TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00039-CV

S. C. and L. C., Appellants

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 146TH DISTRICT COURT OF BELL COUNTY
NO. 302,464-B, THE HONORABLE JACK WELDON JONES, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an appeal from an order terminating S.C.'s (mother) and L.C.'s (father) parental rights to their daughter, S.-A.C., and their son, J.C., following a jury trial. S.C. also appeals the termination of her parental rights to her daughter, P.W.[1] Both S.C. and L.C. challenge the sufficiency of the evidence supporting the jury's findings that they knowingly placed or allowed the children to be placed or remain in conditions that endangered the children's physical and emotional well-being, that they failed to comply with a court order establishing actions necessary for reunification, and that termination of parental rights was in the children's best interest. *See* Tex. Fam. Code § 161.001(b)(1)(E), (O), (b)(2). S.C. also argues that the trial court improperly admitted into evidence unredacted temporary orders and failed to correct alleged misstatements of law made by counsel for the Department of Family and Protective Services (the Department) during cross-examination and closing argument. Also,

[1] The trial court also terminated the rights of P.W.'s father, B.W. B.W. has not appealed.

L.C. argues that the trial court abused its discretion by admitting evidence of his drug-test results, denying him leave to amend his pleadings to request that a relative of the children be named as their managing conservator, excluding certain testimony and argument about conservatorship, and refusing to submit a conservatorship question to the jury. We affirm.

BACKGROUND

S.-A.C., J.C., and P.W. were, respectively, six, three, and two years old during trial in December 2019. S.-A.C. and J.C. were removed from S.C.'s care in December 2016 as part of an initial termination investigation by the Department. P.W. was born later, while the first investigation and suit were ongoing.

The Department's first investigation

The initial investigation started after S.C. and L.C. fought at a store, leading to S.C.'s arrest. During its investigation, the Department learned that S.C. frequently used illegal drugs, including methamphetamine, cocaine, and marijuana. She admitted a history of drug problems, including using methamphetamine up to three times a day, and L.C. admitted using cocaine. As a result, the Department required both S.C and L.C. to be drug tested regularly. L.C. tested positive for cocaine in December 2016. He initially denied any drug use but later said that "he does not use cocaine anymore." In February 2017, L.C. was caught with fake genitals at another drug test and refused to take the test. L.C. denied ever having used cocaine, but, at first in his testimony, he could not explain why cocaine was in his system at the time of the positive drug test. Later in his testimony, he claimed that he was at a club around others using cocaine, so it got into his system that way. The Department sued to terminate S.C.'s and L.C.'s parental rights.

Psychologist's evaluations and recommendations in the first suit

As the first investigation and suit progressed, a licensed clinical psychologist who focuses on abuse and neglect of children examined S.C. and L.C. at the Department's request. He concluded that S.C. "was not a suitable independent parental resource and that there were too many problems present," so the Department should "explore options for relative placements" instead of returning the children to her. He believed S.C. "to have numerous areas of significant problem[s] of a long-term and debilitating nature, which endangered the safety and well-being of" her children and that she was unmotivated to change. He based his conclusions in part on S.C.'s "pervasive drug use beginning at approximately age 13, . . . some mental health issues, emotional instability," and the inability of medications to effectively treat her problems. He also based his conclusions on the results of several personality tests and standardized questionnaires commonly used in his field.

The psychologist examined L.C. and concluded that he has high anxiety, depression, feelings of being withdrawn, feelings of being overwhelmed, low self-esteem, a propensity to be confused, dissatisfaction in life, unstable moods, irrational thoughts, and repeated exposure to others who take advantage of him or harm him. L.C. feared S.C. harming him. He described himself to the psychologist as being too easily angered and as having broken things while angry. The psychologist's global recommendations were that he "could not recommend [L.C.] to be considered as a placement resource"; his problems "would likely intensify"; expanded visitation only would be "most appropriate"; a professional should evaluate how he interacts and bonds with the children; his substance abuse needs further evaluation and regular screenings; he needs to address his panic attacks and anxiety; he would benefit from long-term aftercare for substance abuse; and he should participate in joint therapy with

his parents, with whom he was living. The psychologist believed that L.C.'s issues requiring therapy, when combined with his drug use, "are not likely to be readily resolved."

The end of the first investigation and the beginning of the second

Near the end of the first suit, L.C. shared with the children's guardian *ad litem* a concern about S.C. L.C. suggested to the guardian *ad litem* that S.C. was offering sexual services online, and he gave her a screenshot of a website that had a picture of someone whose tattoos matched S.C.'s "distinctive" tattoos.

The first Department investigation and suit ended in February 2018, and the trial court entered its conservatorship order the next month. The court did not terminate S.C.'s and L.C.'s parental rights and instead ordered that S.-A.C. and J.C. be returned to S.C.'s care.

In August 2018, the Department removed S.-A.C., J.C., and P.W. from S.C.'s care and began this termination suit against both parents. A caseworker for the investigation received "reports of drug use and . . . trafficking into the home." S.C. admitted that she had used methamphetamine again. She later described it as a "relapse" and explained that the children were with her mother at the time. S.C.'s drug use, by her admission, "harms [her] being a better mother to" the children. S.C. described her personal circumstances and home surroundings at the time of the second removal. She described the children as healthy and explained that they had been going to the doctor regularly, had beds and clothing, and were fed.

The Department's temporary placements of the children

The Department temporarily placed S.-A.C., J.C., and P.W with S.C.'s sister, but the children stayed with her only a few days because of her health problems. The Department also investigated whether it should place the children with G.C. and L.T.C., who are L.C.'s

mother and father. The Department conducted a Home Study on their home, and the results were satisfactory. But the trial court refused the placement because L.T.C. refused to take a drug test and admitted to regular marijuana use for pain management. Placing the children with S.C.'s mother was not an option either. She lives out of state and, according to Department personnel, had not completed the interstate-compact "legal requirements" to be a placement. With relative placements unavailable, the Department placed the children in a foster home. But when Department personnel would pick the children up, the children sometimes looked unkempt and dirty. The Department then placed the children in a second foster home, where they remained through trial.

Family Service Plans

Soon after the Department removed the children from S.C.'s home, the caseworker held a group conference with the parents. She told them that it would be harder to get the children back because the Department was involved a second time "after such a short time for the exact same reason"—drug use—as in the first suit. The Department's goal from the outset of this second suit was "unrelated adoption." Having gone through a previous suit was, for the caseworker, "a huge deal here because it's . . . showing some kind of continuing pattern."

The Department created family service plans (Plans) for both S.C. and L.C., and the court ordered S.C. and L.C. to meet their Plans' requirements. According to testimony from Department personnel, a Plan is the document that provides the parents the opportunity to show that they are "able to complete the services and make the behavioral changes that [the Department is] looking for" to reunite the children with them. At every hearing during this suit,

the trial court warned the parents that failure to complete the Plan could result in termination of their parental rights.

Around the time of the court's Plan order, the first caseworker assigned to the case was replaced. The second caseworker echoed the first one by telling L.C. that she had "no intentions of returning these kids to you." Nevertheless, she worked with S.C. and L.C. and tracked how they were doing on completing their Plans.

S.C.'s Plan required her to complete several steps. She had to pay child support, but she never did. She had to provide a safe and stable home for the children and allow the Department to inspect it. She allowed the Department to inspect until about a month before trial, when two unknown males told a visiting Department representative that S.C. was not home, preventing an inspection. Otherwise, S.C.'s home was generally clean and appropriate. The Department was otherwise concerned by S.C.'s admission that, at one point in the past, she was asleep in one room of her home while S.-A.C. and P.W. were left unsupervised in another. S.C.'s home had bedrooms, toys, a toddler bed (though it previously had two), and a mattress for the children. The home was "sometimes" clean.

