S.W.3d 239, 240 (Tex. 2013); *In re S.N.*, 287 S.W.3d 183, 187–88 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *see also* Tex. Fam. Code § 161.001(b)(1)(O). Father acknowledges that the service plan required him to "complete a drug/alcohol assessment and follow all recommendations." The next sentence of the service plan required Father to "maintain a drug/alcohol free lifestyle." The service plan also required Father to complete his drug tests within twenty-four hours of being notified.

Father testified that he had tried cocaine only once in his life and he had not used cocaine or any other drugs since this case started. The drug tests he took during this case tell a different story. After Father signed the family service plan in May 2018, his body hair follicles were tested for drugs seven times as follows:

Date	**Result**
6/4/2018	Positive for cocaine and marijuana.
8/27/2018	Positive for cocaine and marijuana.
12/3/2018	Positive for cocaine.
2/13/2019	Positive for cocaine.
5/29/2019	Positive for cocaine.
8/21/2019	Negative.
10/30/2019	Positive for cocaine.

The Department's expert explained that hair follicle tests like the ones Father took could show a positive result for cocaine that had been ingested up to six months prior. The expert testified that the level of cocaine measured in Father's hair follicles was a "very low, low number." The tests were not indicative of someone who was a chronic user. The expert testified that because hair is "not homogeneous" and because "the numbers were so low," he could not say that Father ingested cocaine after the "totally clean" test on in August 2019. The expert testified that the combination of the last four tests indicated that Father used

cocaine two times, "possibly two days in a row." Father used cocaine at least two times because the positive result in October 2019 was more than six months after the positive result in February 2019. It was "impossible" for Father to not have used cocaine at all during the time period covered by the final four tests.

Moreover, Mother testified that she observed Father use cocaine after the children were in the Department's care. She testified that he was "not a cocaine user, but he did have that one instance where I seen him."

The caseworker testified that Father did not always take his drug tests within twenty-four hours of being notified. She provided an example when she asked him to take a drug test on December 10, but he did not take it until December 11.

The trial court, as the sole judge of the credibility of the witnesses, was free to disregard Father's self-serving testimony that he had not used cocaine or other drugs since this case started. *See In re S.R.*, 452 S.W.3d 351, 362, 365 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Even considering Father's testimony, it is not overwhelming compared to the Department's evidence that Father did not comply with the service plan incorporated as an order of the court because he failed to maintain a drug-free lifestyle and did not always take his drug tests within twenty-four hours of being notified. The evidence is legally and factually sufficient to support the trial court's finding under Section 161.001(b)(1)(O).

Father's fourth issue is overruled.[3]

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[3] Because there is legally sufficient evidence of at least one predicate ground for termination, but we ultimately reverse the trial court's final order of termination due to factually insufficient evidence of the best-interest finding, we do not review the sufficiency of the evidence to support the trial court's findings regarding Section 161.001(b)(1)(D) and (E). *See In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019) (requiring courts of appeals to detail their analysis of Section 161.001(b)(1)(D) or (E) "if the court of appeals affirms the termination"). Because we are reversing the order of termination for Father, he has no longer "had his or her parent-child

C. Best Interests of the Children

In his fifth issue, Father contends that the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights was in the children's best interests.

1. Legal Principles

The purpose of the State's intervention in the parent-child relationship is to protect the best interests of the children, not to punish parents for their conduct. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). There is a strong presumption that the best interest of a child is served by preserving the parent-child relationship. *In re B.J.C.*, 495 S.W.3d 29, 35 (Tex. App.—Houston [14th Dist.] 2016, no pet.). But there is also a presumption that the permanent placement of a child in a safe environment is in the child's best interest. Tex. Fam. Code § 263.307(a); *see also In re B.J.C.*, 495 S.W.3d at 39 (noting that the child's need for permanence through the establishment of a stable, permanent home is the paramount consideration in a best-interest determination). The best-interest analysis is child-centered and focuses on the child's well-being, safety, and development. *In re A.C.*, 560 S.W.3d 624, 631 (Tex. 2018).

