Proving the Best Interest of a Child: The Fundamental Principles Applied to Best Interest Analyses in Parental Termination Cases

STATE BAR OF TEXAS
CHILD PROTECTION LAW SECTION
FIRST ANNUAL ADVANCED CHILD PROTECTION LAW COURSE
APRIL 19-20, 2018
AUSTIN, TEXAS

ATTORNEY ROBERT J. HAZELTINE-SHEDD
HARRIS COUNTY ATTORNEY'S OFFICE
1019 CONGRESS AVENUE, 17TH FLOOR
HOUSTON, TEXAS 77002
713-274-5292 / Robert.Hazeltine-Shedd@cao.hctx.net

TABLE OF CONTENTS

I. Introduction

At the center of Texas' child protection system is always the question of what is best for the child.[1] This one question informs actions taken at every stage of a child protection case, from investigations and lawsuits instituted by the State, to actions taken by guardians and attorneys appointed to represent children and parents, to findings and determinations made by trial courts.[2] Moreover, countless opinions have been authored by appellate courts at every level which have set forth presumptions, burdens of proof, and standards of review which apply to lower courts' final decrees and determinations which affect children.[3] Thus, extensive

---

[1] *See, e.g.,* Tex. Fam. Code §153.001 (West 2014 and Supp. 2017) (announcing the public policy of this State is to assure that children have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child), § 153.002 (West 2014) (requiring that the child's best interest be the primary consideration in determining issues of conservatorship, possession of, and access to the child), and § 262.001 (West 2014) (stating with respect to "Authorized Actions by Governmental Entity," the child's health and safety are the paramount concern when determining the reasonable efforts necessary to prevent or eliminate the need to remove a child from the child's home).

[2] *See, e.g.,* Tex. Fam. Code §261.301 (West 2014 and Supp. 2017) (authorizing the Executive Commissioner of the Health and Human Services Commission to promulgate procedures for prioritizing investigations of reports of abuse or neglect based on the severity and immediacy of the alleged harm to the child, and outlining the determinations the Texas Department of Family and Protective Services ("Department") must make "to provide for the protection of the child…"), § 107.011 (West Supp. 2017) (requiring the court to appoint a guardian ad litem to "represent the best interest of the child," in a suit filed by a governmental entity), 107.012 (West Supp. 2017) (requiring the appointment of an attorney to represent the interests of the child in a suit filed by a governmental entity), §§ 263.202 and 263.306 (West 2014 and West Supp. 2017) (requiring the court to make findings at statutorily required hearings during child protection cases, including regarding the implantation of a service plan which will enable parents to provide the child with a safe environment, as well as concerning locating missing parents or relatives of the child, visitation plans for the child with parents or relatives, the appropriateness of any placement found for the child, any services the child might need, and the child's medical and educational needs and progress).

[3] *E.g., Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212–13, 31 L. Ed. 2d 551 (1972); *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982); *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex.1976); *In Interest of G. M.*, 596 S.W.2d 846, 847 (Tex. 1980); *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002); *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002); *In Interest of A.H.L.*, 01-16-00784-CV, 2017 WL 1149222, at *4 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied); *In Interest of R.H.W. III*, 14-17-00217-CV, 2018 WL 344082, at *4 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018, no pet. h.); *In re D.D.*, 02-14-00162-CV, 2014 WL 5038244, at *1 (Tex. App.—Fort Worth Oct. 9, 2014, pet. denied).

attention has been paid by our State's courts and legislators to the question of how to decide what is in a child's best interest. Given the importance of this one question, and the necessity to address a child's best interest in a child protection suit, this paper will examine fundamental principles set out in case law and Texas' statutes which guide current best interest assessments. Further, because a comprehensive examination of the laws which govern best interest findings in all contexts is outside the scope of this paper, the following review will focus on the proof necessary in a case in which the State seeks to terminate parental rights.

II. Guidance from the Texas Supreme Court

A. *Holley*

In Texas, before the State may terminate a parent-child relationship, it has the burden to prove not only that the parent has engaged in one of many enumerated types of conduct which, as a general matter, focus on a parent's fitness, it must also produce clear and convincing evidence that "termination is in the best interest of the child."[4] And, though Texas' termination statute generally provides detailed elements of the findings necessary to prove a parent engaged in conduct which supports termination, it does not define "best interest."[5]

Nonetheless, since 1976, best interest determinations have been guided by the Texas Supreme Court's decision in *Holley v. Adams*.[6] In *Holley*, the Court briefly found that "an extended number of factors," had been considered in previous decisions which sought to ascertain what was in a child's best interest, and listed nine of those factors, including:

---

[4] Tex. Fam. Code Ann. § 161.001(b)(1), (2) (West Supp. 2017). The Texas Supreme Court has defined clear and convincing evidence as an intermediate standard of proof lying between the civil preponderance standard and the criminal reasonable doubt standard, which demands a "measure or degree of proof which 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." *In Interest of G. M.*, 596 S.W.2d 846, 847 (Tex. 1980); *see also Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that due process requires the State to support allegations in support of parental termination by clear and convincing evidence.); Tex. Fam. Code Ann. § 101.007 (West 2014).

[5] *See, e.g.*, Tex. Fam. Code Ann. § 161.001(b)(1)(O) (West Supp. 2017) (providing that a parent's rights may be terminated for failing to comply with tasks ordered by a court which were necessary for the parent to obtain reunification with a child who has been in the Department's temporary managing conservator for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.).

[6] 544 S.W.2d 367, 371-372.

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by these individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.[7]

The Court provided little guidance regarding this framework, however, other than to state these factors as having been discussed in previous cases, though it did utilize three of the listed factors to analyze the evidence before it in that case.[8] Consequently, looking only at *Holley* provides little direction in how these factors should be applied or weighed. Nevertheless, the Court's analysis does provide some context for best interest determinations, as well as some insight into how to apply the factors it listed.[9] Moreover, in the forty-plus years since *Holley* was decided, the Texas Supreme Court has several times utilized these factors, as have countless courts of appeals.[10] Thus, the significant body of case law following

[7] *Id.*
[8] *Id.* at 372-73.
[9] *Id.* at 370 *citing Herrera v. Herrera*, 409 S.W.2d 395 (Tex. 1966), *Legate v. Legate*, 87 Tex. 248 (1894), and *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976).
[10] *E.g.*, *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002); *In re J.L.*, 163 S.W.3d 79, 87 (Tex. 2005); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012); *In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013); In Interest of J.R., 01-16-00491-CV, 2016 WL 7212582, at *4 (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, pet. denied); *In re D.D.*, 02-14-00162-CV, 2014 WL 5038244, at *1 (Tex. App.—Fort Worth Oct. 9, 2014, pet. denied); *Gibbs v. Texas Dept. of Family & Protective Services*, 03-11-00320-CV, 2012 WL 2979048, at *8 (Tex. App.—Austin July 19, 2012, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *3–4 (Tex. App.—San Antonio Dec. 27, 2017, no pet. h.); *In Interest of T.L.C.*, 05-15-01253-CV, 2016 WL 1254065, at *5 (Tex. App.—Dallas Mar. 31, 2016, no pet.); *In Interest of A.K.*, 07-17-00353-CV, 2018 WL 912703, at *3 (Tex. App.—Amarillo Feb. 15, 2018, no pet.

Holley, in combination with related statutes, sets forth several principles which define the contours of current best interest analyses.[11]

First and foremost, the Court in *Holley* references the presumption that keeping a child with his or her parents is presumed to be in the child's best interest.[12] Before addressing the evidence relevant to the lower court's best interest finding, the Court cited three of its prior decisions, *Herrera v. Herrera*, *Legate v. Legate*, and *Wiley v. Spratlan*, and noted that strict scrutiny of the evidence was required because "the case involves the right of the child to the benefit of the home environment which will probably best promote its interest and the right of the parent to surround the child with proper influences..."[13] Though the Court did not address in depth this principle, its citation to *Herrara*, *Legate*, and *Wiley* rooted its best interest analysis to their common holdings that "This court has always recognized the strong presumption that the best interest of a minor is usually served by keeping custody in the natural parents."[14]

---

h.); *T.W. v. Texas Dept. of Family & Protective Services*, 431 S.W.3d 645, 649 (Tex. App.—El Paso 2014, no pet.); *In Interest of L.S.*, 09-17-00065-CV, 2017 WL 3081120, at *2 (Tex. App.—Beaumont July 20, 2017, no pet.); *In re M.H.*, 319 S.W.3d 137, 150 (Tex. App.—Waco 2010, no pet.); *In Interest of R.H.W. III*, 14-17-00217-CV, 2018 WL 344082, at *4 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018, no pet. h.).

[11] *See, e.g.*, Tex. Fam. Code Ann. §§ 153.131 and 263.307 (West 2014 and West Supp. 2017).

[12] *Holley*, 544 S.W. at 370; *see also In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (stating, "there is a strong presumption that the best interest of a child is served by keeping the child with a parent.").

[13] *Holley*, 544 S.W. at 370 *citing Herrera*, 409 S.W.2d 395, *Legate*, 87 Tex. 248, and *Wiley*, 543 S.W.2d 349.

[14] *Wiley*, 543 S.W.2d at 352 *citing Herrera*, 409 S.W.2d 395. Wiley was decided in the same year the Court decided *Holley*, and also involved the question of whether a trial court's termination finding was adequately supported by the evidence. *Id.* at 350. *Wiley*, however, did not address a best interest determination, but rather the finding that the mother in the case failed to support her child. *Id.*; *see* Tex. Fam. Code Ann. § 161.001(b)(1)(F) (West Supp. 2017). Neither *Herrera* nor *Legate* dealt directly with termination of parental rights, but rather addressed circumstances in which parents left their children with others, and later sought to have the children returned by filing habeas corpus petitions. *Herrera*, 409 S.W.2d 395; *Legate*, 87 Tex. 248. As is relevant here, the *Legate* court stated, in 1894, that, "the interest of the child and of society is best promoted by leaving [the child's] education and maintenance during minority to the promptings of paternal affection." *Legate*, 87 Tex. at 252. It went on, "Ordinarily, the law presumes that the best interest of the child will be subserved by allowing [the child] to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another." *Id.* Similarly, the Court noted in

That principle accorded, moreover, with the United States Supreme Court decision in *Stanley v. Illinois*, which was decided in 1972, four years before *Holley*.[15] In *Stanley*, the Court addressed a circumstance in which an unwed father's children were declared wards of the state upon their mother's death without a hearing on whether the father was a fit parent.[16] The father advanced the claim that the Illinois statute which presumed his unfitness, as an unmarried father, was a violation of equal protection where married fathers and mothers were supplied with the presumption under law that they were fit to raise their children.[17] The Court agreed and in its holding highlighted the importance of the family, noting that the integrity of the family unit had in past cases been afforded protection under the United States Constitution.[18] In language which has been cited countless times since, the Court stated:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,', 'basic civil rights of man,' and '(r)ights far more precious . . . than property rights.' 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.[19]

Herrera that, "There is a presumption that the interests of a minor are best served by award of its custody to its natural parents." *Herrera*, 409 S.W.2d 395. Though none of these cases directly addressed a finding that termination of a parent's rights was in a child's best interest, as was the case in *Holley*, the Court's adoption of these standards in *Holley* rendered them applicable in that context. *Holley*, 544 S.W.2d at 370.

[15] 405 U.S. 645, 651 (1972).

[16] *Id.* at 646-47.

[17] *Id.* at 647.

[18] *Id.* at 651.

[19] *Id. citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *May v. Anderson*, 345 U.S. 528, 533 (1953), *and Prince v. Massachusetts*, 321 U.S. 158 (1944). These principles have been cited by every court of appeals in Texas as guiding their analyses in child protection cases. *See, e.g., In Interest of J.R.*, 01-16-00491-CV, 2016 WL 7212582, at *4 (Tex. App.—Houston [1st Dist.] Dec. 13, 2016, pet. denied); *In re D.D.*, 02-14-

Thus, at the outset of any best interest analysis made in the context of a parental termination case lies the presumption that maintaining the parent-child relationship is best for the child.[20]

Holley provides additional guidance, moreover, in the Court's analysis of the evidence in that case. The suit involved the parental rights of a mother, which were terminated on the petition of her ex-husband following their divorce.[21] The termination was based on the trial court's findings that she engaged in conduct which endangered the child, failed to support the child in accordance with her ability, and that termination of the parent-child relationship was in the child's best interest.[22] The Court reviewed the evidence of the mother's conduct which purportedly supported the endangerment finding, including that she visited the child only three times during the five-year period he was with his father following the divorce, was arrested several years before for a traffic violation, had previously been committed to a mental hospital for two months, divorced a second time, and had voluntarily declared bankruptcy.[23] The Court held, however, that no evidence

---

00162-CV, 2014 WL 5038244, at *1 (Tex. App.—Fort Worth Oct. 9, 2014, pet. denied); *Gibbs v. Texas Dept. of Family & Protective Services*, 03-11-00320-CV, 2012 WL 2979048, at *8 (Tex. App.—Austin July 19, 2012, no pet.); *In Interest of A.M.M.*, 04-15-00638-CV, 2016 WL 1359342, at *2 (Tex. App.—San Antonio Apr. 6, 2016, no pet.); *In Interest of T.L.C.*, 05-15-01253-CV, 2016 WL 1254065, at *5 (Tex. App.—Dallas Mar. 31, 2016, no pet.); *In Interest of S.W.*, 06-16-00045-CV, 2016 WL 7912459, at *1 (Tex. App.—Texarkana Oct. 6, 2016, no pet.); *In Interest of A.K.*, 07-17-00353-CV, 2018 WL 912703, at *3 (Tex. App.—Amarillo Feb. 15, 2018, no pet. h.); *T.W. v. Texas Dept. of Family & Protective Services*, 431 S.W.3d 645, 649 (Tex. App.—El Paso 2014, no pet.); *In Interest of L.S.*, 09-17-00065-CV, 2017 WL 3081120, at *2 (Tex. App.—Beaumont July 20, 2017, no pet.); *In re H.D.B.-M.*, 10-12-00423-CV, 2013 WL 765699, at *2 (Tex. App.—Waco Feb. 28, 2013, pet. denied); *In Interest of S.F.*, 11-15-00055-CV, 2015 WL 5602455, at *3 (Tex. App.—Eastland Sept. 10, 2015, no pet.); *In Interest of R.H.W. III*, 14-17-00217-CV, 2018 WL 344082, at *4 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018, no pet. h.).