S.C.'s Plan required her to take weekly drug tests. About a month after the second suit started, S.C. voluntarily took part in drug treatment. She successfully completed outpatient drug treatment and also attended Narcotics Anonymous meetings. S.C. mostly took the required drug tests, and all but one were clean—33 clean tests. However, in July 2019, she tested positive for Xanax, a substance she was not prescribed. She said that she accidentally took the medication when a friend visited. She stopped taking the drug tests in October 2019, when she gave birth to twins in Oklahoma, and has not taken a drug test since.

S.C.'s Plan required her to secure a job or, failing that, perform community service. She had one job for a two-week period in Houston but then left it, and she later found a seasonal job in Round Rock about two weeks before trial. Otherwise, she has not held a job for more than a month. She did not perform community service during the times that she was unemployed. Nor did she provide the Department with proof of employment income as her Plan required. S.C.'s Plan also required that she receive counseling to address her drug use and to help her develop parenting skills and skills to cope with stress. She started out seeing the counselor weekly but did not complete the required appointments and was discharged for not showing up.

The Plan required her to attend supervised visits with the children. She attended most of them, with the Department recording no negative notes about the visits. The children were happy to see her. During one visit, S.C. put together a birthday party for P.W. and brought birthday cake and clothes for the children. S.C.'s sister went to some of the visits, and the Department even allowed one visit for both S.C. and her sister outside of the Department facility. The sister thought that S.C. was behaving like a good mother would during these visits.

L.C.'s Plan had many of the same requirements. He did not take about "97 percent" of the required drug tests because, according to him, a caseworker "told [him] it was a waste of time" and that he "wouldn't get [his] kids." All the drug tests that he did take came back positive. At an early hearing during the suit, the trial court ordered L.C. to take a fingernail drug test. The guardian *ad litem* for the children then saw L.C. peeling off his fingernails under counsel table in the courtroom, but L.C. characterized it as simply biting and cutting his fingernails like normal.

The caseworker described L.C.'s effort to complete his Plan as "[n]o effort at all." There was no evidence that he completed required counseling appointments or took the required second psychological evaluation with the psychologist. He did attend required supervised visits with his children. The children were happy to see him and seemed bonded with him. They all played together, he interacted well with them, and the Department had no concerns about his behavior. He has also stayed employed.

As for the state of his home, L.C. kept it clean and had a bedroom for his children. However, two home visits caused concern. One time, a caseworker smelled a strong odor of marijuana through his closed front door. When she knocked, someone inside asked who was there. She responded that it was she, but no one came to the door, and she was not let in to inspect the home. Another time, L.C. refused to let the caseworker in because his fiancée was ill and undressed and would not go into another room to allow her to inspect. L.C. also failed to get rid of a pit bull that the Department requested be removed.

The psychologist's reevaluation of S.C.

Another part of the Department's effort was asking the psychologist to reevaluate S.C., in December 2018. The Department told him the information that it included in its August 2018 removal affidavit:

> [S.C.] had resumed drug use, there were reports of drug sales from the home, there was a quote in the referral information that stated that she had threatened to kill the children if CPS were to ever get involved again, there was also a concern about some postings on social media which were interpreted by the Department as indicating she was soliciting sexual relations or sexual activity online.

S.C. disputed that she was "soliciting male companions" and denied engaging in prostitution.

When reviewing S.C.'s responses to standardized tests and questionnaires, the psychologist considered S.C. to sometimes be providing untruthful information because of the discrepancies between her accounts and documented facts from Department records. The results from the testing revealed high anxiety, high self-dissatisfaction, difficulty relating to others, limited support from others, a "pervasive" anger problem, "destructive behavior," notable levels of being critical of others, difficulty with the ability "to engage in planning an[d] organization," restlessness, irritability, racing thoughts, and low self-esteem.

After the reevaluation, the psychologist again concluded that S.C. could not "function[] independently as a parent." And although he recommended treatment to increase her coping capacity and interpersonal skills and to reduce anxiety and depression, he concluded: "given the long-term history of what's taken place in her life, it would be unrealistic to think that a short period of intervention would have a significant impact and change many of the problems." He does not see S.C. "as being able to responsibly or safely provide care for children given the range of problems she has," noting that "she has been neglectful." As for the children's safety, given S.C.'s drug use, anxiety, depression, insomnia, and diagnoses of PTSD and bipolar disorder, the psychologist "ha[s] concerns about her being someone who could become physically abusive."

The psychologist focused on S.C.'s drug use. To him, a parent's using drugs but not around the children "doesn't mean that their drug use is not affecting the children or not affecting the way that they care for" them. Drug use "could" endanger the physical or emotional well-being of the child, including by impairing the parent's judgment and "speed of response," impairments to either of which could turn "a minor accident" into "a major injury" to the child. He also noted that "some drug use results in the individual having a very misguided or distorted

sense of time," sometimes leading to forgetting meals for children or forgetting to pick them up from school.

S.-A.C.'s behavior problems in foster placement

In February 2019, the Department placed the children with the second foster family, with whom they stayed through trial. The foster parents passed a background check and were trained in first aid, general maintenance of the children and the home, and familial stability. Soon after S.-A.C., J.C., and P.W. arrived at their home, the foster parents took the children to see therapists and doctors because, according to the foster father, "something [wa]s not right." Issues with S.-A.C.'s behavior began a couple of weeks into the placement, just before S.C. returned to Texas from having her twins in Oklahoma and started visiting S.-A.C. again. Before that time, the caseworker was not aware of any behavioral problems with S.-A.C.

According to the foster father's testimony, from the time S.-A.C. arrived at their home, "she was prone to . . . outbursts": "She would cry for 40, 45 minutes" in response to requests to turn off the TV, take a bath, or go to bed or to being disciplined. She would refuse to take a bath, once or twice a week. Getting her to take a bath when she was resisting was "like trying to pull a cat off the ceiling," and it got worse over time. In those instances, she would not verbalize anything; she would go into a "crying fit." The foster parents raised the issue with her therapist.

The foster father has also seen S.-A.C. harm P.W. On one occasion, he saw S.-A.C. make P.W. fall by pulling her feet out from under her, but S.-A.C. denied it. Another time, while S.-A.C. and P.W. were in another room, he heard P.W. cry out, he ran in, and he saw

S.-A.C. standing with her foot on P.W.'s chest while telling him that it was "nothing." He is concerned for P.W.'s safety.

A therapist began treating S.-A.C. in June 2019. He testified that S.-A.C. needed help because there were "a lot of concerns with her behavior and her emotions," including "meltdowns," "emotional episodes where she becomes very upset," "a lot of crying," "aggression . . . with other kids" and P.W., and disobedience. He saw S.-A.C. about three times a month and noted how rare it is for a six-year-old to see a therapist. He works with her on communication because she has been diagnosed with autism spectrum disorder. He believed that S.C.'s visits negatively affected S.-A.C.'s behavior and recommended that the visits stop.