In assessing whether the evidence is sufficient to prove that termination is in the best interest of a child, we may consider the non-exclusive factors discussed in *Holley v. Adams*, 544 S.W.2d 367, 371–72 (1976). *See In re E.C.R.*, 402 S.W.3d 239, 249 & n.9 (Tex. 2013). These factors include: (1) the child's desires; (2) the child's present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist the individuals

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relationship terminated." *See* Tex. Fam. Code § 161.001(b)(1)(M). The due process concerns in *In re N.G.* are inapplicable.

seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and (9) any excuse for the parent's acts or omissions. *Id.* (citing *Holley*, 544 S.W.2d at 371–72). We may also consider the statutory factors in Section 263.307 of the Family Code, including whether there is a history of substance abuse by the child's family and the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time. *See In re A.R.M.*, No 14-13-01039-CV, 2014 WL 1390285, at *9 (Tex. App.—Houston [14th Dist.] Apr. 8, 2014, no pet.) (mem. op.) (citing Tex. Fam. Code § 263.307(b)).

2. Evidence

Before the children were born, Father was convicted three times of misdemeanor possession of marijuana. He has had no criminal charges since the children were born.

After Daughter was born, but before Son was born, Mother assaulted Father; she was convicted of assaulting a family member. She continued to engage in criminal activity after the children were placed with her sister and after the termination case began—she was convicted of terroristic threat and arson, and a robbery charge was pending. She was incarcerated at the time of the final hearing. Mother tested positive for drugs and failed to complete court-ordered drug tests throughout the case.

The caseworker and child advocate each testified that they thought termination of Father's rights was in the children's best interests because of Father's drug use. When the Department took custody of the children in April 2018, a test of Father's hair follicles returned positive results for multiple illegal

substances. The test returned a "pretty high" number for cocaine, which was a "very strong indication that cocaine [had] been used multiple, multiple times. More than one time." As noted above, Father continued to test positive for cocaine throughout the case. The Department's expert testified, however, that these tests showed "very low" levels of cocaine, indicating that Father used cocaine only twice, "possibly two days in a row," over the course of six months. Due to the nature of hair follicle tests, the expert could not conclude that appellant had used cocaine after his "totally clean" test in August 2019.

Father agreed that during the FBSS period of this case—while the children were placed with a maternal aunt and before the Department took custody in April 2018—Father was "nowhere around." The caseworker testified that Father had no explanation for why he was not a consistent person in the children's lives. But the caseworker acknowledged that she was not an FBSS worker and had no documentation to suggest that Father was ever approached with a safety plan or service plan of some type. Father testified he was never given a service plan for FBSS. Father testified that he was living with family members when the Department became involved in this case, and he did not have a stable home at the time. Father testified that he was living with Mother when Daughter was born, but after Son was born, he lived with them only "off and on." He testified that he saw his children almost every day before they were taken into custody. By the time of the final hearing, Mother and Father were no longer in a relationship.

The caseworker testified that Father was not involved in the incident that gave rise to removal—when the children were found in mother's care on the side of the road while she was intoxicated, and the children were dirty and had diaper rashes and unexplained injuries.

The caseworker testified that Father completed the "vast majority" of the family service plan. He completed all assigned therapies, parenting classes, and other things that he was supposed to do, but he had not been fully compliant with drug testing, and he continued to test positive for drugs.

Father had been consistently employed throughout the case. The owner of the restaurant where Father worked testified that Father had worked there for four years and was promoted to a supervisor position. The caseworker and child advocate each testified that they visited Father's home and that it would be appropriate for the children.

The children were participating in behavioral and play therapies while in foster care. Daughter acts out with tantrums and destructive behaviors frequently during the day, and Son exhibits behavioral tantrums when Daughter does. The child advocate testified that she observed visits between Father and the children, and "it goes very well." She testified that Father was able to redirect Daughter's temper tantrums quickly. She thought Father was "very appropriate" with the children. She thought Father would be capable of handling the children's therapies. The children love him, and there is a clear, significant bond between him and the children. The caseworker similarly testified that Father and the children are bonded and love each other. Father would bring the children gifts and presents when visiting them. Father visited the children regularly throughout the case, except for a one-month period during which the court prohibited visitations due to Father's positive drug tests.