[20] *See* Tex. Fam. Code Ann. § 153.001 (West 2014) (stating the public policy of the State is to assure children have frequent contact with parents who have shown the ability to act in their children's best interest); Tex. Fam. Code Ann. § 153.131 (West 2014) (setting forth the presumption that appointing parents as conservators of their children is in the children's best interest.); *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (stating, "there is a strong presumption that the best interest of a child is served by keeping the child with a parent.") *citing* Tex. Fam. Code Ann. § 153.131.

[21] *Holley*, 544 S.W.2d at 368-69.

[22] *Id.* at 369-70; *see* Tex. Fam. Code Ann. § 161.001(b)(1)(E), (F), and (2) (West Supp. 2017).

[23] *Holley*, 544 S.W.2d at 370-71.

was presented "of any nature that [the child's] emotional well-being was endangered by this conduct in any way."[24]

The Court went on, then, to address the finding that the mother failed to support her child.[25] It briefly held that the record supported that finding but went on to address the mother's argument that her failure to support could not serve as a basis to terminate her parental rights because her duty to support "was excused."[26]

The Court noted that an analogous contention was made in a previous case involving the question of whether a parent must consent to an adoption.[27] The law at the time was that consent was necessary unless the parent failed to support the subject child for a period of two years.[28] However, it found that the termination statute in *Holley* was significantly different, and so the prior case was not persuasive.[29] In particular, it focused on the two-fold nature of the termination statute, which required not only a finding of parental misconduct, but also one that termination was in a child's best interest.[30] Thus, it held that the interpretation of the termination statute, "which will best fulfill the intent of the Legislature is that any 'excuse' for the acts or omissions of the parent can be considered by the trial court only as one of the factors in determining the best interest of the child."[31]

The Court therefore turned its analysis to the question of whether termination of the mother's rights was in the child's best interest.[32] It set forth the nine best-interest factors listed above, and went on to address three of them.[33] It first listed the mother's failure to support the child as relevant to the eighth factor regarding any acts or omissions which may indicate an improper parent-child relationship.[34] However, it held under the ninth factor, which considered any excuse for the

---

[24] *Id.*
[25] *Id.*
[26] *Holley*, 544 S.W.2d at 371.
[27] *Id. citing Heard v. Bauman*, 443 S.W.2d 715 (Tex. 1969).
[28] *Id.*
[29] *Id.*
[30] *Holley*, 544 S.W.2d at 371.
[31] *Id.*
[32] *Id.* at 372-73.
[33] *Id.*
[34] *Id.* at 372.

parents' acts or omissions, that the mother's conduct was excused.[35] It reasoned that that the mother voluntarily gave custody of the child to her husband to ensure the child was adequately supported.[36] Moreover, the mother was never ordered to pay support, the father never sought support from the mother, and it was undisputed that the child was properly cared for.[37] Thus, the Court concluded, the mother's "duty to support her child was excused and the fact that the failure to support is excused is one of the factors to be considered in ascertaining the best interest of the child."[38]

Lastly, the Court considered the emotional needs of the child as was relevant to the second factor.[39] The record demonstrated that an emotional relationship existed between the child and his mother, as well as between the child and his maternal grandmother.[40] Further, there was no evidence presented in support of the contention that termination of the mother's rights would serve the child's best interest in any way.[41] The only reasons given by the father in support of his termination petition were that he wanted his current wife to adopt the child and feared that, should he die, the child's mother would be given custody of the child.[42] Otherwise, the father testified that it was best for the child to have continuing contact with his mother.[43] Accordingly, the Court held that no evidence existed which indicated termination of the mother's rights would be best for the child.[44]

Though brief, the Court's opinion in *Holley* provides some guidance in the application of the nine factors it set forth. First, it is not necessary that the evidence address each of the nine best interest factors, as in *Holley* the Court found only three of the factors were applicable.[45] Second, any excuse for a parent's

---

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Holley*, 544 S.W.2d at 372.
[39] *Id.* at 372-73.
[40] *Id.* at 372.
[41] *Id.*
[42] *Holley*, 544 S.W.2d at 372.
[43] *Id.*
[44] *Id.* at 373.
[45] *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002) (stating, regarding the factors announced in *Holley*, "we have never held that these considerations are exhaustive, or that all such considerations must be proved as a condition precedent to parental termination.").

misconduct is not relevant to a finding made under the first prong of the termination statute, which regards the parent's fitness.[46] Instead, excuses must be addressed under the ninth factor in a best interest analysis.[47] Moreover, an excuse under this factor may preclude application of one of the grounds for termination which regards a parent's fitness.[48] Finally, the Court's analysis highlights that, under Texas' parental termination statute, parental misconduct alone is not sufficient to support termination of the parent-child relationship.[49] Rather, there must be an affirmative showing of how termination will serve to support a child's best interest.[50]

Since 1976, the Supreme Court and the lower courts of appeals have repeatedly addressed best interest determinations in child protection cases using the factors set out in *Holley*. As the case law has developed courts have provided additional guidance with regard to the application of these factors, and several principles have arisen which demonstrate how evidence may be weighed in a best interest analysis. The following is a review of cases which have substantively addressed best interest findings, and illustrate the principles applied to those findings.

B. *In re C.H.*

In 2002, the Court decided *In re C.H.*, a seminal case in child protection law.[51] The Court there addressed what standard appellate courts should use in child protection cases where the State has the burden to prove that parental termination is warranted by clear and convincing evidence.[52] Following trial in the case, the jury found that the parents endangered and abandoned the child, and that termination of the

---

[46] *See, e.g., In re M.A.B.*, 01-15-00388-CV, 2015 WL 6081937, at *7 (Tex. App.—Houston [1st Dist.] Oct. 15, 2015, pet. denied) (stating the rule that "any excuse for failing to complete a family services plan goes only to the best interest determination and not to whether sufficient evidence supports a predicate finding under subsection O.") *citing In re M.C.G.*, 329 S.W.3d 674, 675 (Tex.App.–Houston [14th Dist.] 2010, pet. denied); Tex. Fam. Code Ann. §161.001(b)(1) (West Supp. 2017).
[47] *Holley*, 544 S.W.2d at 371.
[48] *Id.* at 372.
[49] *Id.* at 373; Tex. Fam. Code Ann. § 161.001 (West Supp. 2017).
[50] *Holley*, 544 S.W.2d at 373.
[51] 89 S.W.3d 17 (Tex. 2002).
[52] *Id.* at 18; *see supra* note 4.

parents' rights was in the child's best interest.[53] The parents sought review, and the appellate court found the evidence both legally and factually sufficient to support that the parents endangered and abandoned the child.[54] It held, however, that while the evidence was legally sufficient to show termination was in the child's best interest, it was factually insufficient to do so.[55] The State then petitioned the Texas Supreme Court and argued that the various courts of appeals utilized different formulations of the factual sufficiency standard to review clear and convincing evidence, and thus had rendered the standard unclear.[56] Moreover, the State asserted that the appellate court in *C.H.* failed to afford the jury the proper deference required by a factual sufficiency review when it reversed the jury's best interest determination.[57]

The Court agreed with both of these arguments.[58] As to the first, it held that "the standard for reviewing termination findings is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations."[59] As to the State's second argument, the Court held that, though the lower court correctly stated the standard of review, it failed to give sufficient weight to the evidence which supported the jury's finding.[60] The Court's reasoning and analysis on this point are instructive, and underscore that while a parent has a fundamental interest in the protection of the parent-child relationship, that interest must be balanced by a review of the child's needs.[61] Balancing the principle announced in *Stanley* and referenced in *Holley* that a parent's interest in a child is fundamental and constitutionally protected, the Court provided language in *C.H.* which has since been repeated many times in child protection suits:

---

[53] *In re C.H.*, 89 S.W.3d at 19-20; *see* Tex. Fam. Code Ann. § 161.001(b)(1)(E) and (H) (West Supp. 2017).
[54] *In re C.H.*, 89 S.W.3d at 19.
[55] *Id.* As a more thorough discussion of the development of the legal and factual sufficiency standards of review in child protection cases is outside this paper's scope, the discussion here will focus rather on the effect of the Court's decision on best interest determinations.
[56] *Id*.
[57] *Id*. at 25, 27.
[58] *Id*.
[59] *Id*. at 25.
[60] *Id.* at 27.
[61] *Id*. at 26-29.

> While parental rights are of constitutional magnitude, they are not absolute. Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right.[62]

Applying this principle, the Court found fault with the appellate court's failure to properly weigh the father's misconduct, and indicated the lower court relied too heavily on the State's lack of evidence showing concrete plans for the child.[63] The Court acknowledged that nothing in the record showed whether the child's foster parents intended to adopt the child; what the emotional effect of termination would be for the child; or what the child's needs were with respect to "continuity of care and for timely integration into a stable and permanent home."[64] In reference to the *Holley* factors discussed above, however, the Court clarified that "The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child."[65]

Accordingly, the Court reviewed the evidence of the father's conduct, including that he was imprisoned and unable to care for the child; had extensive criminal history involving dugs and assaults which the court characterized as "inimical to the very idea of child-rearing"; failed to provide assistance or emotional support to the child; had no concrete plans demonstrating how he would care for the child; and failed to foster a relationship with the child and saw the boy only twice.[66] The Court noted that the appellate court found this evidence sufficient to show that the father endangered the child, but that the lower court's opinion failed to "suggest that any of this evidence would be relevant to a determination of the child's best

---

[62] *Id.* at 26; *see, e.g., In re E.C.R.*, 402, S.W.3d 239, 240 (Tex. 2013) *citing In re C.H.*, 89 S.W.3d at 26; *Holley*, 544 S.W. at 370; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).
[63] *In re C.H.*, 89 S.W.3d at 19, 27-28. The Court focused on the father's conduct in its analysis because the child's mother relinquished her parental rights after appealing the trial court's judgment. *Id.* at 19.
[64] *Id.* at 27.
[65] *Id.*
[66] *Id.* at 27-28.

interest."[67] Additionally, the Court highlighted evidence with regard to the father's past performance as a parent, including that the father was unaware of the whereabouts of his fourteen-year-old son from a prior marriage.[68] It held that this history, "could certainly have a bearing on his fitness to provide for C.H., yet the court of appeal did not mention [the father's] prior history of child neglect as a factor bearing upon the jury's finding that termination would be in C.H.'s best interest."[69] In light of the father's past misconduct and the appellate court's failure to address it in its best interest analysis, the Court clarified, "While it is true that proof of acts or omissions under section 161.001(1) does not relieve the petitioner from proving the best interest of the child, the same evidence may be probative of both issues."[70]

Given the record before it, the Court concluded the appellate court erred when it disregarded the father's endangering conduct in its best interest analysis.[71] Additionally, with regard to the appellate court's concerns about the State's failure to show it had concrete plans for the child, the Court stated another principle which has come to guide many decisions since:

> Evidence about placement plans and adoption are, of course, relevant to best interest. However, the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor; otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located. Instead, the inquiry is whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest – even if the agency is unable to identify with precision the child's future home environment.[72]

---

[67] *In re C.H.*, 89 S.W.3d at 28.
[68] *In re C.H.*, 89 S.W.3d at 28.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 28-29.
[72] *In re C.H.*, 89 S.W.3d at 28; s*ee also, e.g.*, *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013), *In Interest of C.M.*, Jr., 14-17-00507-CV, 2017 WL 5895111, at *11 (Tex. App.—Houston [14th Dist.] Nov. 30, 2017, no pet. h.), *In Interest of R.N.P.*, 07-16-00470-CV, 2017 WL 2333803, at