S.-A.C. expressed to the therapist a strong desire to stay with the foster parents and not go back to S.C. She made similar comments to the caseworker. S.-A.C. expressed "some fear about her mother," and she talked with the therapist "about her mother hitting her across the legs with . . . a coat hanger." Although the caseworker reviewed the video of S.-A.C. discussing this with the therapist, she did not ask S.C.'s counselor to raise the issue with her because S.-A.C. did not give much detail about what happened. The guardian *ad litem* heard about the hanger issue too, from the foster mother, who had asked S.-A.C. about the scars on her knees, and S.-A.C. told her that S.C. hit her with a hanger.

Shortly before trial, S.-A.C had a violent emotional outburst, during which she "cried for two-and-a-half hours, tore up the room, tore down the curtains, stripped the bed, [and] threw chairs." The foster parents called the Department for help, and the Department took S.-A.C. to a psychiatric hospital. She was hospitalized for nearly a week and then moved to a therapeutic foster home, which has parents trained to deal with aggressive behavior.

Both S.-A.C. and J.C. are autistic, so the foster parents have "had to learn what it takes to try to deal with an autistic child." They have observed S.-A.C. to be "a more outgoing autistic" and J.C. "kind of reserved." S.-A.C. has also been diagnosed with ADHD.

The caseworker sometimes updated L.C. on S.-A.C.'s behavior. L.C. would then address the behavior with S.-A.C. during supervised visits. The caseworker also observed visits, and she testified that S.-A.C. responds better to the foster father's instructions about seeking to address behavior than she does to her parents'.

Trial and the court's final order

The parties tried the suit to a jury in December 2019. S.C. and L.C. testified about their parenting and some of the facts that they believed supported retaining their parental rights. S.C. testified that she has never hit S.-A.C. with a hanger. She explained the circumstances and effects of her pregnancy with the twins and their birth in Oklahoma in October 2019. Both she and the twins were tested for drugs, and they all tested negative. Despite this, authorities took the twins from her and told her that they were experiencing drug withdrawal symptoms.

Because of the pregnancy and post-partum depression, S.C. missed supervised visits with the children for two or three weeks. She explained that she did not take the required drug tests before trial because she was either in Oklahoma or in an inpatient treatment program. Also, because she now works in Round Rock, she is not able to make it to the Killeen drug-testing facility before it closes for the day. Nevertheless, she admitted that the court had not excused her from drug testing. She also has not returned to counseling since returning from Oklahoma about two months before trial.

To her knowledge, the only goals in her Plan that S.C. did not meet were the missed drug tests. But she later admitted the requirement to pay child support and that she has not paid anything. She said that is because her rent went up; she needed to make other payments, such as for required counseling appointments; "and also the taxes that I was supposed to get for my kids this year, that was supposed to go to them[,] but it was taken." For financial support, she receives SSI because of her bipolar disorder, PTSD, and depression.

Lastly, S.C. approved of L.C.'s parenting. She testified that the children love L.C. and are bonded with him. She has no concerns about L.C. with them, despite any problems that she and L.C. have had between each other.

During his testimony, L.C. testified that he uses marijuana to manage pain, including because of recent surgery. He also testified that he had not seen autism-related problems or emotional problems in S.-A.C. until she went into foster care. He has seen scratches on the children during his supervised visits while they were living at the foster placements. He had never observed S.-A.C. trying to hurt her siblings or any children, and he has seen her play well with others. He had no concerns about the children with S.C., was not afraid for their safety with her, and has never seen her use a hanger to hit them. He believed her to have a clean home and that she has gotten past any drug problem.

S.C.'s sister and G.C., who is L.C.'s mother, also testified, and they supported S.C. and L.C. The sister heard the testimony about S.-A.C.'s outbursts and harming P.W., but that did not sound to her like S.-A.C. at all. The sister often saw S.C. and the children before their removal—nearly every day or every other day—including at S.C.'s home. She had never seen S.C. unable to parent because of being high and never saw drugs in the home. She did see S.C. talk to the children and put them in timeout to discipline them, but she has never seen her hit

them. The sister testified that S.C. kept the children fed and bathed and that there was food in S.C.'s refrigerator for them. She testified that S.C. had no trouble getting S.-A.C. to take baths, and she had no safety concerns about the children being with either S.C. or L.C.

G.C. testified that she never observed S.-A.C. exhibit any of the screaming or extreme behaviors that others testified about. While in S.C.'s care, the children would arrive at G.C.'s home always clean, fed, and clothed. G.C. has never seen anything concerning in the children's behavior. She believes L.C. to be very attentive with his children, playing with them, reading to them, and talking with them. S.C. has never used drugs in G.C.'s home.

The psychologist, the foster father, both caseworkers, and the guardian *ad litem* testified for the Department. The psychologist explained his evaluations and recommendations to the jury. He also admitted that "it's a more comfortable situation for children to be with relatives" so long as it "is a safe opportunity." Placement with a relative is "less problematic" because "[f]amiliarity promotes comfort."

The foster father told the jury that he and his wife want to adopt the children because he was a foster child himself and they can help provide the children meaning, purpose, and stability. He thinks of the children as his own. He noted that S.-A.C. has never asked to go home to S.C. and that she "couldn't stand the thought of leaving [the foster parents'] home."

The second caseworker testified about S.C.'s failing to complete her Plan. From October 2019 to trial in December, she was not aware of any Plan services that S.C. had done. In all, she does not believe that S.C. has made necessary behavioral changes to have the children returned. But she acknowledged that S.C. has addressed some of S.-A.C.'s behavioral problems with S.-A.C. during supervised visits.

The caseworker also believed that it was in the best interest of the children to stay with the foster parents. She testified about their "very loving and caring bond." She has "never seen any concerns or issues during" visits to their home. She is concerned that S.-A.C. is afraid to go back to S.C., in part because S.-A.C. has told her that she does not want to and wants to stay with the foster parents instead. The caseworker testified that S.-A.C. felt it was "dangerous" to be with S.C.

The guardian *ad litem* testified about her role and conclusions. She tried to stay in frequent contact with S.C. but was last able to connect with her in March 2019, despite attempts at contact through August. She supports terminating S.C.'s parental rights because of the drug use. She believes it is in the best interest of the children to stay with the foster parents, including because of how happy S.-A.C. is at their home.

The court submitted the case to the jury, asking it to decide whether S.C.'s and L.C.'s parental rights to S.-A.C., J.C., and P.W. should be terminated based on (1) either of the two predicate grounds of endangerment by conduct to the children's physical or emotional well-being or failure to comply with a court order relating to what was necessary to see the children returned and (2) whether termination was in the best interest of the children. *See* Tex. Fam. Code § 161.001(b)(1)(E), (O), (b)(2). The court denied L.C.'s request for jury instructions and a question about conservatorship with a relative. The jury answered that S.C.'s and L.C.'s parental rights should be terminated, and the trial court rendered judgment on the verdict.

DISCUSSION

We begin with L.C.'s issue about whether he should have been allowed to amend his pleadings. We then address S.C.'s and L.C.'s issues about certain evidence admitted, certain

testimony excluded and a related issue about the refusal to submit a conservatorship question, and statements by counsel during trial. Then we address S.C.'s and L.C.'s issues about the sufficiency of the evidence.

I. L.C. may not advance a request to name a relative of the children as conservator.

In his second issue, L.C. contends that the trial court abused its discretion by denying him leave to amend his pleadings to include a request that a relative, instead of the Department, be appointed as the children's managing conservator. L.C. asked for leave to make this amendment within the seven-day window before trial. *See* Tex. R. Civ. P. 63 (requiring leave of court for pleading amendments filed within seven days of trial). On the third day of trial, the trial court denied leave for the requested amendment. We review a trial court's decision about Rule 63 leave to amend for an abuse of discretion. *See F.R. v. Texas Dep't of Family & Protective Servs.*, No. 03-17-00487-CV, 2017 WL 6503082, at *6 (Tex. App.—Austin Dec. 15, 2017, no pet.) (mem. op.).