Father testified that he wanted the children to live with him. Although he sometimes worked sixty-hours per week, his schedule was flexible. He testified that he could work less or different schedules, and he would obtain daycare for the children. He testified that he provided support for the children before they were

taken into custody. He made sure the children had what they needed, including food, clothes, and diapers. He was not making child support payments, but there was no evidence he was ever ordered to pay child support.

The caseworker testified that an adoptive home had been located for the children. The children had one visit with the prospective family, and the visit went well. Daughter did "great" with the visit. The caseworker acknowledged that there was no consistent bond with the prospective family.

3. Legally Sufficient Evidence

A child's love for a parent cannot be ignored as a reflection of the parent's ability to provide for the child's emotional needs. *In re F.M.E.A.F.*, 572 S.W.3d 716, 732 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). A child's love for their parent is "a very important consideration in determining the best interest of the children," although it cannot override or outweigh evidence of danger to the child. *In re K.L.P.*, No. 14-18-00582-CV, 2018 WL 6684275, at *10 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, pet. denied) (mem. op.) (affirming termination despite children's love for their mother because the mother failed to protect the children from the father's physical abuse). The Department's witnesses testified that the children were bonded with and love father, and there was no bond between them and the prospective adoptive family. This factor weighs against termination.

The Department's primary concern regarding Father was his drug use. Father tested positive for illegal drugs throughout the case. This pattern of illegal drug use suggests that Father was not willing and able to provide the children with a safe environment—a primary consideration in determining the children's best interest. *See In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see also In re E.R.W.*, 528 S.W.3d 251, 266 (Tex. App.—Houston

[14th Dist.] 2017, no pet.) ("A parent's drug use supports a finding that termination is in the best interest of the child.").

The Department contends that Father allowed the children to live with Mother while Father knew that Mother had been convicted of a domestic violence assault against him. *See In re L.W.*, No. 01-18-01025-CV, 2019 WL 1523124, at *19 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, pet. denied) (mem. op.) (noting that a history of domestic violence supports a finding that termination was in the child's best interest). During the FBSS process, he was "nowhere" to be found; it was during that time that the children sustained unexplained injuries while in Mother's unauthorized care. Father's acts and omissions, coupled with the lack of an excuse, suggest that the parent-child relationship was improper.

Moreover, by the time of the final hearing, the Department had located a family willing to adopt the children. Thus, the Department had identified with precision the child's future home environment. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (plans for adoption are relevant to best interest). Father provided self-serving testimony that he was presently able to take care of the children.

Disregarding Father's self-serving testimony, and viewing the evidence in the light most favorable to the trial court's finding, a reasonable factfinder could have formed a firm belief or conviction that termination was in the children's best interests. *See In re L.C.L.*, 599 S.W.3d 79, 87–89 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) (en banc) (legally sufficient evidence to support termination when parent failed drug tests throughout the proceedings); *In re D.D.M.*, No. 01-18-01033-CV, 2019 WL 2939259, at *8 (Tex. App.—Houston [1st Dist.] July 9, 2019, no pet.) (mem. op.) (same, and disregarding parent's self-serving testimony).

Father's fifth issue is overruled as to legal sufficiency.

4. Factually Insufficient Evidence

However, considering Father's testimony and the testimony of the other witnesses that the trial court must have disregarded, coupled with the remaining evidence that weighs against termination, a factfinder could not have formed a firm belief or conviction that termination was in the children's best interest.

As noted above, the Department's witnesses testified that the children and Father love each other and are bonded—an important consideration. *See In re F.M.E.A.F.*, 572 S.W.3d at 732. There was no evidence regarding the children's desires to be adopted or that they did not want to live with their father. *See In re. D.D.M.*, 2019 WL 2939259, at *5 (strong bond between children and parent, coupled with lack of evidence indicating that the children did not want to be placed with the parent, weighed against finding of termination).