Consequently, the Court reversed and remanded the case to the lower appellate court to reconsider the father's factual sufficiency complaint under the standards set forth in *C.H.*[73]

The opinion in *C.H.* thus provides several principles which inform best interest analyses. First, the Court emphasized what was demonstrated by the reasoning in *Holley*, which was that not all nine best interest factors need to be proven in order for a parent's rights to be terminated, nor does the nine factor list exclude other relevant considerations.[74] It follows that even where some factors are not addressed, other factors may weigh heavily in favor of termination.[75] This is particularly true, the Court noted, where a parent's misconduct demonstrates the parent continues to be a danger to the child.[76] Furthermore, a parent's past performance with other children may be weighed as an indication of how they will parent the child at issue.[77] Finally, the Court stated what has become a guiding principle in child protection cases, which is that a lack of permanent plans for a child, while relevant, may not be the dispositive factor precluding termination of parental rights where the evidence otherwise weighs in favor of it.[78]

C. *In re J.F.C.*

Five months after *C.H.*, the Court decided another pivotal case in child protection law, *In re. J.F.C.*[79] In *J.F.C.*, the Court faced a circumstance in which a jury charge

---

*4 (Tex. App.—Amarillo May 25, 2017, no pet.), *In Interest of V.H.*, 04-15-00511-CV, 2016 WL 519649, at *4 (Tex. App.—San Antonio Feb. 10, 2016, no pet.), *In Interest of N.T.*, 474 S.W.3d 465, 478 (Tex. App.—Dallas 2015, no pet.), *In Interest of J.-M. A.Y.*, 01-15-00469-CV, 2015 WL 6755595, at *8 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, pet. denied), *In Interest of D.T.*, 10-14-00386-CV, 2015 WL 2169966, at *3 (Tex. App.—Waco May 7, 2015, pet. denied), *In re R.E.S. III*, 13-10-00132-CV, 2011 WL 2475926, at *6 (Tex. App.—Corpus Christi June 23, 2011, no pet.), *Spencer v. Texas Dept. of Family & Protective Services*, 03-10-00498-CV, 2010 WL 5464110, at *3 (Tex. App.—Austin Dec. 31, 2010, no pet.), *In re J.E.H.*, 2-07-137-CV, 2008 WL 467332, at *5 (Tex. App.—Fort Worth Feb. 21, 2008, no pet.) *all citing In re C.H.*, 89 S.W.3d at 28.

[73] *In re C.H.*, 89 S.W.3d at 29.

[74] *In re C.H.*, 89 S.W.3d at 27.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 28.

[78] *In re C.H.*, 89 S.W.3d at 28.

[79] 96 S.W.3d 256 (Tex. 2002).

mistakenly omitted the requirement that the children's best interests be considered when terminating the parents' rights.[80] Though the error was raised for the first time on appeal, the appellate court held the missing instruction was fundamental error going to a "core issue" in a termination case.[81] Failing to consider the best interest requirement was, the lower court reasoned, a violation of Fourteenth Amendment procedural due process which required reversal, and a remand for a new trial.[82]

The Texas Supreme Court disagreed, and held that the missing instruction could be addressed through the application of Rule 279 of the Texas Rules of Civil Procedure.[83] This rule, the Court stated, was an embodiment of long-standing case law, and allowed that when some but not all elements of a claim are submitted to and found by a jury, and there is no request or objection made to the trial court with regard to the missing element, "a trial court may expressly make a finding on the omitted element or, it if does not, the omitted element is deemed found by the court in a manner supporting the judgment if the deemed finding is supported by some evidence."[84] Moreover, the Court held that applying Rule 279 was not a violation of due process, in essence, because it applied only after the parents had a full trial on the merits, did not preclude the parents from objecting to the missing element, and "more importantly, an omitted finding may be suppled…only if that finding is supported by some evidence."[85]

Notably, before addressing the question of whether there was "some evidence" in order to support a deemed best interest finding, the Court first recognized that it had never considered how to apply the legal sufficiency standard of review when

[80] *Id.* at 259, 262.
[81] *In re J.F.C.*, 96 S.W.3d at 259-60.
[82] *Id.*
[83] *Id.* at 262-63; Tex. R. Civ. P. 279.
[84] *In re J.F.C.*, 96 S.W.3d at 262-63; Tex. R. Civ. P. 279.
[85] *In re J.F.C.*, 96 S.W.3d at 273. See the opinion for a more thorough review of the Court's analysis of this issue. The Court addressed the three-factor test required by *Santosky v. Kramer*, 455 U.S. at 753-54, and analyzed the interests held by the parents, the risk of error, and the countervailing governmental interest in order to determine whether deeming a finding under Rule 279 provided the parents with "fundamentally fair procedures." *In re J.F.C.*, 96 S.W.3d at 273. Again, as this paper is concerned primarily with the effect of the decision on best interest analyses, it will not provide an in-depth discussion of this portion of the Court's opinion.

the burden of proof was clear and convincing.[86] And, it is for the Court's statement of the legal sufficiency standard that *J.F.C.* has come to be cited in virtually every termination case which followed it.[87]

Nevertheless, the decision also has value because of its detailed and thorough analysis of the evidence before it in consideration of the question of whether termination of the parents' rights was in the children's best interests.[88] The following is evidence the Court recited and found relevant to the best interest finding in that case.[89]

Children's Protective Services (CPS) became involved with the family when it received a report that the parents were involved with the use of illegal drugs and were physically abusive to one another.[90] During its investigation, CPS found no indication that two of the children were abused or neglected in any way, though it was only after CPS called police that the parents produced the third child, who had "dark bruises surrounding the outside of the child's eye," which were caused by the mother.[91] The father subsequently reported that the mother was very violent, was having relationships with several men in the home, and both parents admitted to being under the influence of illegal drugs while watching their children. [92] CPS additionally learned that the mother used cocaine and methamphetamines shortly after one of the children's births.[93] CPS determined, however, that the children were not in any immediate danger, and implemented a "Child Safety and Evaluation Plan," in which it referred the parents to "family preservation" services, including substance abuse assessments and counseling.[94]

---

[86] *In re J.F.C.*, 96 S.W.3d at 264.
[87] *In re J.F.C.*, 96 S.W.3d at 264. As with the Court's discussion of the adequacy of deemed findings with respect to the parents' due process rights, this paper will not provide an in-depth review of the Court's discussion of the legal sufficiency standard. For information on the development of that standard, please see the opinion.
[88] *Id.* at 268-73.
[89] *Id.*
[90] *Id.* at 268.
[91] *Id*. at 269.
[92] *In re J.F.C.*, 96 S.W.3d at 269.
[93] *Id*.
[94] *Id.*

During the following six months, the fighting and violence between the parents escalated, including incidents where the mother grabbed one of the young children by the face and shoved him into the car, injuring his neck; several domestic violence disturbances which involved the police; and several fights between the parents which occurred in front of the children. [95] Based on this history, CPS made the determination that the children were not safe in the home, and the trial court subsequently granted its request to remove the children and be appointed as their temporary managing conservator.[96]

Upon removal, the trial court entered orders requiring the parents to participate in rehabilitative services, and the parents were admonished that failing to do so could result in the restriction or termination of their parental rights.[97] The parents failed to comply with the court's orders, however, and refused to participate in parenting classes or counseling.[98] Further, the father admitted to continued use of illegal drugs, the couple had a fourth child, and the violence between the parents continued.[99]

At trial, several experts testified regarding the children's best interest.[100] One testified that the children had witnessed physically violent altercations between their parents, which had a negative impact on their emotional well-being.[101] Another expert who had evaluated the parents testified that he "did not see any real potential for change," in the mother, and that her violent tendencies presented concerns with regard to her ability to safely parent the children.[102] The father additionally reported significant history with using illegal drugs, and suffered from bipolar disorder.[103] The expert said about these conditions that it was unlikely the

---

[95] *In re J.F.C.*, 96 S.W.3d at 270.
[96] *Id.* at 271.
[97] *Id.*; *See* Tex. Fam. Code Ann. §§ 263.101-06, 263.201-02 (West Supp. 2017) (requiring the Department of Family and Protective Services to create a family service plan for the parents which outlines tasks and services necessary for the parent to obtain reunification with their children, and mandating that the court review, modify, and approve the service plan, and order the parents' compliance with it.)
[98] *In re J.F.C.*, 96 S.W.3d at 271.
[99] *Id.*
[100] *Id.* at 271-72.
[101] *Id.* at 272.
[102] *In re J.F.C.*, 96 S.W.3d at 272.
[103] *Id.*

father would comply with treatment because "he, like other individuals with bipolar disorder, prefers the excitement of the unmedicated state."[104] Furthermore, a caseworker testified that she witnessed visits between the parents and their children, and described that the children's behavior worsened after each visit.[105]

The Court also considered evidence which did not support the finding that termination was in the children's best interest, including that the mother was employed, the parents' landlord reported that their home was a safe environment, and the mother's obstetrician who was present at the birth of the fourth child described the parents as a loving couple.[106]

Nonetheless, the Court ultimately decided that the record presented sufficient evidence such that a factfinder could "reasonably form a firm belief or conviction that termination was in the children's best interest."[107] And, while the court's analysis of this evidence indicates the decision was not a difficult one, the opinion does provide helpful guidance for future determinations.

First, while the jury charge at issue plainly listed the nine best interest factors set forth in *Holley*, nowhere does the Court in *J.F.C.* reference its decision in *Holley*.[108] The *J.F.C.* opinion illustrates, therefore, what was explicitly stated in *C.H.*, that a best interest determination is a flexible one in which the court should look at the entire record in making its decision.[109]

Second, the kind of evidence analyzed in *J.F.C.* demonstrates what will be found probative in subsequent best interest analyses. In this case, the court reviewed the history of the parents' misconduct both before and after CPS sought the removal of the children; the likelihood that the parents might be able to address their conduct; the parent's participation in services offered by CPS, and their compliance with the trial court's orders; the evaluations and opinions of experts regarding the parents' fitness and their prognosis for rehabilitation; the effect of the parents' conduct on the children, along with testimony regarding the children's statements and

---

[104] *Id.*
[105] *In re J.F.C.*, 96 S.W.3d at 272.
[106] *Id.*
[107] *Id.* at 273.
[108] *Id.* at 261-62.
[109] *In re C.H.*, 89 S.W.3d at 28.

behavior; and finally evidence regarding the parents' stability, including their employment status and housing.[110]

This list is not far removed from the *Holley* factors, and could easily be organized within the framework *Holley* announced.[111] The fact that the Court in *J.F.C.* declined to do so underscores that it is the evidence most pertinent to a child's well-being which will be persuasive, rather than a strict adherence to a list of specific factors.

D. *In re J.L.*

Three years after the Court decided *J.F.C.*, it again engaged in an analysis in *In re J.L.* of the evidence presented in support of a claim that termination of a parent's rights was in the best interest of a child.[112] Coming relatively soon after *J.F.C.*, the opinion in *J.L.* provides a fresh application of *J.F.C.*'s newly announced legal sufficiency standard where the burden of proof at trial was clear and convincing.[113] Thus, the best interest analysis provided by the Court presents a very plainly stated roadmap for a legal sufficiency review.[114] First, the Court set forth the evidence which supported the best interest finding; it then weighed against the finding the undisputed evidence which did not favor it; and finally the Court determined whether, in a light favorable to the verdict, the jury could reasonably have formed a firm belief or conviction that termination of the mother's parental rights was in J.L.'s best interest.[115] At the same time, like in *J.F.C.*, the Court made no mention of *Holley* as providing a framework for its discussion of the best interest evidence.[116] It is apparent, therefore, that the Court was guided more by its intention to illustrate an appropriate legal sufficiency review rather than a desire to demonstrate an application of the *Holley* factors it set forth many years before.

---

[110] *In re J.F.C.*, 96 S.W.3d at 268-72.
[111] *See Holley*, 544 S.W.2d at 372; *see also In re C.H.*, 89 S.W.3d at 28 (stating, "...the inquiry is whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest…").
[112] *In re J.L.*, 163 S.W.3d 79 (Tex. 2005).
[113] *Id.* at 84-85 *citing In re J.F.C.*, 966 S.W.3d at 266.
[114] *Id.* at 87-88.
[115] *Id.*
[116] *In re J.L.*, 163 S.W.3d at 87-88. Just as in *J.F.C.*, the jury charge in *J.L.* listed each of the *Holley* factors to be considered in determining the best interest of the charge. *Id.* at 87. However, nowhere does the Court mention or cite to *Holley* in its decision.

Nonetheless, the opinion is helpful not only because it again underscores the flexible nature of a best interest analysis, rather than a strict adherence to the *Holley* factors, but also because it demonstrates the kind of evidence which will support a finding that termination of the parent-child relationship is in a child's best interest.