L.C. argues that the trial court should not have denied him leave because his requested amendment was "nearly identical to" the Department's own live pleading. The Department pleaded for the children to be "permanently placed with a relative or other suitable person" as "sole managing conservator" "if the children cannot be safely reunified with either parent." It also pleaded that, failing placement "with a relative or other suitable person," the trial court should "appoint the Department as permanent sole managing conservator." L.C. argues that the Department could not have been surprised by his requested amendment because much of the trial testimony identified his mother, G.C., as the proposed relative placement and because there had been a home study about G.C.'s home "at the outset of the case." In response, the

Department argues that L.C. does not have standing to request that G.C. should have been appointed as managing conservator because only G.C. herself could advance that request.

This Court has indeed concluded: "a challenge asserting that" a child's grandmother, who had "not intervene[d] or attempt[ed] to intervene in" the case, "should have been appointed conservator must be raised by" the grandmother herself. *E.A. v. Texas Dep't of Family & Protective Servs.*, No. 03-15-00811-CV, 2016 WL 1639847, at *4 & n.4 (Tex. App.—Austin Apr. 21, 2016, pet. denied) (mem. op.); *see also A.P. v. Texas Dep't of Family & Protective Servs.*, Nos. 03-18-00780-CV, 03-18-00781-CV, 2019 WL 1342163, at *1–2 (Tex. App.—Austin Mar. 26, 2019, no pet.) (mem. op.) (dismissing appeal for lack of standing because appellant parents did not have standing to "challeng[e] the trial court's rulings concerning A.C.'s paternal grandmother's petition in intervention" seeking conservatorship); *In re L.K.*, No. 12-11-00169-CV, 2012 WL 6674417, at *7 (Tex. App.—Tyler Dec. 20, 2012, pet. denied) (mem. op.) (overruling appellant parents' issues challenging denial of intervenor grandparents' request for conservatorship because denial affected only grandparents' rights and because grandparents "could have perfected their own appeal, but they did not do so," so parents "may not raise this issue when the intervenors have not raised the complaint themselves"). Considering these authorities, L.C. could not have advanced a conservatorship request on behalf of G.C. or any other relative of the children because neither G.C. nor any other relative intervened or attempted to intervene in the suit. We hold that the trial court thus did not abuse its discretion by denying the requested pleading amendment. *See* Tex. R. Civ. P. 63; *F.R.*, 2017 WL 6503082, at *6. We overrule L.C.'s second issue.

II. We overrule S.C.'s and L.C.'s issues about the admission or exclusion of certain evidence and L.C.'s related issue about the refused conservatorship question.

A. The erroneous admission of a temporary order's fact findings did not harm S.C.

In a portion of her first issue, S.C. contends that the trial court abused its discretion by admitting an unredacted temporary order from this suit because of the following fact findings contained in the order:

- "there is a danger to the physical health or safety of the children caused by the acts or failure to act of Respondent and therefore parental possession of the children is not in the best interest of the children";
- although the Department tried "to prevent or eliminate the need for removal of the children," it was "not in the children's welfare to remain at home";
- the Department "made reasonable efforts to make it possible for the children to return home"; and
- each parent was advised that their parental rights could be restricted or terminated unless they were "willing and able to provide the children with a safe environment."

S.C. argues that admitting these fact findings into evidence amounted to impermissibly admitting testimony, or commentary on the weight of the evidence, from the associate judge that signed the orders, under *In re M.S.*, 115 S.W.3d 534 (Tex. 2003). Generally, admitting findings like these is error when the findings are "the very ones that the jury itself [i]s being asked to find." *Id.* at 538. For the error to be reversible, it must be harmful. *Id.* (citing Tex. R. App. P. 44.1(a)(1)).

Here, the findings are indeed some of "the very ones that the jury itself was being asked to find." *See id.* The findings about danger to the children's physical health or safety were some of the Department's very allegations under Family Code section 161.001(b)(1)(E) and were directly implicated by the charge's instructions to the jury about what "endanger" means. Admitting the temporary orders without redacting the fact findings was thus error. *See id.*

We next must review the record for harm: "In cases where the error complained of involves an evidentiary ruling, the reviewing court examines the whole record to determine if the complaining party was harmed." *Id.* It is S.C.'s burden to show that she was prejudiced by the admitted findings. *See id.* To do so, she must show that, but for the admission of the order into evidence, the jury would have reached a different conclusion about endangerment of the physical or emotional well-being of the children. *See id.* at 542.

In *M.S.*, the Court concluded that there was no harm in admitting the challenged judicial findings because (1) the appellant did not point out how she was harmed by their admission; (2) nothing in the record showed that the Department "specifically based any of its arguments on the" findings or that it "pointed out the findings to the jury for its particular consideration"; and, (3) for purposes of Family Code section 161.001(b)(1)(O), there was ample other evidence that the appellant did not comply with a court order. *Id.* at 538–39; *see also In re A.T.K.*, No. 02-11-00520-CV, 2012 WL 4450361, at *5 (Tex. App.—Fort Worth Sept. 27, 2012, no pet.) (mem. op.) (holding that admission of fact findings was harmless because verdict was "supported by other ample evidence in the record" and Department "did not point out the findings to the jury for them to consider, and it did not base any of its arguments on the findings"); *In re S.G.S.*, 130 S.W.3d 223, 243 (Tex. App.—Beaumont 2004, no pet.) (holding that admission of fact findings was harmless because "[n]either the Department nor the children's ad litem attorneys specifically based any of their arguments on the" findings and "there was ample evidence otherwise" to support verdict).

S.C. argues that the Department pointed out the challenged findings in this portion of closing argument:

> Petitioner's Exhibit 1 is the removal affidavit from the current case that happened most recently. Petitioner's Exhibit 2 is the removal affidavit that was presented to the Court in the first case. And so these are what the courts reviewed when they were determining whether there was a danger to the child that necessitated a removal from their home.

We conclude that this does not rise to the level announced in *M.S.* of the Department "specifically bas[ing] any of its arguments on the" findings or "point[ing] out the findings to the jury for its particular consideration." *See* 115 S.W.3d at 538. This portion of the Department's argument might mention the relevant temporary order, but it does not "specifically base[]" any argument on that order's findings; instead, it specifically bases an argument on the material that the Department included in its removal affidavits. The temporary order that contained the challenged findings was the Department's exhibit 12, and nowhere in its closing argument did the Department highlight that exhibit.