Nothing in the record suggests that the children—age three and four at the time of trial—displayed temper tantrums and destructive behavior because of Father's conduct. *See In re L.C.L.*, 599 S.W.3d at 88 (discounting evidence of young children's disorders and disabilities as supporting termination when there was no evidence that the disorders or disabilities were present before the children's removal or were caused by separation from the parent). Rather, the child advocate testified that Father redirected Daughter's tantrums and that he could handle the children's therapies. His visits with the children were "very appropriate."

Father testified that he visited the children regularly when he was permitted, and he saw the children almost every day before their removal from Mother's care. He testified that he supplied necessities for the children in the past, was gainfully employed, had a home for the children, would procure childcare while he worked, and was ready for the children to live with him. The caseworker and child advocate thought appellant's home was appropriate for the children, and the child

advocate believed Father could handle therapies for the children. This evidence indicates that Father could satisfy the children's present and future emotional and physical needs and could provide a stable home for the children.

Although Father did not have a stable home for the children during the FBSS process, the circumstances that led to Father being unable to care for his children at that time no longer exist. By the time of the final hearing, Father had an appropriate home for the children. Although he had tested positive for multiple drugs with a "pretty high" result for cocaine at the time of the children's removal, his use of drugs by the time of the final hearing was much less significant—two uses of cocaine in a period up to six months. *See In re D.D.M.*, 2019 WL 2939259, at *7–8 (factually insufficient evidence that termination was in child's best interest despite the parent's drug test result showing "very heavy" and "daily" use of methamphetamine, the parent's continued drug use throughout the case, and the parent's former homelessness and giving up custody of the child to the Department; reasoning that drug use was only one factor to consider and that the parent later procured a home, which the caseworker visited and thought was safe for the children); *see also In re L.C.L.*, 599 S.W.3d at 84, 89 (factually insufficient evidence that the parent endangered the children and that termination was in the children's best interest even though the parent tested positive for drugs throughout the proceedings).

Although Father allowed the children to stay with Mother when he did not have a stable home of his own, knowing that she had been violent toward him, there is no evidence that Father was aware that Mother was ever violent toward the children or had a propensity to be violent toward them. The caseworker testified that Father was not involved in the incident during which the children were injured while in Mother's care. Father was no longer living with Mother or in a

relationship with her by the time of the final hearing. *Cf. In re K.L.P.*, 2018 WL 6684275, at *7 (sufficient evidence that termination of the mother's parental rights was in the child's best interest when the mother did not believe her daughter's allegations of physical abuse by the father, failed to protect the daughter from the father's abuse, and stayed in a relationship with the father after the father had been charged with assaulting the mother).

Although Father's substantial compliance with the service plan does not undermine the trial court's Section 161.101(b)(1)(O) finding, *see In re M.C.G.*, 329 S.W.3d 674, 676 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (op. on reh'g), we consider the evidence that Father completed the "vast majority" of the service plan for purposes of the best-interest analysis. The record does not show that his failure to comply with the service plan—by not always scheduling his drug tests within twenty-four hours, and by using cocaine twice in a six month period—was due to indifference or malice toward his children. *See In re R.W.*, No. 01-11-00023-CV, 2011 WL 2436541, at *1–2, *13 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.) (factually insufficient evidence of best interest despite the parent's failure to comply with service plan, refusal to take drug tests, unemployment, lack of self-sufficiency, continued marriage to abusive co-parent, and previously allowing the children to live under neglectful conditions when they were dirty and sick and lived in a house with animal urine and feces covering the floor and unknown substances covering the place where the children ate; reversing because the parent's failure to comply with the service plan was not due to indifference or malice, the parent visited the children, they were bonded, and the parent was no longer living with the abusive co-parent but was living with a significant other who agreed to provide for the children).

By completing the vast majority of the service plan, maintaining stable employment, securing an appropriate home for the children, regularly visiting the children, bonding with the children, being loved by the children, never having caused physical or emotional injury to the children, providing necessities to the children, ending his relationship with Mother (who could not explain the children's injuries and continued to commit offenses involving violence), and showing improvement on his drug tests (going from "pretty high" results to "very low" results), Father has shown a willingness and ability to effect positive environmental and personal changes.