In re J.L. involved the removal of a boy from his mother's care after the boy's three-year-old sister suffered injuries to her abdomen which caused the girl's death.[117] Two weeks after the girl died, the mother and her paramour were arrested after an autopsy determined that the girl's death was a homicide caused by blunt force trauma.[118] At that point, the Department of Family and Protective Services took possession of the child J.L., and placed him with his biological father.[119] After a jury trial, the trial court ordered termination of the mother's relationship with J.L. based on the jury's findings that she engaged in conduct which endangered the child, exposed the child to endangering circumstances, and that termination was in J.L.'s best interest.[120] The court of appeals concluded, however, that the evidence was legally insufficient to support the termination order, and rendered judgment restoring the mother's parental rights.[121] The Department sought review of the decision in the Texas Supreme Court, which accepted the case and reversed the lower appellate court's judgment.[122] Among the Department's claims was its contention that the appellate court erred in finding that the evidence supporting the trial court's best interest determination was legally insufficient.[123]

At the outset of its best interest analysis, the Texas Supreme Court noted, as it did in *C.H.*, that the evidence of the mother's endangering conduct was also relevant to

---

[117] *In re J.L.*, 163 S.W.3d at 81.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 81, 84; *see* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E) and (2) (West Supp. 2017).
[121] *In re J.L.*, 163 S.W.3d at 81.
[122] *Id.* at 81, 88.
[123] *Id.* at 81, 83, 84. The Department advanced several claims in its petition, including that the court of appeals improperly took judicial notice of expert testimony offered in the mother's criminal trial, lacked jurisdiction to hear the case because the mother's notice of appeal was untimely, and erred in finding the evidence legally insufficient to support the trial court's termination judgment. *Id.* at 81, 83, 84. The Court's analysis of the two former claims was not relevant to its best interest determination and so is not addressed here.

the jury's best interest finding.[124] That evidence was that the mother's paramour "would fly off the handle, lose his temper, and be too rough with [the children]," including two incidents in which he spanked J.L. with a belt leaving red marks on the child's hand, and lifted J.L.'s sister by her arm and pushed her into their home with his foot after she "urinated in her pants during a family trip to Walmart."[125] Additionally, there was evidence that J.L.'s sister suffered from seizures and had asthma, and the mother was neglectful in seeking medical care for her on two occasions, including by leaving the child in the paramour's care rather than take her to the hospital in the time leading up to the child's death.[126] Finally, there was expert testimony supporting that the paramour's "rough treatment caused [the girl's] death."[127]

Next, the Court addressed other evidence which it found supported the jury's best interest finding.[128] It listed the guardian ad litem and the Department's testimony that J.L. would be safer with his biological father because the mother continued to live with her paramour who was accused of killing J.L.'s sister; the mother had financial difficulties and unstable living arrangements in the time following her daughter's death; the biological father had a supportive family network; and the mother lacked of family support.[129]

As undisputed evidence weighing against the jury's best interest determination, the Court listed that the mother participated in services requested by the Department and was employed.[130] Moreover, the biological father demonstrated an inability to maintain stable employment as a result of having sickle-cell disease; was behind in making child support payments to the mother; stated at trial that it would be good for J.L. to maintain a relationship with his mother and that he intended to allow her to visit J.L.; relied on others to support him; and admitted that he sold illegal drugs in the past.[131]

---

[124] *In re J.L.*, 163 S.W.3d at 87; *In re C.H.*, 89 S.W.3d at 19, 27-28.
[125] *In re J.L.*, 163 S.W.3d at 85.
[126] *Id.* at 85-86.
[127] *Id.* at 86.
[128] *Id.* at 87-88.
[129] *In re J.L.*, 163 S.W.3d at 87.
[130] *Id.*
[131] *Id.* at 87-88.

Notwithstanding this evidence, however, the Court found that, in a light favorable to the verdict, the record taken as a whole allowed the jury to form a firm belief or conviction that termination of the mother's parental rights was in the child's best interest.[132]

The kind of evidence the Court found persuasive, therefore, was the danger the mother posed to the child, and the stability and safety of the parents' respective homes.[133] Moreover, as it appears from the Court's recounting of this evidence that both parents demonstrated levels of instability in their employment and housing, the mother's endangering conduct seems to have tipped the balance in favor of termination. That it did would accord, further, with the analyses in both *C.H.* and *J.F.C.*, which highlighted as relevant the history of the parent's conduct, including with respect to other children in the parent's care.[134]

E. *In re E.N.C.*

The next case in which the Court addressed the evidence in support of a best interest determination was *In re E.N.C.*, decided in 2012.[135] Unlike in *C.H.*, *J.F.C.*, and *J.L.*, the Court in *E.N.C.* was simply faced with the question of whether the evidence presented by the Department sufficiently supported the termination of a father's parental rights.[136] Nonetheless, it is a valuable opinion in a best interest discussion because it is the only Texas Supreme Court case aside from *Holley* which applies the evidence in the record to the specific factors *Holley* announced.[137] Thus, it provides helpful guidance in the application of those factors, and illustrates how best interest evidence as to each factor may be viewed on appeal. Moreover, as one of few cases in which the Court found insufficient evidence to support a best interest finding, the *E.N.C.* opinion illustrates how principles applied in cases which affirm parental termination may apply instead to reverse it.

---

[132] *In re J.L.*, 163 S.W.3d at 88.
[133] *Id.* at 87-88.
[134] *See In re C.H.*, 89 S.W.3d at 19, 27-28; *see also In re J.F.C.*, 96 S.W.3d at 268-73.
[135] 384 S.W.3d 796 (Tex. 2012).
[136] *Id.* at 798.
[137] *Id.* at 807-810.

In *E.N.C.*, a father's parental rights were terminated based on the trial court's findings that he endangered, abandoned, and failed to provide support for his children, and that termination of his parental rights was in the children's best interest.[138] A divided court of appeals affirmed the termination, and held that sufficient evidence supported the endangerment and best interest portions of the trial court's decree.[139] The Texas Supreme Court subsequently granted the father's petition for review and reversed the appellate court's judgment.[140]

The facts of the case were as follows.[141] Years before his children were born, the father was convicted in Wisconsin "of an offense involving an underage girl and placed on probation."[142] Nonetheless, he moved to Texas before completing the requirements of his probation, got married, and he and his wife had two children.[143] The two separated and later, when the father sought to obtain his green card, he was detained and deported for violating the terms of his probation by leaving Wisconsin, and was barred from re-entering the United States for ten years.[144]

In the years following the couple's separation, the children's mother was investigated several times by the Department until, in 2009, the mother's involvement with prescription drugs, including during a pregnancy, led the Department to request possession of the children.[145] During this time, the father lived in Mexico, re-married, had two children with his new wife, and was employed.[146] He remained in contact with the children of his first marriage by calling them "about three times a week or on weekends, and sometimes daily," and he provided the children with financial support and sent the children clothing from Mexico.[147] Once the children were removed from his former wife's care, the father maintained regular contact with the Department's caseworker, and participated in

---

[138] *Id.* at 798, 802.
[139] *In re E.N.C.*, S.W.3d at 802.
[140] *Id.*
[141] *Id.* at 798-801.
[142] *Id.* at 798. The Court emphasized that the exact nature of the offense was not determined by the evidence in the record. *Id.* at 803-04.
[143] *Id.*
[144] *Id.*
[145] *In re E.N.C.*, 384 S.W.3d at 798-99.
[146] *Id.* at 799.
[147] *Id.*

scheduled conference calls with the children.[148] However, the Department did not provide the father with a family service plan, but reported that the father would need to complete his probation, "and have restrictions lifted to return to the United States for the Department to evaluation his ability and willingness to provide for the children."[149] The last time the children saw the father was during a visit they made to Mexico a year and a half before trial in the suit, and the evidence indicated that at the end of their visit the children did not want to return home but wished to stay with their father.[150]

By the time of trial, the children and their two half-siblings were living together with foster parents who were willing to care for the children "until they aged out," but the foster parents had not committed to adopting the children.[151] Nonetheless, the Department urged that the father's parental rights be terminated, contending that the father's prior illegal conduct in combination with his deportation constituted sufficient evidence to show that he endangered his children's well-being and that termination was in the children's best interest.[152]

With regard to the trial court's endangerment finding, the Texas Supreme Court agreed that the father's conviction and probation violation were appropriate factors to consider.[153] However, it noted that the limited information about the nature of the father's criminal offense failed to support any reasonable inference that the conduct which led to the offense established a voluntary course of conduct which endangered the father's later-born children.[154] Moreover, though the Court also agreed with the appellate court's reasoning that deportation, like incarceration, was a relevant factor "(albeit an insufficient one in and of itself to establish endangerment)," it stated that its relevance to an endangerment determination

---

[148] *Id.*
[149] *In re E.N.C.*, 384 S.W.3d at 799
[150] *Id.*
[151] *Id.*
[152] *In re E.N.C.*, 384 S.W.3d at 799.
[153] *Id.* at 803-04.
[154] *Id.* at 804. The Court noted that the "underage girl" who was the victim of the father's conduct could have been 17 years old, which was under the age of consent in Wisconsin, but not in Texas. *Id.* at 805. Thus, it was possible that the father's conduct may not have constituted a crime in this State. *Id.*

depends on the circumstances of the case.[155] In this case, the Court held, "there is no evidence that [the father's] actions created such uncertainty and instability for his children sufficient to establish endangerment."[156] Rather, the record shows that the father lived with his children until he was separated from his wife, and remained "a regular presence and source of support in the children's lives after he was deported."[157] Thus, the Court found insufficient evidence in the record to establish that the father endangered his children.[158] Accordingly, the Court proceeded to review the father's complaint that the evidence was insufficient also to support that termination of his rights was in his children's best interest.[159]

The Court began its best interest analysis by setting forth the nine factors announced in *Holley*, and enumerating those which the appellate court weighed in favor of terminating the father's parental rights.[160] It proceeded then to address each in turn.[161] As noted above, the Court's evaluation is helpful as it illustrates how some of the principles utilized in previous best interest analyses may be applied to demonstrate that a finding lacks sufficient support.

With regard to the first *Holley* factor, which examines the children's desires, the Court found error with the appellate court's finding that there was "no evidence that any of the children wanted to live with their father in Mexico."[162] The Court held that the court of appeals' reasoning incorrectly applied the burden of proof and standard of review.[163] Rather than require the father to produce evidence of his children's desires to remain with him, the Court stated it was the Department's burden to introduce evidence in support of its termination request.[164] And, in this case, the Department failed to controvert the evidence that the children wanted to

---

[155] *Id.* at 805.
[156] *Id.*
[157] *In re E.N.C.*, 384 S.W.3d at 805-06. The Court noted further that deportation differs from incarceration in that, though deported, the father was still able to "work, have a home, and support a family. More importantly, it is possible for [his] children to live with him." *Id.*
[158] *Id.* at 806-07.
[159] *Id.* at 807.
[160] *Id.* at 807.
[161] *In re E.N.C.*, 384 S.W.3d at 807-809.
[162] *Id.* at 808.
[163] *Id.*
[164] *Id.*

remain with their father after their last visit with him.[165] Consequently, the Court stated a principle which has many times been used to illustrate an improper application of the standard of review in weighing best interest factors: "A lack of evidence does not constitute clear and convincing evidence."[166]

As to the second *Holley* factor regarding the children's emotional and physical needs, the Court noted the appellate court's finding that the children's needs "are great," but held that the lower court failed to cite to evidence demonstrating how the children had needs that differed from other children in general, or how their needs would go unmet in their father's care.[167] Thus, it was not enough to show that the children had significant needs.[168] Rather, the Court indicated the record must demonstrate how termination of the parent's rights would serve in some way to support meeting those needs.[169]

The Court next addressed the sixth and seventh factors, which involved the plans for the children by the individuals or agency seeking custody, and the stability of the home or proposed placement.[170] Under these factors, the Court took issue with the appellate court's conclusion that the father failed to articulate a plan for the children other than to leave them in the mother's care.[171] Rather, it noted the father's testimony that the children also could be placed with him.[172] The Court also found relevant the Department's failure to consider the father as a possible placement, or to engage in efforts to evaluate the father through services offered in a family service plan.[173] As a consequence, the Department failed to show any instability in the father's home indicating the children could not be placed with

---

[165] *In re E.N.C.*, 384 S.W.3d at 808.
[166] *See, e.g., In Interest of S.C. F.*, 522 S.W.3d 693, 708 (Tex. App.—Houston [1st Dist.] 2017, pet. denied), *In Interest of G.H.*, 02-14-00261-CV, 2015 WL 3827703, at *4 (Tex. App.—Fort Worth June 18, 2015, no pet.), *In Interest of J.K.V.*, 490 S.W.3d 250, 258 (Tex. App.—Texarkana 2016, no pet.), *In re J.A.S., Jr.*, 13-12-00612-CV, 2013 WL 782692, at *8 (Tex. App.—Corpus Christi Feb. 28, 2013, pet. denied), *each citing In re E.N.C.*, 384 S.W.3d at 808.
[167] *In re E.N.C.*, 384 S.W.3d at 808.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *In re E.N.C.*, 384 S.W.3d at 808.
[172] *Id.*
[173] *Id.*

him.[174] Lastly, the Court examined the Department's plan for the children, which amounted to leaving them in the same foster home until they aged out of foster care.[175] The Court stated, "the Department presented no evidence that another family wishes to adopt the children, or that the children's foster parents can provide for them in a way [the father] cannot."[176]