We also conclude that ample other evidence supported the endangerment allegations under Family Code section 161.001(b)(1)(E), which was the relevant jury issue: there was testimony about S.C. scarring S.-A.C.'s legs by hitting her with a hanger; S.-A.C.'s fear about returning to S.C.; S.C.'s methamphetamine relapse shortly before the Department filed this proceeding; L.C.'s admitted, frequent marijuana use; the psychologist's findings and recommendations about why each of S.C. and L.C. would not be appropriate parents; S.-A.C.'s autism and ADHD diagnoses; and J.C.'s autism diagnosis. *See M.S.*, 115 S.W.3d at 538–39; *A.T.K.*, 2012 WL 4450361, at *5; *S.G.S.*, 130 S.W.3d at 243. All this constitutes "ample other evidence" of endangerment because striking S.-A.C. with a hanger plainly exposed her to injury and jeopardized her, the children's diagnoses in concert with the psychologist's views on the parents' parenting hindrances meant that the children's outcomes with S.C. or L.C. parenting

them would be uncertain or unstable at best, and the evidence of the parents' illegal drug use was significant. *See Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987) (explaining that "'endanger means to expose to loss or injury; to jeopardize"; it requires "more than a threat of a metaphysical injury or the possible ill effects of a less-than-ideal family environment"; and conduct may be endangering even if it was not "directed at the child" or even if "the child" did not "actually suffer[] injury"); *E.D. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00766-CV, 2020 WL 1908303, at *5 (Tex. App.—Austin Apr. 17, 2020, no pet.) (mem. op.) (noting that conduct that subjects child to uncertainty and instability may endanger child's physical and emotional well-being (citing *In re A.J.H.*, 205 S.W.3d 79, 81 (Tex. App.—Fort Worth 2006, no pet.))); *In re A.M.*, 495 S.W.3d 573, 579 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (noting that illegal drug use affects parental abilities and may support termination under Section 161.001(b)(1)(E) because it exposes child to possibility that parent may be impaired or imprisoned); *In re M.E.-M.N.*, 342 S.W.3d 254, 263 (Tex. App.—Fort Worth 2011, pet. denied) ("[A] parent's decision to engage in illegal drug use during the pendency of a termination suit, when the parent is at risk of losing a child, supports a finding that the parent engaged in conduct that endangered the child's physical or emotional well-being.").

Because of our conclusions, *M.S.* compels us to overrule this portion of S.C.'s first issue: the record shows no harm stemming from the admission of the fact findings in the temporary orders.

B. Admitting L.C.'s drug-test results was harmless.

In his first issue, L.C. contends that the trial court abused its discretion by admitting drug-test results that showed that he had marijuana or cocaine in his system at times in

2016, 2017, and 2019. He argues that the Department's business-records affidavits did not establish "whether the devices used" to test him "were properly supervised or maintained."

We review the admission or exclusion of evidence for an abuse of discretion. *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam). An abuse of discretion occurs if the trial court acts unreasonably or arbitrarily, without reference to guiding principles. *Calderon v. Texas Dep't of Family & Protective Servs.*, No. 03-09-00257-CV, 2010 WL 2330372, at *6 (Tex. App.—Austin June 11, 2010, no pet.) (mem. op.). We uphold a trial court's admission or exclusion of evidence unless (1) there was no legitimate basis for the court's ruling, and (2) the error probably caused the rendition of an improper judgment. *Id.* We sustain an admission or exclusion of evidence if it is correct under any applicable legal theory. *Id.*

If the challenged evidence is cumulative of other unchallenged, admitted evidence, then admitting the challenged evidence was harmless, and we may not reverse. *See State v. Central Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009); *In re D.J.H.*, No. 04-11-00815-CV, 2012 WL 1654953, at *3 (Tex. App.—San Antonio May 9, 2012, no pet.) (mem. op.); *In re M.D.V.*, No. 14-04-00463-CV, 2005 WL 2787006, *4 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.) (mem. op.). "But if erroneously admitted or excluded evidence was crucial to a key issue, the error is likely harmful." *Central Expressway Sign Assocs.*, 302 S.W.3d at 870. A trial court's admission of a parent's positive drug-test results is harmless when the results are cumulative of "other testimony that [parent] had used drugs, including [parent]'s own admission" of illegal drug use. *See D.J.H.*, 2012 WL 1654953, at *3.

As for L.C.'s positive marijuana results, assuming without deciding that the trial court should not have admitted the results, admitting them was harmless because L.C. elsewhere admitted to regularly using marijuana and to having used it since he was 14 years old. *See*

Central Expressway Sign Assocs., 302 S.W.3d at 870; *D.J.H.*, 2012 WL 1654953, at *3; *Calderon*, 2010 WL 2330372, at *6. As for the cocaine, assuming without deciding that evidence about the results showing the presence of cocaine should not have been admitted either, the admission was harmless because other evidence showed that L.C. had admitted to cocaine use. *See Central Expressway Sign Assocs.*, 302 S.W.3d at 870; *D.J.H.*, 2012 WL 1654953, at *3; *Calderon*, 2010 WL 2330372, at *6. As we detailed above, ample other evidence bore on L.C.'s endangering conduct. In addition, the many missed drug tests on their own support the reasonable inference that L.C. was continuing to use illegal drugs. *See In re C.A.B.*, 289 S.W.3d 874, 885 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("A factfinder reasonably could infer that [parent]'s failure to submit to the court-ordered drug screening indicated she was avoiding testing because she was using drugs."). Because any error in the admission of the test results was harmless, we overrule L.C.'s first issue.

C. The trial court did not abuse its discretion by refusing to submit a conservatorship jury question, and the complaint about excluding further testimony or argument about placement with G.C. was not preserved.

In a portion of his third issue, L.C. contends that the trial court abused its discretion by excluding testimony and argument about G.C. being named conservator. In the rest of his third issue, he contends that the trial court abused its discretion by refusing to submit a conservatorship jury question so a relative of the children could be named conservator.

S.C.'s counsel sought to cross-examine the second caseworker about whether G.C.'s home was a possible placement, and L.C.'s counsel argued that S.C.'s counsel should be allowed to pursue the line of questioning. The trial court prohibited any further questioning on the topic. Earlier in the trial, the jury had heard other testimony about G.C.'s suitability or about

the general preference to place children with relatives. At the charge conference, the trial court refused L.C.'s request to submit a conservatorship jury question.

We review evidentiary rulings for an abuse of discretion. *J.P.B.*, 180 S.W.3d at 575. And we review a trial court's decision on whether to submit a jury question for an abuse of discretion. *J.A.B. v. Texas Dep't of Family & Protective Servs.*, No. 03-13-00273-CV, 2013 WL 4487513, at *1 (Tex. App.—Austin Aug. 14, 2013, pet. denied) (mem. op.) (citing *Ayala v. Texas Dep't of Family & Protective Servs.*, No. 03-09-00121-CV, 2010 WL 3672351, at *3 (Tex. App.—Austin Sept. 16, 2010, no pet.) (mem. op.)).

As support for his position, L.C. relies on Family Code sections 105.002 and 263.404. He argues that Section 263.404 allowed the jury "to name a non-parent as managing conservator without terminating" because Section 105.002 "gives a party a right to a jury trial in a suit to terminate the parental rights as well as conservatorship questions."

Section 263.404 does not support L.C.'s position. That statute addresses naming only the Department as managing conservator in the event that a parent's rights are not terminated. *See* Tex. Fam. Code § 263.404(a)–(b). To the extent that L.C.'s position on appeal could be construed as complaining about the refusal to submit a conservatorship question because the jury could have chosen *the Department* as the conservator, we reject such a complaint. L.C.'s position in the trial court was that either he himself, G.C., or another relative should have and would have been named conservator. "Objections to the charge must comport with the arguments made on appeal. If the objection at trial is not the same as the complaint on appeal, the issue has not been preserved for review." *Panhandle Steel Erectors, Inc. v. Cantu*, No. 05-17-01495-CV, 2019 WL 3214147, at *9 (Tex. App.—Dallas July 17, 2019, pet. denied) (mem. op.) (internal citation omitted) (citing *Continental Cas. Co. v. Baker*, 355 S.W.3d 375,

383 (Tex. App.—Houston [1st Dist.] 2011, no pet.)). Thus, L.C. has not preserved a complaint that he was entitled to a conservatorship question so that the Department could be named the children's conservator, which is all that Section 263.404 supports.