Considering the entire record, including the disputed and conflicting evidence with equal weight, the evidence that the trial court could not have credited in favor of the best-interest finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction that termination was in the children's best interests. *See In re J.F.C.*, 96 S.W.3d at 266. The evidence is factually insufficient to support the termination of Father's parental rights. *See In re L.C.L.*, 599 S.W.3d 79 at 89; *In re D.D.M.*, 2019 WL 2939259, at *7–8; *In re R.W.*, 2011 WL 2436541, at *13.

Father's fifth issue is sustained as to factual sufficiency.

III. CONSERVATORSHIP

In his sixth and final issue, Father contends that the trial court abused its discretion by appointing the Department rather than Father as the sole managing conservator of the children.

In the final order, the trial court appointed the Department as the children's sole managing conservator. Consistent with Section 153.131(a) of the Family Code, the court found that the appointment would be in the children's best interests

and that appointment of the parents as managing conservators would not be in the children's best interests because the appointment would significantly impair the children's physical health or emotional development. *See* Tex. Fam. Code § 153.131(a).

Unlike a finding to terminate parental rights, the quantum of evidence required to appoint a non-parent as a conservator is a mere preponderance of the evidence. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007) (citing Tex. Fam. Code § 105.005). The differing standards of proof affect the standards of appellate review. *Id.* Conservatorship decisions are reviewed only for an abuse of discretion, and we may reverse the trial court's decision only if it is arbitrary or unreasonable. *Id.* Thus, evidence supporting termination may be insufficient while at the same time still support the trial court's finding that appointment of a parent as conservator would impair the child's physical health or emotional development. *Id.*; *see also In re D.D.M.*, 2019 WL 2939259, at *9.[4]

Based on the evidence discussed above—particularly that Father continued to test positive for cocaine throughout the case—and the lightened evidentiary standard, we cannot conclude that the trial court acted arbitrarily or unreasonably by finding that the appointment of Father as a managing conservator would significantly impair the children's physical or emotional development. *See In re D.D.M.*, 2019 WL 2939259, at *9 (upholding conservatorship for the Department although evidence was factually insufficient for termination because the parent continued to test positive for methamphetamine during the pendency of the case).

Father's sixth issue is overruled.

[4] Affirming a conservatorship decision does not cause a de facto termination of parental rights because a trial court retains jurisdiction to modify the conservatorship order. *See In re J.A.J.*, 243 S.W.3d at 617.

IV. TERMINATION OF MOTHER'S PARENTAL RIGHTS

Mother's appointed counsel filed a brief contending that her appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807, 811–13 (Tex. Crim. App. 1978). The *Anders* procedures are applicable to an appeal from the termination of parental rights when an appointed attorney concludes that there are no non-frivolous issues to assert on appeal. *In re D.E.S.*, 135 S.W.3d 326, 329 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

On March 9, 2020, this court notified Mother that counsel filed an Anders brief, and this court informed her how to obtain a copy record and her right to file a pro se response. *See Stafford v. State*, 813 S.W.2d 503, 510 (Tex. Crim. App. 1991); *In re D.E.S.*, 135 S.W.3d at 329–30. More than 120 days have elapsed, and as of this date, no pro se response has been filed.

We have carefully reviewed the record and counsel's brief and agree the appeal is wholly frivolous and without merit. Counsel thoroughly analyzed the sufficiency of the evidence supporting the trial court's findings that termination was in the children's best interest and that Mother engaged in conduct that endangered the physical or emotional well-being of the children under Section 161.001(b)(1)(E) of the Family Code. We find no reversible error in the record. A detailed discussion of the brief would add nothing to the jurisprudence of the state. *See In re D.E.S.*, 135 S.W.3d at 330.

V. Conclusion

Having considered the entire record and the arguments of the parties, we (1) affirm the part of the trial court's final order terminating Mother's parental rights; (2) affirm the part of the trial court's final order appointing the Department as the sole managing conservator of the children; (3) reverse the part of the trial court's final order terminating Father's parental rights; and (4) remand the case to the trial court for further proceedings.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Bourliot, and Spain. (Spain, J., dissenting and concurring).