Under the eighth *Holley* factor regarding the father's acts or omissions which indicated his relationship with the children was improper, the Court did not credit the court of appeal's reliance on the father's criminal history, but referenced again that there was no evidence which provided details about the father's previous criminal offense.[177] Similarly, under the ninth *Holley* factor, the father's failure to provide an excuse for his criminal conduct was insufficient to support termination where the conduct itself was not established by the record.[178] What the record did show, however, was undisputed evidence that the father had a good relationship with the children.[179]

Lastly, the Court addressed the appellate court's conclusions that the father failed to maintain contact with the children and failed to support them.[180] Here, however, the Court focused on the fact that it was only after the Department moved the children to a different foster home without informing the father that he lost contact with them.[181]

Accordingly, for the first time since *Holley*, the Court reversed a finding that termination of a parent's rights was in the children's best interest.[182] Its analysis in

---

[174] *Id.*
[175] *In re E.N.C.*, 384 S.W.3d at 808.
[176] *Id.*
[177] *In re E.N.C.*, 384 S.W.3d at 808.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *In re E.N.C.*, S.W.3d at 809.
[182] *But see In re R.R. and S.J.S.*, 209 S.W.3d 112 (Tex. 2006). In *R.R.*, the Court held that the trial court abused its discretion when it refused to set aside a default judgment against a mother, and held as part of its analysis that the mother presented a meritorious defense by asserting that termination of her rights was not in her children's best interest. *Id.* at 116-17. Therefore, *R.R.* was a case in which a termination finding was reversed. *Id.* However, as the question in *R.R.* addressed the propriety of a default judgment, the case did not deal directly with whether a best interest finding was supported by sufficient evidence. *Id.*

E.N.C. therefore provides a valuable counterweight to the decisions which came before, and broadens the understanding of principles applied in previous best interest determinations. Thus, as in *C.H.*, *J.F.C.*, and *J.L.*, the Court in *E.N.C.* found the parent's conduct was relevant to the trial court's best interest finding.[183] However, it clarified that, while parental misconduct – like the criminal conviction and probation violation in *E.N.C.* – is relevant, there must be a showing of how that misconduct is part of a voluntary course of conduct which was endangering to the children's welfare, or how the conduct itself shows an inappropriate relationship between the parent and the child.[184] Moreover, the focus in a best interest analysis, particularly under the eighth factor, is not only on the parent's acts or omissions, but also on the nature of the relationship the child has with the parent.[185] In *E.N.C.*, the Court found the evidence with regard to the eighth *Holley* factor legally insufficient to support termination in part based on the evidence that, despite the father's past misdeeds, the evidence indisputably demonstrated he had a good relationship with his children.[186]

Moreover, in *E.N.C.*, like in *C.H.*, the evidence was that the children were placed with their siblings in a foster home which was presumably meeting their needs, yet the foster parents had not committed to adopting them.[187] In *C.H.*, the Court discounted the Department's failure to obtain permanent plans for the children in light of the other evidence in the record regarding the father's pattern of criminal conduct and his failure to demonstrate the ability to safely parent his child.[188] In *E.N.C.*, however, the Court repeatedly relied on the uncertainty of the Department's plans as weighing against parental termination, particularly where the Department failed to show that the foster family would be any better at providing for the children's needs than the father was.[189] *E.N.C.* thus demonstrates the necessity to balance the factors against one another rather than focus on a strict adherence to the principles that parental misconduct will always favor termination,

---

[183] *In re C.H.*, 89 S.W.3d at 19, 27-28; *In re J.F.C.*, 96 S.W.3d at 268-72; *In re J.L.*, 163 S.W.3d at 87; *In re E.N.C.*, 384 S.W.3d at 808.
[184] *In re E.N.C.*, 384 S.W.3d at 805-06, 808.
[185] *Id.* at 808; *see Holley*, 544 S.W.2d at 372.
[186] *In re E.N.C.*, 384 S.W.3d at 808.
[187] *In re E.N.C.*, 384 S.W.3d at 808; *In re C.H.*, 89 S.W.3d at 28;
[188] *In re C.H.*, 89 S.W.3d at 28.
[189] *In re E.N.C.*, 384 S.W.3d at 808-09.

or that a lack of definitive plans made by the Department will always be weighed lightly.

Lastly, the Court in *E.N.C.* consistently balanced the evidence which weighed against the father with evidence regarding the Department's efforts.[190] In its discussion of the father's plans for the children, the Court emphasized the Department's failure to provide him with a family service plan or evaluate his ability to care for the children.[191] With regard to the children's wishes and needs, the Court focused on the lack of evidence showing that the children's desires weighed affirmatively in favor of termination, or that the Department had been able to determine that the father was unable to meet the children's needs.[192] And, as to the appellate court's finding that the father failed to maintain contact with or support the children, the Court noted that until the Department relocated the children without notifying the father, the father complied with the Department's visitation schedule and suppled the children with money and clothing.[193] Consequently, the decision highlights the importance, again, of viewing the evidence as a whole when determining what is best for a child.

F. *In re E.C.R.*

The next case in which the Court addressed the evidence in support of a best interest finding was *In re E.C.R.*, decided in 2013.[194] In *E.C.R.*, the Court was asked to interpret one often-utilized section of Texas' termination statute, subsection (O), which allows a parent's rights to be terminated if the parent fails to comply with a trial court's orders "which specifically established the actions necessary for the parent to obtain the return of the child."[195] Under subsection (O), a parent's rights may be terminated if the parent fails to comply with tasks and services outlined in a family service plan, which the Department of Family and Protective Services, in the typical case, must provide to parents under Texas law,

[190] *Id.*
[191] *In re E.N.C.*, 384 S.W.3d at 808.
[192] *Id.*
[193] *Id.* at 809.
[194] 402 S.W.3d 239 (Tex. 2013).
[195] Tex. Fam. Code Ann. § 161.001(b)(1)(O) (West Supp. 2017).

and which the trial court is required to make a part of its orders.[196] The language of subsection (O), however, only applies to circumstances in which a child has been removed from a parent "for the abuse or neglect of the child."[197]

In *E.C.R.*, the mother did not dispute that she failed to comply with her family service plan.[198] Instead, her contention was that her child was not removed because of actual abuse or neglect but because there existed a risk of abuse or neglect.[199] The facts demonstrated that the mother was abusive to one of the child's siblings, but not directly to the child at issue.[200] Thus, the mother's argument ran, the child who was involved in the present case was not actually abused or neglected, and subsection (O) was therefore inapplicable as to that child.[201] The court of appeals agreed with the mother's contention, reversed the trial court's termination order, and rendered judgment denying the Department's request to terminate the mother's parental rights.[202]

The Texas Supreme Court granted the Department's petition for review, and addressed the question of whether the definition of "abuse or neglect" as it is used by subsection (O) includes the circumstance in which a child is removed because there is a risk the child will be harmed, or whether the provision required proof of actual harm to the child.[203]

In answering this question, the Court first discussed its prior opinion in *J.F.C.*, which also analyzed the evidence required in support of a subsection (O) finding.[204] In *J.F.C.*, after addressing the trial court's best interest determination, the Court moved on to the parents' complaint that the jury charge in that case

---

[196] Tex. Fam. Code Ann. §§ 263.101-102, 263.106 (West Supp. 2017) (requiring the Department to file a family service plan, listing a plan's required contents, and mandating that the trial court must make the plan a part of its orders); *but see* Tex. Fam. Code Ann. § 262.2015 (West Supp. 2017) (providing a list of circumstances in which the Department is excused from making efforts to return a child to a parent, including the requirement that it create a family service plan for the parent.)
[197] Tex. Fam. Code Ann. § 161.001(b)(1)(O) (West Supp. 2017).
[198] *In re E.C.R.*, 402 S.W.3d at 242.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *In re E.C.R.*, 402 S.W.3d at 242.
[203] *Id.* at 242-43.
[204] *Id.* at 243-44; *In re J.F.C.*, 96 S.W.3d at 277-78.

failed to require the same ten jurors to agree on the specific grounds for termination of the parents' rights.[205] The Court declined to address the issue, however, because it found the record conclusively proved the parents violated subsection (O), rendering the alleged jury charge error harmless.[206] In making the finding, the Court pointed to undisputed evidence of the parents' failures to comply with their family service plans.[207] Notably, however, the Court did not address the specific question of what evidence was required to prove the children were removed from the parents' care for "abuse or neglect."[208] Rather, the Court set forth the evidence of the parents' failures with respect to their family service plans and concluded, "The evidence establishes as a matter of law that the parents failed to comply with the court's orders... The record also conclusively establishes that the children were removed from their parents under Chapter 262 of the Family Code…"[209] Thus, there was no express reference to abuse or neglect in the Court's subsection (O) analysis.

Nevertheless, the Court in *E.C.R.* relied on *J.F.C.* to show that where the Department complies with the requirements for removing a child under Chapter 262 of the Texas Family Code, the record will show sufficient evidence that a child was abused or neglected in support of subsection (O).[210] It discussed several opinions in the courts of appeals which differed on the question of what proof is necessary to show abuse or neglect, and reviewed several provisions in the Texas Family Code regarding the Department's obligation to investigate reports of abuse, as well as what the Department must prove before a removal is authorized by the trial court.[211] It found that the definitions of abuse and neglect in the Family Code

---

[205] *In re J.F.C.*, 96 S.W.3d at 277. The jury charge in *J.F.C.* listed two different kinds of parental misconduct which the Department alleged supported termination of the parents' rights, and then posed the broad-form question of whether the parents' rights should be terminated. *Id.* Thus, the charge allowed fewer than ten jurors to agree on the specific type of misconduct which supported termination, while still requiring ten jurors to agree that termination was warranted by the evidence. *Id.*; *see also In re E.C.R.*, 402 S.W.3d at 243.
[206] *In re J.F.C.*, 96 S.W.3d at 277.
[207] *In re J.F.C.*, 96 S.W.3d at 277-78.
[208] *Id.* at 278-79.
[209] *Id.*
[210] *In re E.C.R.*, 402 S.W.3d at 243-44.
[211] *Id.* at 244-48; *see* Tex. Fam. Code Ann. §§ 261.301, 262.101-02, .104-05, .107, .201(g) (West Supp. 2017) (requiring the Department to make a "prompt and thorough investigation of a report

included situations in which children have been exposed to substantial risks of harm, and referenced the Department's obligation to prove there is an immediate danger to the child's physical health or safety in order to take possession of a child.[212] It relied on these provisions to hold that, "Consistent with chapter 262's removal standards, 'abuse or neglect of the child' necessarily includes the risks or threats of the environment in which the child is placed."[213] Thus, if the record demonstrates that "a parent has neglected, sexually abused, or otherwise endangered her child's physical health or safety, such that initial and continued removal are appropriate, the child has been 'removed from the parent under Chapter 262 for the abuse or neglect of the child.'"[214] Given that holding, the Court cited to evidence in the record showing that there was a danger to the child, which included the Department's removal affidavit and the trial court's orders which authorized the removal based on the finding that the child was placed in immediate danger by the mother's conduct.[215] The Court stated, "This evidence and these findings establish that E.C.R. was removed from [the mother] under Chapter 262 for abuse or neglect."[216] As the mother admitted she failed to comply with the terms of her family service plan, "the Parental conduct described in [subsection (O)] of the Family Code was thus established as a matter of law."[217]

Having disposed of the mother's challenge to subsection (O), the Court next addressed her complaint that the record did not sufficiently support the trial court's finding that termination of her parental rights was in the child's best interest.[218] As with *E.N.C.*, the Court referenced the nine *Holley* factors as informing its

---

of child abuse or neglect…," and providing that there must be an immediate danger to the physical health or safety of a child before the Department can take possession of a child.)

[212] *In re E.C.R.*, 402 S.W.3d at 246-47; *see* Tex. Fam. Code Ann. §262.201(g) (West Supp. 2017).

[213] *In re E.C.R.*, 402, S.W.3d at 248.

[214] *In re E.C.R.*, 402 S.W.3d at 248 *citing* Tex. Fam. Code Ann. §§ 161.001(b)(1), 262.101, .102, .104, .107, .201. (West Supp. 2017).

[215] *Id.* at 248-49; Tex. Fam. Code Ann. §§ 262.101, .106. These provisions require the Department to support a petition to remove a child with an affidavit stating facts which demonstrate there is an immediate danger to the child. The Court noted that the Department's affidavit, "even if not evidence for all purposes, shows what the trial court relied on in determining whether removal was justified." *In re E.C.R.*, 402 S.W.3d at 248-49.

[216] *In re E.C.R.*, 402 S.W.3d at 248-49.

[217] *Id.* at 249.