Section 105.002 is no support either because our case law forecloses that argument: "In the context of a parental termination case, this Court has squarely addressed the issue of whether a trial court abuses its discretion when it refuses to submit jury questions concerning conservatorship." *J.A.B.*, 2013 WL 4487513, at *2 (citing *Ayala*, 2010 WL 3672351, at *4). As we explained, we have "rejected the appellant parent's contention that sections of the family code, including section 105.002, gave her the right to have the jury consider naming her conservator as an alternative to termination." *Id.* (citing *Ayala*). "The controlling question in this case was whether [the mother]'s parental rights should be terminated. The trial court asked the controlling question, so it did not abuse its discretion by refusing to submit additional questions." *Id.* (internal quotations and citations omitted) (quoting *Ayala*, 2010 WL 3672351, at *4). We conclude that the trial court did not abuse its discretion by refusing to submit a conservatorship question. *See id.*; *Ayala*, 2010 WL 3672351, at *4.

We also conclude that the complaint about the exclusion of further testimony or argument about placing the children in G.C.'s home was not preserved for our review. "If a court ruling excludes evidence, a party must preserve error by filing an offer of proof informing the court of the substance of the excluded evidence." *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018) (citing Tex. R. Evid. 103). There was no offer of proof made about what the caseworker's testimony would have been concerning whether G.C.'s home was a possible placement. Thus, this evidentiary complaint is not preserved for our review. *See id.*; *McKinnon v. Wallin*, No. 03-17-00592-CV, 2018 WL 3849399, at *4 (Tex. App.—Austin Aug. 14, 2018,

pet. denied) (mem. op.) ("As to McKinnon's complaint that he was not allowed to cross-examine appellees' witnesses, he has failed to preserve this complaint for our review because he did not make an offer of proof concerning the substance of what the excluded testimony would have been"). We overrule L.C.'s third issue.

D. Refusing curative instructions about alleged misstatements of law did not probably cause the rendition of an improper judgment.

In the remaining portion of her first issue, S.C. contends that the trial court's "failing to cure a misstatement of law" by the Department's counsel in the presence of the jury resulted in an improper judgment. S.C. argues that the Department's counsel left the jury with the mistaken impression "that if parental rights were not terminated the children would have to be returned to the parents immediately (or some other hearing would have to be held)."

During S.C.'s counsel's cross-examination of the guardian *ad litem*, the Department's counsel objected to a line of questioning about whether the children would be returned to S.C. or L.C. if their parental rights were not terminated. In the presence of the jury, the Department's counsel said, "Objection. Relevance. If the jury doesn't terminate, the Department can no longer be a custodian. That's a legal fact." In response, also in the presence of the jury, S.C.'s counsel asked for a curative instruction: "I just want to make sure that the jury understands that that's not accurate, that's not legally accurate. So however—if you'd like to instruct them, I really think that that's an important point that they need to hear." The trial court responded, "Let's move on," and S.C.'s counsel resumed cross-examining the guardian *ad litem*. The trial court's statement to move on was not a ruling on the Department's counsel's statement, and there was no objection to the trial court's refusal to rule. Therefore, the complaint about this alleged misstatement of law is not preserved for our review. *See* Tex. R. App. P. 33.1(a)(2).

S.C. also complains of this statement by the Department's counsel during closing argument: "Not terminating . . . the parental rights would cause the Department to be dismissed, [the children] returned to these parents until the next time they put them in severe danger, which would be pretty much immediately upon placement." S.C.'s counsel again objected that the Department's counsel was misstating the law. This time, the trial court overruled the objection. We assume without deciding that the trial court should have cured this statement made by the Department's counsel by instructing the jury to disregard it. But for any error in the trial court's refusal to give a curative instruction to result in reversal, the error must have "probably caused the rendition of an improper judgment." Tex. R. App. P. 44.1(a)(1). S.C.'s only argument on this score is that the trial court's "failing to correct the misstatement about what would happen if [the jury] failed to terminate parental rights[] increased the likelihood that an improper judgment was rendered."

We disagree. The combination of S.C.'s counsel's own framing of the case for the jury and the trial court's proper refusal to submit any conservatorship jury question negated any harm in the jury's hearing the Department's counsel's uncured comment. S.C.'s counsel framed the jury's choice as either returning the children to their parents, sending them to a relative, or terminating parental rights. In opening statement, S.C.'s counsel said that "what home is the best, which family is the best" is what the jury was "going to be choosing in this trial." Counsel continued by explaining that "[t]ermination is not the only option" because the children "could go with" a relative. She asked the jury not to "terminate and either place these kids back with one of these parents or with a relative." She returned to the topic in closing argument by referring to G.C.'s home as a possible placement:

> [G.C.] came to court, had an approved Home Study. She's a preschool teacher, her husband is retired military . . . . It's not like they don't have people that love them and aren't capable of loving them. So if you do terminate, all of those things are gone. Termination is the death penalty of a parent's rights.

S.C.'s counsel's own framing of the case for the jury was thus (1) placement with the parents, (2) placement with a relative, or (3) termination.

As we have already concluded, the trial court did not abuse its discretion by refusing to submit a conservatorship jury question or by forbidding any further testimony on the topic. This removed option number two from S.C.'s counsel's framing of the case. What is left—either terminate or return the children to their parents—is exactly what S.C. argues is the mistaken impression left by the Department's counsel's uncured comment: either terminate or return the children to the parents. We conclude that the trial court's refusal to give a curative instruction about that comment did not probably cause the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a)(1); *Lakota Energy Ltd. P'ship v. Merit Mgmt. Partners I, L.P.*, No. 02-13-00057-CV, 2016 WL 6803181, at *6 & n.10 (Tex. App.—Fort Worth Nov. 17, 2016, pet. denied) (mem. op.) (reasoning that party "affirmatively invited the error by requesting a substantially similar question to the one it now argues was error"). We overrule this remaining portion of S.C.'s first issue.

III. The evidence was legally and factually sufficient to support the necessary findings under Section 161.001(b)(1)(E) and (b)(2).

In her second, third, and fourth issues, and in his fourth issue, S.C. and L.C. challenge the legal and factual sufficiency of the evidence supporting the jury's findings against them under Family Code section 161.001(b)(1)(E), (O), and (b)(2). A trial court may terminate a parent's rights to a child only upon the presence of both of two findings, both supported by clear

and convincing evidence: (1) the parent committed one or more of the acts or omissions listed in Section 161.001(b)(1), and (2) termination is in the best interest of the child. Tex. Fam. Code § 161.001(b)(1)–(2); *J.O. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00895-CV, 2020 WL 2896540, at *4 (Tex. App.—Austin June 1, 2020, no pet. h.) (op.). For these purposes, "clear and convincing evidence" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code § 101.007.

The "clear and convincing evidence" standard informs our standard of review for challenges to the sufficiency of the evidence. *See In re J.F.C.*, 96 S.W.3d 256, 263–67 (Tex. 2002); *J.O.*, 2020 WL 2896540, at *4. As a result, in a legal-sufficiency review, we cannot ignore undisputed evidence contrary to the challenged finding but must otherwise assume that the factfinder resolved disputed facts in favor of its finding. *J.O.*, 2020 WL 2896540, at *4 (quoting *In re A.C.*, 560 S.W.3d 624, 630–31 (Tex. 2018)). The evidence is legally sufficient if, after viewing the disputed and undisputed evidence in this manner, a reasonable factfinder could form a firm belief or conviction that the finding was true. *Id.* (quoting *A.C.*, 560 S.W.3d at 631). In a factual-sufficiency review, we weigh disputed evidence contrary to the challenged finding against all the evidence supporting the finding. *Id.* (citing *A.C.*, 560 S.W.3d at 631). We must consider whether the disputed evidence is such that a reasonable factfinder could not have resolved it in favor of the finding. *Id.* (quoting *A.C.*, 560 S.W.3d at 631). 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 *J.F.C.*, 96 S.W.3d at 266).

Section 161.001(b)(1)(E) allows for termination if the parent "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." "Endanger" here means "to expose to loss or injury; to jeopardize." *Boyd*, 727 S.W.2d at 533. It requires "more than a threat of a metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Id.* Conduct may be endangering even if it was not "directed at the child" or even if the child did not "actually suffer[] injury." *Id.* "Conduct" includes both acts and omissions or failures to act. *A.C. v. Texas Dep't of Family & Protective Servs.*, 577 S.W.3d 689, 699 (Tex. App.—Austin 2019, pet. denied).

Conduct that subjects a child to uncertainty and instability may endanger the child's physical and emotional well-being. *E.D.*, 2020 WL 1908303, at *5 (citing *A.J.H.*, 205 S.W.3d at 81). A parent's use of illegal drugs is relevant under Section 161.001(b)(1)(E). *A.C.*, 577 S.W.3d at 699. "[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct. . . . [I]llegal drug use may support termination under section 161.001(b)(1)(E) because it exposes the child to the possibility that the parent may be impaired or imprisoned." *A.M.*, 495 S.W.3d at 579 (internal quotations and citation omitted) (quoting *In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009)*; Walker v. Texas Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 617 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)); *see also M.E.-M.N.*, 342 S.W.3d at 263 ("[A] parent's decision to engage in illegal drug use during the pendency of a termination suit, when the parent is at risk of losing a child, supports a finding that the parent engaged in conduct that endangered the child's physical or emotional well-being.").

As noted above, the jury heard evidence that bore on endangering conduct by S.C. and L.C.[2] The jury heard testimony that S.C. had hit S.-A.C. on the legs with a hanger. The foster mother learned about the incident from S.-A.C. because she noticed scarring on S.-A.C.'s legs and asked her what happened. Witnesses also testified that S.-A.C. was afraid of returning to S.C. By hitting S.-A.C. with a hanger, injuring her, and causing her this fear, S.C. exposed S.-A.C. to injury and jeopardized her physical and emotional well-being. *See Boyd*, 727 S.W.2d at 533. Relevant too is the allegation in the Department's removal affidavit, relayed to the psychologist, that S.C. threatened to kill the children if the Department ever became involved with them again. This too exposes the children to injury or jeopardy. *See id.*

The jury also heard about S.C.'s methamphetamine relapse; L.C.'s admitted, frequent marijuana use; and evidence of his using cocaine. The psychologist explained to the jury that any illegal drug use—even if the children are not nearby—could endanger the children. He explained that it affects the way the parents care for the children, exposing them to injury by impairing response times or to uncertainty like missed meals or pick-ups. Impairment is especially important considering the testimony about S.-A.C. harming P.W. An impaired parent could reasonably be seen as unable to protect P.W. in a situation when time is of the essence. S.C. even admitted that her drug use "harms me being a better mother to" the children. The evidence of illegal drug use thus supports endangerment. *See E.D.*, 2020 WL 1908303, at *5; *A.C.*, 577 S.W.3d at 699; *A.M.*, 495 S.W.3d at 579.

[2] S.C. raises only a factual-sufficiency challenge under Section 161.001(b)(1)(E), but evidence concerning S.C.'s conduct is also relevant to L.C.'s legal-sufficiency challenge to that finding because L.C. allowed the children to remain with S.C. and the statute contemplates that situation. *See* Tex. Fam. Code § 161.001(b)(1)(E) (providing for termination when parent "knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child").

Finally, the jury heard the psychologist testify about a host of problems in both S.C. and L.C., which led him to conclude that neither would be a suitable parent. S.-A.C.'s and J.C.'s diagnoses require increased parental care and attention, which the foster father testified about learning to address. In L.C.'s case, though he knew that failing to complete his Plan could result in termination of his parental rights, the caseworker saw "[n]o effort at all" from him. The combination of the children's diagnoses, the parents' parenting hindrances, and the parents' failures to complete their Plans gives rise to the reasonable inference that the children's outcomes with either S.C. or L.C. would be uncertain or unstable at best. That uncertainty and instability supports endangerment. *See E.D.*, 2020 WL 1908303, at *5 (noting that evidence that parent "did not complete services intended to help her improve her parenting skills" was some evidence of uncertainty and instability that supported endangerment finding under Section 161.001(b)(1)(E)).

On the other hand, there was some undisputed evidence tending to show that S.C. and L.C.'s conduct did not endanger their children because the conduct supported the children's physical or emotional well-being. Both parents had generally good supervised visits. Both addressed S.-A.C.'s behavior with her. The children often were happy with, or responded well to, their parents. Neither parent's home was insufficiently clean, and S.C.'s home was not dangerous. Both parents were able to provide the children with food and clothing. On balance, however, we conclude that this undisputed evidence in the parents' favor did not rise to the level of preventing a reasonable factfinder from forming a firm belief or conviction that the parents engaged in endangering conduct. *See J.O.*, 2020 WL 2896540, at *4. Both parents, according to the psychologist, had impairments stemming from mental illness or extreme behaviors, which is relevant here because two of the children required specialized care, and the

third was at risk of injury from even a momentary act or accident involving her half-sister. *See E.D.*, 2020 WL 1908303, at *5 (noting that evidence that parent "did not complete services intended to help her improve her parenting skills" was some evidence of uncertainty and instability that supported endangerment finding under Section 161.001(b)(1)(E)). Using illegal drugs exacerbated it all even if it was not done around the children. The evidence under Section 161.001(b)(1)(E) was thus legally sufficient.

As for factual sufficiency, we add to our review the disputed evidence contrary to the endangerment finding. *See id.* L.C. denied using cocaine, but the jury, as the sole arbiter of witness credibility, was entitled to disbelieve him, *see J.O.A.*, 283 S.W.3d at 346 (factfinder is sole arbiter of witness credibility); *In re B.L.D.*, 113 S.W.3d 340, 347–48 (Tex. 2003) (jury entitled to disbelieve testimony); *L.D.-C. v. Texas Department of Family and Protective Services*, Nos. 03-18-00115-CV, 03-18-00116-CV, 2018 WL 2976339, at *3 (Tex. App.—Austin June 14, 2018, no pet.) (mem. op.) (factfinder entitled to disbelieve parent's denials of Department's endangerment evidence), especially given his initial lack of an explanation for the cocaine in his system and later switch to the club explanation. Both S.C. and L.C. denied that S.C. had ever hit S.-A.C. with a hanger, but the jury was entitled to disbelieve that too. Although the caseworker did not raise the hanger issue with S.C.'s counselor because S.-A.C.'s description of the incident to the therapist was not detailed, there was no evidence that S.-A.C.'s report about the incident to the foster mother lacked sufficient detail. We thus conclude that the evidence against endangerment was not so significant that the jury could not have reasonably formed a firm belief or conviction that the parents had engaged in conduct that endangered the children, under Section 161.001(b)(1)(E). *See J.O.*, 2020 WL 2896540, at *4. We therefore overrule S.C.'s third issue and the portion of L.C.'s fourth issue about Section 161.001(b)(1)(E). Only

one of Section 161.001(b)(1)'s predicate grounds need be present, with an accompanying best-interest finding, to support termination. *C.W. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00654-CV, 2020 WL 828673, at *2 (Tex. App.—Austin Feb. 20, 2020, no pet.) (mem. op.). Thus, we need not address S.C.'s second issue and the portion of L.C.'s fourth issue about Section 161.001(b)(1)(O). *See* Tex. R. App. P. 47.1.