[218] *Id.* at 249-50.

examination of the best interest evidence.[219] Its analysis, however, was more akin to those conducted in *C.H.* and *J.F.C.* than in *E.N.C.*, in that it did not reference specific *Holley* factors, but engaged in a flexible review of the entire record.[220]

With regard to the mother, the Court reaffirmed the principle that a parent's conduct which supported termination, in this case under subsection (O), was also relevant to a determination of the child's best interest.[221] Additionally, the Court detailed that the mother had in the past pleaded guilty to the third degree felony offense of endangering a child; twice attempted suicide while incarcerated for that offense; no longer had custody of her previous children; had her parental rights terminated as to her oldest child after the Department removed the child based on a report of physical abuse; had a history of homelessness which she did not address during the time E.C.R. was in the Department's care; and was unemployed in violation of the terms of her community supervision.[222]

With regard to the child, the Court reviewed the evidence that he lived in the same foster home with one of his siblings; was doing very well in the home; and the foster parents had shown the ability to provide for all of his physical and emotional needs.[223] It also noted that there was no evidence the foster parents planned to adopt the child, but cited again the principle announced in *C.H.* that "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor."[224] Rather, the opinion said, "we examine the entire record to decide best interest, 'even if the agency is unable to identify with precision the child's future home environment.'"[225]

In *E.C.R.*, therefore, the Court provided another opinion which highlights the probative value to a best interest finding of evidence regarding any conduct, including with regard to prior children, which demonstrates a parent will pose a

[219] *Id.*; *In re E.N.C.*, 348 S.W.3d at 807.
[220] *See In re J.F.C.*, 96 S.W.3d at 268-73; *see also In re C.H.*, 89 S.W.3d at 28; *In re E.N.C.*, 384 S.W.3d at 807-809.
[221] *In re E.C.R.*, 402 S.W.3d at 249.
[222] *In re E.C.R.*, 402 S.W.3d at 249-50.
[223] *Id.* at 250.
[224] *Id. citing In re C.H.*, 89 S.W.3d at 28.
[225] *In re E.C.R.*, 402 S.W.3d at 250.

danger to the child.[226] It also referenced the mother's lack of employment or stable housing as compared to the child's living circumstances while in the Department's care.[227] Moreover, it reinforced the principle that a lack of permanent plans on the Department's part for the adoption of the child will not weigh heavily against termination when the record, viewed as a whole, balances in favor of it.[228]

G. Summary

The above Texas Supreme Court cases provide several principles which have since been relied on many times to guide best interest analyses in subsequent cases. The most notable of these principles can be summarized as follows:

1. All best interest evaluations must begin with the presumption that maintaining the parent-child relationship is best for the child.[229] The right to conceive and raise one's child is one of the basic human civil rights, described by the United States Supreme Court as "far more precious than any property right."[230]

2. A parent's interest in a child however, while fundamental, is not absolute, and must be balanced against the physical and emotional needs of the child.[231]

3. A parent's conduct which supports termination under 161.001(b)(1) of Texas' termination statute, including evidence of a parent's conduct with respect to other children, will also support that termination is in the best interest of the child at issue.[232]

---

[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Holley*, 544 S.W. at 370 *citing Herrera*, 409 S.W.2d 395, *Legate*, 87 Tex. 248, and *Wiley*, 543 S.W.2d 349.
[230] *Stanley v. Illinois*, 405 U.S. at 651.
[231] *In re C.H.*, 89 S.W.3d at 26; *see also In re E.C.R.*, 402, S.W.3d 239, 240 (Tex. 2013) *citing In re C.H.*, 89 S.W.3d at 26.
[232] *Holley*, 544 S.W.2d at 372; *In re C.H.*, 89 S.W.3d at 27-28; *see* Tex. Fam. Code Ann. § 161.001(b)(1) (West Supp. 2017) (listing the types of conduct which will demonstrate parental unfitness in support of a termination finding).

4. A best interest analysis is a flexible one; rather than adhere to any one principle or best-interest factor, it is necessary to review the entire record when determining what is in a child's best interest.[233]

5. As a corollary to the previous principle, no one factor may be dispositive if the entire record, on balance, weighs against that factor.[234] Thus, for example, a lack of definitive plans for a child may not preclude termination where the record would otherwise support it.[235]

6. Lastly, a lack of evidence regarding a best interest factor does not constitute evidence in support of that factor.[236] For example, a lack of evidence about a child's desire to remain with his father does not support the finding that the child's wishes weigh in favor of parental termination.[237]

III. Guidance from the Courts of Appeals

In addition to the guidance provided by the Texas Supreme Court, countless courts of appeals have also developed several other principles which have come to shape current best interests analyses. The following discussion will examine the most often cited of these principles, and how they apply to each *Holley* factor in turn.

Factor 1: The child's desires

Cases essentially fall into two categories with respect to an analysis of children's desires – those in which there is evidence of what a child wants, and those in which there is not, often because the child involved is too young.[238] Somewhat ironically,

---

[233] *See In re C.H.*, 89 S.W.3d at 27.
[234] *See Id.* at 28.
[235] *Id.*
[236] *In re E.N.C.*, 384 S.W.3d at 808.
[237] *Id.*
[238] *See, e.g., In Interest of J.N.S.*, 13-17-00356-CV, 2018 WL 286090, at *7 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet.) (weighing in the parent's favor that the children wished to continue seeing their mother); *In re J.J.W.*, 11-12-00324-CV, 2013 WL 1281839, at *3 (Tex. App.—Eastland Mar. 28, 2013, no pet.) (weighing in favor of termination the child's statements to her therapist that she wanted to stay with her foster parent); *In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *15 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (noting that

when there is evidence of what a child wants, the child's desires often weigh less heavily as a factor than in cases where a child is unable to express his or her desires.[239] The rationale is that, while children may love their parents, they do not yet have the capacity to understand the danger posed to their welfare should they remain in their parents' care.[240] Thus, even where a child expresses a desire to remain with parents, if there is evidence that the child's welfare will be endangered by keeping the family together, the child's desires will not weigh heavily against termination.[241]

---

the children was very young at the time of trial and that there was no evidence of what the child's desires were, but examining the bond between the child and the foster parent.); *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *10 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (again, noting that the children's young age precluded them from expressing a desire as to termination, but weighing instead that they referred to their mother as "mama" and that the visits with their mother went well.)

[239] *In re M.H.*, 319 S.W.3d 137, 150 (Tex. App.—Waco 2010, no pet.) (holding that evidence the children loved their mother very much, enjoyed visits with her, and showed affection toward her was "at best marginally relevant, and stating, "the record contains scant evidence that any of the children possess sufficient maturity to express an opinion regarding a parental preference."); *see also In re O.R.F.*, 417 S.W.3d 24, 39 (Tex. App.—Texarkana 2013, pet. denied) (stating, "Evidence that a child loves a parent, enjoys visits, and shows affection is marginally relevant.") *citing In re A.M.*, 385 S.W.3d 74, 82 (Tex.App.—Waco 2012, pet. denied).

[240] *See In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (recounting that the child developed a bond with his father, enjoyed visiting with him, and expressed a desire to live with him, but reasoning that the evidence of the child's desires was not so significant that it weighed heavily against the danger posed by the father's history of illegal drug use and criminal conduct.); *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *8 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.) (stating, "Although the children's love of their parents is a very important consideration in determining the best interest of the children, it can neither override or outweigh evidence of danger to the children nor 'compensate for the lack of an opportunity to grow up in a normal and safe way equipped to live a normal, productive, and satisfying life.') *citing In re W.S.M.*, 107 S.W.3d 772, 773 (Tex.App.—Texarcana 2003, no pet.).

[241] *In re M.H.*, 319 S.W.3d at 150 (holding that the children's desire to remain with their mother was outweighed by evidence showing the children suffered physically and emotionally because of the mother's "false reports of non-existent medical conditions."); *In re O.N.H.*, 401 S.W.3d at 687-88 (finding for termination where the evidence showed the children wished to remain with their father, but the father had a history of leaving them with their mother when the father knew the mother to be an active alcoholic who neglected the children's care); *but see In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *10 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) *citing Yonko v. Dep't of Family & Protective Servs*, 196 S.W.3d 236, 245 (Tex.App.—Houston [1st Dist.] 2006, no pet.) (stating, "We agree that the child's desire to remain with a parent is only one factor to consider among many, but love for a parent cannot be ignored as a

Consequently, when a child expresses the desire to remain with parents courts will often examine whether a parent is continuing to engage in endangering conduct and whether that conduct has historically or is presently having a negative effect on the relationship with the child.[242] The following is language from the First Court of Appeals which demonstrates reasoning commonly utilized where a parent's endangering conduct will outweigh a child's desires:

> With regard to the factual sufficiency of the evidence, the record reflects that [the child] had developed a bond with Father, enjoyed visiting with him, and had expressed a desire to live with Father. [The child]'s child advocate volunteer testified it was not in [the child]'s best interest to terminate Father's parental rights because the child's placement options were limited due to his behavioral and medical issues. There is also evidence that Father was employed for eight months and owned a home by the time of trial, and that he had complied with his service plan and participated in the rehabilitative services offered to him by DFPS. Despite Father's improved conduct and the recent relationship he developed with his eleven-year old son, the record demonstrates that this evidence was not so significant that it weighed heavily against termination or outweighed the danger Father's history demonstrated that he posed to [the child], as evidenced by Father's extensive criminal history that spanned over ten years and included both violent and non-violent crimes, and his illegal drug usage, including drug use that occurred after paternity was confirmed and while [the child] was in DFPS's custody. In light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the best interest finding is not so significant that a factfinder could not reasonably have formed a firm

---

reflection of the parent's ability to provide for the child's emotional needs. Where the evidence of the parent's failures is not overwhelming, the desires of the child weigh against termination of parental rights.").

[242] *See, e.g., In Interest of J.N.S.,* 13-17-00356-CV, 2018 WL 286090, at *7 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet.) (holding that a mother's continued instability and use of illegal drugs presented a risk to the children's welfare which outweighed their desire to remain with her.).

> belief or conviction that termination of Father's parental rights is in [the child]'s best interest.[243]

In contrast, there are many cases which demonstrate that in the absence of a child's express desires, courts may weigh this factor heavily by examining the nature of the child's relationships with prospective caregivers as a proxy for the child's wishes.[244] Thus, where the record is silent regarding a child's desires, this factor often presents the opportunity to discuss a great deal of other evidence regarding the child's circumstances.[245] Relying on the principle that, "When children are too young to express their desires, the factfinder may consider whether the children have bonded with their current caregiver and are well-cared for," courts of appeals have found the following as evidence relevant to what a child might want:

- The bond the child shares with a caregiver;
- which caregiver has demonstrated the ability to meet the child's needs;
    - whether the child is clean or well-clothed in the home;
    - whether the home itself is well-maintained;
    - the child's progress with the prospective caregiver;
    - which caregiver ensured the child received needed medical care;
    - which caregiver attended appointments and services with the child;
    - which caregiver celebrated significant life-events with the child;
    - how the child is doing in school while with the caregiver;
    - the caregiver's employment and stability;

---

[243] *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied).

[244] *See In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *15 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (examining the nature of the child's relationship with his foster parents and the quality of the care they provided him as evidence of his desire where he was too young to express it); *see also In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *10 (noting the children's bond with their mother as evidence of their desires to remain with her).

[245] *See, e.g., In Interest of J.E.M.M.*, 532 S.W.3d 874, 886 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (discussing as relevant to the children's desires, though they were too young to express them, the mother's history as being their primary caregiver in which she nurtured them and tended to their daily needs, the mother's "positive relationship" with the children, the mother's love for her children, and children's love for her, and the mother's having consistently visited with the children during the suit.)

- How much time parents have spent with the child as compared to foster parents;
- Who the child refers to as his or her parents;
- What transpires at visits with the child;
    - Whether a parent visits regularly;
    - the child's behavior before and after a visit;
    - the nature of interactions between the parent and child at visits;
- Other significant relationships in the child's life;
    - attachments to siblings or relatives who live in a prospective home;
- Testimony and reports from those who have investigated the child's circumstances;
    - Interviews, permanency reports, testimony from relatives and foster parents.[246]

Plainly, therefore, examining a young child's bond with prospective caregivers as evidence of a child's wishes allows for a great deal of evidence to be discussed and weighed under the first *Holley* factor.[247] Practitioners who are involved with cases concerning young children are thus guided to present as much evidence as possible with regard to a child's bonds and relationships with caregivers, relatives, siblings, and foster parents in order to inform a trial court's best interest determination under this factor.

---

[246] *See, e.g., In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *15 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.); *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *10 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.); *In re I.R.*, 14-14-00626-CV, 2014 WL 6854747, at *10 (Tex. App.—Houston [14th Dist.] Dec. 4, 2014, no pet.); *In re M.S.L.*, 14-14-00382-CV, 2014 WL 5148157, at *10 (Tex. App.—Houston [14th Dist.] Oct. 14, 2014, no pet.); *In Interest of J.E.M.M.*, 532 S.W.3d 874, 886–87 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *10 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied); *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *3–4 (Tex. App.—San Antonio Dec. 27, 2017, no pet. h.); *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *14–15 (Tex. App.—San Antonio Dec. 28, 2016, no pet.); *In Interest of A.O.*, 07-16-00331-CV, 2017 WL 877333, at *5 (Tex. App.—Amarillo Mar. 3, 2017, pet. denied), reh'g denied (Apr. 4, 2017); *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *10 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.).

[247] *Holley v. Adams*, 544 S.W.2d at 371-372.

In summary, the following principles often apply in discussions of a child's desires:

1. Where a parent's conduct demonstrates the parent poses a danger to the child, the child's desire to remain with the parent will not weigh heavily against terminating the parent's rights.[248]

2. However, where the evidence regarding a parent's unfitness is not overwhelming, the desires of a child may weigh against termination.[249]

3. When a child is too young to express his or her desires, significant other evidence may be considered relevant to those desires, including the bond the child may share with parents or prospective caregivers and the nature of the relationships which are most significant to the child.[250]

Factor 2: The child's physical and emotional needs, now and in the future

Under this factor, as indicated, courts broadly examine evidence relating to a child's needs, both generically as would apply to any child in the given circumstances, and more specifically with regard to needs that are particular to the child at issue.[251] Moreover, this factor is necessarily tied to the parent or

[248] *See, e.g., In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *6 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.); *In re O.N.H.*, 401 S.W.3d 681, 687 (Tex. App.—San Antonio 2013, no pet.); *In re M.H.*, 319 S.W.3d 137, 150 (Tex. App.—Waco 2010, no pet.)

[249] *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *10 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.); *In re O.R.F.*, 417 S.W.3d 24, 39 (Tex. App.—Texarkana 2013, pet. denied)

[250] *See, e.g., In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *15 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *3 (Tex. App.—San Antonio Dec. 27, 2017, no pet.).

[251] *See, e.g., In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *8 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.) (noting no special needs, but holding that the child "will benefit by a stable permanent home with her siblings and a caregiver who puts her needs first."); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4 (Tex. App.—San Antonio Dec. 27, 2017, no pet.) (noting that, because they were young, the children required constant care and supervision, and depended solely on their caregivers to have their needs met.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *11 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (noting that one of the subject children had needs requiring special care, including that the child had syphilis, brain damage, and hearing loss.); *In Interest of L.D.A.*, 01-

caregiver's ability to meet the child's needs, and consequently often addresses parental conduct which may indicate the parent is either well-suited or unable to provide the care a child requires.[252]

Typically, the most salient evidence discussed in relation to this *Holley* factor is anything indicating the child has particular needs requiring specialized care.[253] Cases will discuss, for example, any physical or emotional condition affecting the child, including mental health diagnoses, behavioral issues, or ongoing challenges related to physical or emotional trauma the child may have experienced.[254] Moreover, courts will examine whether the parent or prospective caregiver has demonstrated the ability to address the special needs at issue.[255]

In re C.M.C., for example, was a case in which the children demonstrated significant emotional needs which required ongoing attention and active participation in services.[256] In weighing this factor, the court noted the extensive services necessary to care for the children, and the evidence of the mother's conduct which indicated she would not be able to ensure the children received

---

14-00782-CV, 2015 WL 293118, at *4 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.) (listing as the children's particular needs that they suffered from A.D.H.D., one was diagnosed as bipolar, and both displayed aggressive behaviors in foster care and at school.); *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *10 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.) (discussing the child's violent and aggressive behaviors when he was first taken into the Department's possession, that the child was withdrawn, and was behind educationally).

[252] *See In re O.R.F.*, 417 S.W.3d 24, 39 (Tex. App.—Texarkana 2013, pet. denied) (examining testimony that the emotional ramifications to the child of the mother's "drug use, poor decisions, and need for validation from her daughter" indicated the child would need ongoing therapy, and demonstrated the mother would be unable to meet the child's emotional needs, particularly given that the mother missed several counseling appointments.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4–5 (Tex. App.—San Antonio Dec. 27, 2017, no pet.) (noting testimony indicating that the mother was unable to recognize when her children needed medical care as evidenced by untreated injuries which the mother should have noticed, and which would have caused the child discomfort "in all of her movements.")

[253] *See, e.g., In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4; *In re C.M.C.*, 273 S.W.3d 862, 877 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4 (Tex. App.—San Antonio Dec. 27, 2017, no pet.).

[254] *See, e.g., In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4; *In re C.M.C.*, 273 S.W.3d at 877; *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4 (Tex. App.—San Antonio Dec. 27, 2017, no pet.).

[255] *In re C.M.C.*, 273 S.W.3d at 877.

[256] *Id.*

proper treatment.[257] The court's analysis provides a good example of the weight given to the needs children have, as well as the kinds of evidence examined to determine whether a parent or prospective caregiver will be able to meet those needs:

> As to the children's present emotional or physical needs, McCartney [the children's therapist] testified that both C.M.C. and C.E.C. suffer from post-traumatic stress syndrome, C.E.C. exhibits extreme A.D.H.D., and C.M.C. shows signs of reactive-attachment disorder. As to the children's placement, she believes that C.E.C. will need someone who is active and can "keep on top of him" due to his hyperactivity, and who is knowledgeable about his disorder. In addition, C.E.C. will need psychiatric monitoring and continuing, regular therapy. As to C.M.C., McCartney testified that she will need a caregiver who is knowledgeable about her disorders, namely post-traumatic stress syndrome and attachment issues. Further, due to the disclosed sexual abuse, C.M.C. should receive sex-abuse counseling. G.L.C. needs speech therapy due to his delayed language development.
>
> With regard to [the mother's] parenting abilities, McCartney concluded that C.M.C. and C.E.C. both appeared to have 'significant signs of early abuse and neglect.' She testified that C.M.C.'s hoarding behavior signaled prior neglect for food and nurturing. As to G.L.C., …his hurried manner of eating, resulting in occasional vomiting, likely indicated neglect and that he was unaccustomed to receiving consistent meals. Both C.M.C. and C.E.C. told McCartney that they did not feel safe with [their mother]. C.E.C. told McCartney that he was afraid of [his mother], and C.M.C. said that her mother did not take very good care of her. McCartney and the foster mother both testified that C.M.C. told them that [the mother] had allowed her to go with men whom she did not know and who sexually abused her. When Hunt asked [the mother] about C.M.C.'s issue with hoarding food, [the mother] responded that her behavior simply meant 'she was

[257] *In re C.M.C.*, 273 S.W.3d at 877.

> greedy and likes everything she wanted.' Androphy testified that there was no interaction between Latanya and her children at a supervised visit... Although C.E.C. was hysterically crying during the visit, [the mother] did nothing to comfort him or G.L.C.[258]

With this evidence, the court went on to hold that the record adequately supported that termination of the mother's parental rights was in the children's best interest.[259] The court's analysis demonstrates, therefore, not only the value of details regarding the emotional and behavioral challenges facing the children, but also of testimony provided by the children's service providers regarding the children's progress, continuing need for services, and the necessity that a caregiver understand the children's condition and ensure they are provided with ongoing care.[260]

In Interest of T.T. is another case which illustrates that courts will weigh heavily evidence tending to show a parent lacks the ability to recognize or address a child's needs.[261] In that case, one child had a "broken clavicle and nine fractured ribs that were in the healing process" when she and her sister were removed from their mother's care.[262] The court noted also that the children were very young and thus "require constant care and supervision."[263] And, though the one child's injuries were unexplained, the court focused on evidence which demonstrated that the mother should have recognized her daughter was suffering and demonstrated a greater responsiveness to the child's distress:

> Dr. Lukefahr and Dr. Arizpe each testified A.T. would have shown signs of discomfort as a result of her rib fractures, which Dr. Lukefahr estimated to be over a week old. Ms. Lailson testified Mother did not seem to notice any discomfort in A.T. prior to the emergency room visit. Dr. Arizpe testified it would be fair to say Mother had no idea A.T. had a rib injury prior to the emergency room visit, and Mother should have recognized A.T. was uncomfortable, particularly because

[258] In re C.M.C., 273 S.W.3d at 876–77.
[259] *In re C.M.C.*, 273 S.W.3d at 878.
[260] *Id.*
[261] *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4.
[262] *Id.*
[263] *Id.*

> A.T. would have shown discomfort in almost all of her movements. Moreover, Department Investigator Garza testified he removed the children due to the fact they were completely dependent on their caregivers, and neither Mother nor the children's father were able to provide a reasonable explanation as to how A.T. was injured. Thus, based on this evidence, the trial court could have reasonably inferred Mother's past inattention to A.T.'s injury would continue and Mother would be unable to provide for either child's needs.[264]

This case, too, illustrates the importance not only of evidence which describes the child's physical and emotional needs, but also of specific details which may show a parent or caregiver's ability to meet those needs. In *T.T.*, testimony provided by doctors was plainly necessary to describe the physical injuries done to the child, but as important were descriptions of the mother's reaction to the child's condition, and her conduct during the time leading up to the doctor's diagnosis of the child's fractures.[265] Given the mother's failure to notice injuries which would have caused discomfort in her young child, the trial court was allowed to conclude that the mother would continue in her inattention to the child's needs.[266] Consequently, practitioners are advised to examine not only the physical and emotional needs children may have faced both in their parents' and the Department's care, but also any conduct displayed by caregivers or parents which demonstrates the attention, care, and ability paid to ensure the children's needs are met.

In other cases, courts often address circumstances in which children have no special needs. [267] In such cases courts will nonetheless examine a variety of other

---

[264] *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4.
[265] *Id.*
[266] *Id.*
[267] *See, e.g., In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *8 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.) (discussing only the child's need for a stable, permanent home); *In re J.S.G.*, 14-08-00754-CV, 2009 WL 1311986, at *7 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.) (noting that the children had no special needs, but examining the mother's neglect of another child's medical needs as evidence she would fail to provide adequate care for the subject children); *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9 (Tex. App.—Houston [1st Dist.] May 9, 2017, pet. denied) (examining the children's positive progress while removed from their parents, though evidence reflected they had no "special needs."); *and In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *10 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (discussing that, though the children

kinds of evidence in determining whether a child's needs weigh in favor of parental termination or against it.[268] Courts often cite the general principle, for example, that "the need for permanence" and "the establishment of a stable, permanent home has been recognized as the paramount consideration in a best interest determination."[269] Thus, evidence regarding the prospective home and the ability of parents or caregivers to provide the child with stability and permanency are relevant to the discussion of a child's needs.[270] In *Z.N.M.* for example, the court focused on the appellant father's absence from the child's life as evidence demonstrating that he would be unable to meet the child's needs in the future.[271] Though the discussion did not reflect the child had any special needs, the court reasoned:

> The record reflects that Father was absent from Zoe's life until approximately six months before trial. He explained his absence by testifying that he was too young to care for an infant when Zoe was born, and that he was incarcerated the majority of time the termination proceeding was pending. Father has not provided for Zoe's past or present physical and emotional needs. A fact finder may infer from a parent's past inability to meet the child's physical and emotional

---

had no "special needs," the foster parents appropriately provided for the children's medical, dental, developmental, educational and emotional needs while caring for them.)

[268] *See, e.g., In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *8 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.); *In re J.S.G.*, 14-08-00754-CV, 2009 WL 1311986, at *7 (Tex. App.—Houston [14th Dist.] May 7, 2009, no pet.); *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9 (Tex. App.—Houston [1st Dist.] May 9, 2017, pet. denied); *and In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *10 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.).

[269] *In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *8; *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9 *citing In re K.C.*, 219 S.W.3d 924, 931 (Tex.App.—Dallas 2007, not pet.); *see also* Tex. Fam. Code Ann. § 263.307 (West Supp. 2017) (stating, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.").

[270] *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9 (stating, "evidence about the present and future placement of the child is relevant to the best interest determination.") *citing In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002).

[271] *In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *8.

> needs an inability or unwillingness to meet the child's needs in the future.[272]

Similarly, in *J.S.G.*, the subject children had no special needs, but the court found the evidence supported termination where the mother had a history of neglecting the medical needs of one of the children's siblings.[273] The court concluded, given the mother's conduct, that the needs of the children involved were thus jeopardized by the mother's care.[274] Clearly, therefore, a parent's care of other children will be relevant to a determination of the parent's ability with respect to the subject children.

Courts also examine any progress a child made during a child protection suit in determining what their physical or emotional needs indicate about their best interest. In *T.M.*, for instance, two girls had no special needs at the time of trial, and the appellant father testified that he had plans "to take great care of them."[275] However, the court noted that when the children were first placed in the Department's custody they were quiet and "not developmentally on target."[276] The court held that the subsequent progress the girls made as compared to their condition soon after they were removed from their parents' care weighed in favor of termination:

> While in the Department's care, Theresa has received speech therapy and Emma has received speech therapy and occupational therapy. According to [the Department's caseworker], the girls have since blossomed and are developmentally on target. Theresa is currently in kindergarten, is very talkative, follows direction well, and has begun learning sight words. Emma is doing much better and is speaking more although she still has some issues with her motor skills and her balance that require daily hands-on work to continue in her development.[277]

---

[272] *Id.*
[273] *In re J.S.G.*, 14-08-00754-CV, 2009 WL 1311986, at *7.
[274] *Id.*
[275] *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9.
[276] *Id.*
[277] *In Interest of T.M.*, 01-16-00942-CV, 2017 WL 1885406, at *9.