S.C.'s and L.C.'s challenges to the best-interest finding remain. When addressing such a challenge, we review the evidence under the non-exclusive factors announced in *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). *J.B. v. Texas Dep't of Family & Protective Servs.*, No. 03-19-00881-CV, 2020 WL 2183127, at *5 (Tex. App.—Austin May 6, 2020, no pet.) (mem. op.). Those are (1) the child's wishes, (2) the child's emotional and physical needs now and in the future, (3) emotional or physical danger to the child now and in the future, (4) the parenting abilities of the parties seeking custody, (5) programs available to help those parties, (6) plans for the child by the parties seeking custody, (7) the stability of the proposed placement, (8) the parent's conduct indicating that the parent–child relationship is improper, and (9) any excuses for the parent's conduct. *Id.* The Department need not prove all of the *Holley* factors "as a condition precedent to parental termination," and a lack of evidence about some does not "preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest." *L.R. v. Texas Dep't of Family & Protective Servs.*, No. 03-18-00125-CV, 2018 WL 3059959, at *1 (Tex. App.—Austin June 21, 2018, no pet.) (mem. op.) (quoting *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002)). No one factor is controlling, but a single factor may be adequate in a particular factual situation to support a best-interest finding. *In re J.M.T.*, 519 S.W.3d 258, 268 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *In re A.P.*, 184 S.W.3d 410, 414 (Tex. App.—Dallas 2006, no pet.). Illegal drug use supports a

finding that termination is in the best interest of the child; the factfinder may give great weight to this significant factor. *See In re L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *In re M.R.*, 243 S.W.3d 807, 821 (Tex. App.—Fort Worth 2007, no pet.); *In re K.C.*, 219 S.W.3d 924, 927 (Tex. App.—Dallas 2007, no pet.); *see also* Tex. Fam. Code § 263.307(b)(8) (requiring consideration of "history of substance abuse by the child's family").

As to the children's wishes, the foster father testified that S.-A.C. did not want to return to S.C. and feared her. *See* Tex. Fam. Code § 263.307(b)(5) (requiring consideration of "whether the child is fearful of living in or returning to the child's home"). The caseworker and the therapist testified that S.-A.C. wanted to remain with the foster parents. Because J.C. and P.W. were too young to express their wishes, the jury could have considered how the children were bonded with the foster parents, well cared for by them, and had spent minimal time with either S.C. or L.C. *See L.G.R.*, 498 S.W.3d at 205. On the other hand, there was also testimony that the children were always happy to see S.C. and L.C. All this evidence taken together tips this factor in favor of termination.

As to the children's emotional and physical needs now and in the future, both S.C. and L.C. point to S.-A.C.'s extreme behavior once in foster care. There is no evidence that she had screaming or crying fits before she was removed from S.C.'s care. And her harming P.W. and tearing a room apart occurred when she was living with the foster parents. The therapist believed that the problems coincided with S.C.'s return from Oklahoma, but S.C. elicited testimony that the problems started before she returned. The foster father testified that he and his wife have since sought to understand S.-A.C.'s autism and ADHD diagnoses and how to work with a child in those circumstances. *See* Tex. Fam. Code § 263.307(b)(1) (requiring consideration of children's "physical and mental vulnerabilities"). The psychologist was unequivocal that

neither S.C. nor L.C. were suitable parents. *See id.* § 263.307(b)(6) (requiring consideration of "results of psychiatric, psychological, or developmental evaluations of . . . the child's parents"). S.-A.C.'s and J.C.'s diagnoses suggest that they will need specialized parental care. But L.C.'s drug use and minimal effort to complete his Plan suggest that he will have difficulty providing that care. *See In re E.C.R.*, 402 S.W.3d 239, 249–50 (Tex. 2013) (parent's failure to complete court-ordered services can support best-interest finding); *J.M.T.*, 519 S.W.3d at 269–70 (same); *see also* Tex. Fam. Code § 263.307(b)(10) (requiring consideration of "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"). S.C.'s not completing her Plan suggests that she might have difficulty too. We conclude that this factor supports termination.

As for emotional or physical danger to the children now and in the future and S.C.'s and L.C.'s conduct indicating that the parent–child relationships are improper, our review above of the sufficiency of the evidence bearing on endangering conduct under Section 161.001(b)(1)(E) leads us to conclude under these two factors that there is emotional or physical danger to the children in returning them to S.C. or L.C. because of the parents' conduct. *See C.H.*, 89 S.W.3d at 28 (providing that same evidence may be probative under both statutory predicate ground and best-interest ground). These two factors, then, point in favor of termination.

As for the foster parents' parenting abilities, their plans for the children, and the stability of placing the children with them, the foster father testified that he and his wife have taken parenting and family-stability training. He also testified that they will seek more help to address S.-A.C.'s and J.C.'s particular needs. As soon as all the children arrived with them, the foster parents sought medical and therapeutic care for the children. They also hope to adopt the children. Further, the evidence showed that the younger children were faring well with the foster

parents. Both the caseworker and the guardian *ad litem* believed that the children should stay with the foster parents. We note S.-A.C.'s behavioral problems in the foster parents' home but also consider how they have sought help from the Department, medical professionals, and the therapeutic foster home. We conclude that these three factors support termination. *See Anderson v. Texas Dep't of Family & Protective Servs.*, No. 03-06-00327-CV, 2007 WL 1372429, at *5 & 6 n.4 (Tex. App.—Austin May 9, 2007, pet. denied) (mem. op.) (evidence supporting termination included long-term care by foster parents seeking to adopt, guardian *ad litem*'s testimony favoring foster parents, children's positive development in foster home, and foster parents' commitment to children).

As for excuses for S.C.'s and L.C.'s conduct, both S.C. and L.C. expressed frustration with the Department's goal of not returning their children to them. This could have harmed the parents' efforts to complete their Plans. S.C. also notes that her pregnancy with the twins hindered her ability to complete her Plan; her last methamphetamine use was a one-time relapse; and she followed it up with consistently clean drug tests, save only for the mistake when a friend stayed over. On the other hand, L.C. freely admitted frequent illegal drug use. At best for S.C. and L.C., this factor points slightly against terminating their parental rights.

We conclude that the *Holley* factors favor termination. The evidence allowed the jury to form a firm belief or conviction that it was in the best interest of the children to terminate S.C.'s and L.C.'s parental rights. *See J.O.*, 2020 WL 2896540, at *4. And the evidence that a reasonable factfinder could not have credited in favor of the best-interest finding is not so significant that the jury could not reasonably have formed that firm belief or conviction. *See id.* We overrule S.C.'s fourth issue and the remaining portion of L.C.'s fourth issue, which challenged the best-interest finding.

CONCLUSION

With all of S.C.'s and L.C.'s dispositive appellate issues overruled, we affirm the trial court's termination order.

Chari L. Kelly, Justice

Before Justices Goodwin, Kelly, and Smith
Concurring Opinion by Justice Goodwin

Affirmed

Filed: July 10, 2020