In contrast, where the evidence shows that a child's needs were met in the parent's care, the child had no special needs while in the Department's care, and nothing indicated the child's needs would go unmet if returned to the parent, the evidence will likely weigh in favor of family reunification.[278] In *D.T.*, the appellant mother was incarcerated at the time of trial and unable to provide for the child's present physical and emotional needs.[279] However, no evidence demonstrated the child's needs had ever gone unmet while with his mother, or would go unmet if returned to her, particularly where the mother herself participated in services offered by the Department.[280] The court explained:

> As to [the child's] emotional and physical needs, the evidence affirmatively established that those needs were adequately met by Appellant in the past, as shown by the evidence that D.T. was developmentally and intellectually on-target, has no special needs, and was happy and healthy when placed in custody of the TDPRS. Caseworker Preston acknowledged D.T.'s past home environment could be considered safe. There is no evidence whatsoever as to any actual emotional or physical danger to D.T. in the past. It is undisputed that D.T. is not currently endangered and his emotional and physical needs are being met in foster care. No evidence, direct or indirect, was offered by TDPRS regarding D.T.'s future emotional or physical needs or endangerment to him in the future.[281]

Without evidence of some kind showing how the child's needs were unmet while in his mother's care, or would be unmet if returned to her, the second *Holley* factor weighed against terminating the mother's parental rights, and the court went on ultimately to reverse the trial court's best interest determination.[282]

As demonstrated, therefore, even where there is no evidence that a child has special needs at the time of trial, other relevant proof may weigh heavily under this factor. The case law instructs that practitioners examine closely the condition of a

---

[278] *In re D.T.*, 34 S.W.3d 625, 641 (Tex. App.—Fort Worth 2000, pet. denied)
[279] *Id.*
[280] *Id.*
[281] *In re D.T.*, 34 S.W.3d at 641.
[282] *Id.* at 641-42.

child while in a parent's care, at the time the child is removed by the Department, and throughout the child protection suit, and weigh whether the child improved or not given the Department's intervention. Also highly probative is any evidence with respect to the stability of a prospective placement, or proof showing a parent or caregiver has been unable to meet the child's needs, or has historically demonstrated an inability to parent with respect to other children.

The above cases demonstrate that any evidence which bears on a child's needs and the ability of parents or prospective caregivers to provide for those needs will be weighed heavily in a best interest determination. The following represents a brief list of the kinds of evidence courts of appeals have found relevant under the second *Holley* factor:

- medical or mental health issues that require treatment;
- the child's age and developmental state;
- developmental delays;
- educational needs, learning disorders, special education considerations;
- behavioral concerns, including aggressive or violent tendencies, bed wetting, nightmares;
- recommendations or concerns from counselors or therapists;
- parent or caregiver's participation in services to address child's needs;
- special training received by parents or caregivers in order to meet child's needs;
- parent or caregiver's attendance at medical appointments, school meetings, counseling sessions;
- parent or caregiver's ability to recognize child's needs;
- any progress a child has experienced as a result of a parent's or caregiver's care;
- history of parent's ability or inability to care for other children;
- any history of parent's inability to care for the subject child;
- parents' continued endangering conduct;
- the stability of the prospective home.[283]

[283] *See generally In Interest of Z.N.M.*, 14-17-00650-CV, 2018 WL 358480, at *6 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet. h.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015

<u>Factor 3</u>: The emotional and physical danger to the child, now and in the future

The third factor, having to do with any danger to a child, is one of the most heavily weighted factors in a best interest analysis.[284] When examining the evidence under this factor, courts repeat the principle that "A parent's ability to provide a child with a safe environment is a primary consideration in determining the child's best interest."[285] Accordingly, courts have found that evidence showing a parent

---

WL 1402652, at *11 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.); *In re O.R.F.*, 417 S.W.3d 24, 39–40 (Tex. App.—Texarkana 2013, pet. denied); *In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.); *In Interest of J.E.M.M..*, 532 S.W.3d 874, 887–88 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *10 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.); *In Interest of V.D.A.*, 14-14-00561-CV, 2014 WL 7347776, at *12–13 (Tex. App.—Houston [14th Dist.] Dec. 23, 2014, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *4–5 (Tex. App.—San Antonio Dec. 27, 2017, no pet.); *In re C.M.C.*, 273 S.W.3d 862, 876–77 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *In re U.P.*, 105 S.W.3d 222, 230–31 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *In Interest of A.F.*, 14-17-00394-CV, 2017 WL 4697836, at *12 (Tex. App.—Houston [14th Dist.] Oct. 19, 2017, no pet.).

[284] *See, e.g.*, *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (holding that father's participation in rehabilitative services, his improved conduct, his employment and stable residence, and the relationship he developed with his son were all outweighed by the danger posed to the child by his extensive history of engaging in crime and drug use.); *see also In re O.N.H.*, 401 S.W.3d 681, 688 (Tex. App.—San Antonio 2013, no pet.) (holding that father's conduct which demonstrated he remained a danger to his children outweighed the children's desires to return to him, and that he had a stable job and home); *see also In re B.M.*, 14-13-00599-CV, 2013 WL 6506659, at *8 (Tex. App.—Houston [14th Dist.] Dec. 10, 2013, no pet.) (stating, "While the record reflects that appellant has made some positive strides in her life, her recent actions do not negate her history of drug use and endangering conduct. A trier of fact is not required to ignore a long history of irresponsible choices and bad behavior because the behavior abates as trial approaches.").

[285] *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *4 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.); *see also In re K.G.*, 350 S.W.3d 338, 352 (Tex. App.—Fort Worth 2011, pet. denied) (stating that Texas' public policy, as reflected by the Texas Family Code, is "to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child and to provide a safe, stable and nonviolent environment for the child.") *citing* Tex. Fam. Code Ann. §§ 153.001(a)(1)-(2), 153.002 (West 2008) (internal quotation marks omitted); *In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (stating, "[T]he prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.") *citing* Tex. Fam. Code Ann. § 263.307(a) (West 2008); *see* Tex. Fam. Code Ann. §§ 153.001(a)(1)-(2), 153.002, 263.307 (West 2014 and West Supp. 2017).

remains dangerous to a child will outweigh other considerations, including a child's desires, a parent's participation in rehabilitative services, a parent's obtaining and maintaining stable employment and a residence, and the parent's development of a positive relationship with the child during the termination suit.[286]

Analyses conducted with regard to the third *Holley* factor often address the same evidence which supported a finding for parental termination under the first prong of Texas' termination statute, 161.001(b)(1).[287] Thus, where the evidence in the record adequately supports termination based on findings, for example, that the parent engaged in conduct which endangered the child, failed to participate in rehabilitative services, or abandoned the child during the suit, that evidence will also support a finding that termination is in the child's best interest under the third

---

[286] *See, e.g., In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *10 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (holding that father's endangering conduct outweighed his participation in services, improved conduct, employment and stable residence, and the relationship he developed with his son); *see also In re O.N.H.*, 401 S.W.3d 681, 688 (Tex. App.—San Antonio 2013, no pet.) (holding that the danger father posed to the child outweighed the children's desires, and father's stable job and home); *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *8 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.) (stating, "Although the children's love of their parents is a very important consideration in determining the best interest of the children, it can neither override or outweigh evidence of danger to the children nor 'compensate for the lack of an opportunity to grow up in a normal and safe way equipped to live a normal, productive, and satisfying life.') *citing In re W.S.M.*, 107 S.W.3d 772, 773 (Tex.App.—Texarcana 2003, no pet.); *see also In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied); *In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (stating, "abuse of drugs is hard to escape and the fact finder is not required to ignore a long history of dependency merely because it abates as trial approaches. The trial court may reasonably determine that a parent's changes shortly before trial are too late to impact the best-interest decision.") *citing In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) *and In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (internal quotation marks omitted).

[287] *In Interest of A.H.L.*, 01-16-00784-CV, 2017 WL 1149222, at *4 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied) ("Evidence establishing one of the predicate acts under Section 161.001(b)(1) also may be relevant to determining the best interests of the children."); *In Interest of M.J.P.*, 05-16-01293-CV, 2017 WL 655955, at *6 (Tex. App.—Dallas Feb. 17, 2017, no pet.) ("Evidence of one of the predicate acts for termination under section 161.001(1) of the family code may also be relevant to determining the best interest of the child."); *In re M.F.D.*, 01-16-00295-CV, 2016 WL 7164063, at *5 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) ("In this case, as in all parental-rights termination cases, the evidence supportive of the Department's termination request was relevant to a determination regarding M.F.D.'s best interest."); Tex. Fam. Code Ann. § 161.001(b)(1) (West Supp. 2017).

Holley factor.[288] Consequently, many of the same principles which apply to court's analyses of endangerment evidence under 161.001(b)(1) will also apply to the third *Holley* factor regarding the danger that conduct poses to the child.[289] The following is a list of several of the more-often cited of those principles:

- A parent's drug use and its effect on the ability to parent may qualify as an endangering course of conduct, and supports a finding that termination of parental rights is in the best interest of the child.[290]

- "Continued illegal drug use after a child's removal is conduct that jeopardizes parental rights and may be considered as establishing an endangering course of conduct, and that termination is in the best interest of the child."[291]

- "By using drugs, the parent exposes the child to the possibility that the parent may be impaired or imprisoned and, therefore, unable to take care of the child."[292]

---

[288] *In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *5 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (holding that the trial court's findings that the mother endangered the children, failed to complete services required of her in a family service plan, and constructively abandoned the children during the suit supported also under the third *Holley* factor that termination of the mother's parental rights was in her children's best interest.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *5 (Tex. App.—San Antonio Dec. 27, 2017, no pet.) (holding that the evidence the mother endangered her children under subsections (D) and (E) of 161.001(b)(1) also supported that she posed a danger to the children as part of best interest analysis.); *see* Tex. Fam. Code Ann. §§ 161.001(b)(1) (West Supp. 2017).

[289] *See In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *4-10 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (discussing the mother's history of drug use, criminal conduct, involvement in domestic violence, and lack of stability under the third *Holley* factor).

[290] *Id.* at *4; *In re A.C.*, 394 S.W.3d 633, 642 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied).

[291] *E.g.*, *In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *5 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied).

[292] *E.g.*, *In Interest of L.M.R.*, 14-17-00597-CV, 2018 WL 285121, at *6, *8 (Tex. App.—Houston [14th Dist.] Jan. 4, 2018, no pet.) (applying the court's analysis of the father's substance abuse, including its application of this principle, to its best interest determination).

- "While imprisonment alone is not a basis to terminate a parent's rights, it is an appropriate factor to consider because when a parent is incarcerated, he or she is absent from the child's daily life and unable to provide support to the child, negatively impacting the child's living environment and emotional well-being."[293]

- "A parent's abusive or violent conduct can produce a home environment that endangers a child's well-being. Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment."[294]

- "Stability and permanence are paramount in the upbringing of children. Failure to maintain stability endangers a child's physical and emotional well-being. Evidence of a parent's unstable lifestyle also can support a factfinder's conclusion that termination of parental rights is in the child's best interest."[295]

- "Mental illness alone is not grounds for terminating the parent-child relationship. Unsuccessfully treated mental illness can expose a child to endangerment, however, and is a factor the court may consider."[296]

- "[Evidence] of past misconduct or neglect can be used to measure a parent's future conduct."[297]

Courts will also note as particularly probative any evidence showing that the child at issue was affected directly by the parents' endangering conduct.[298] In this way,

---

[293] *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *7 *citing In Interest of M.R.J.M.*, 280 S.W.3d 494, 503 (Tex. App.—Fort Worth 2009, no pet.); *see also In Interest of L.J.T.*, 04-17-00567-CV, 2018 WL 1072346, at *7 (Tex. App.—San Antonio Feb. 28, 2018, no pet.).

[294] *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *7 *citing In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex.App.—Houston [14th Dist.] 2003, no pet.).

[295] *Id. citing In re T.D.C.*, 91 S.W.3d 865, 873 (Tex.App.–Fort Worth 2002, pet. denied) and *In re A.B.*, 412 S.W.3d 588, 599 (Tex.App.–Fort Worth 2013), aff'd, 437 S.W.3d 498 (Tex.2014).

[296] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *7 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.)

[297] *In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.)

the best interest analysis differs somewhat from discussions of a parent's endangering conduct in that, in order to establish endangering conduct under 161.001(b)(1), it is not necessary to show that the conduct was directed at the child, occurred in the child's presence, or that the child was harmed or injured.[299] However, where the record demonstrates that a parent engaged in conduct despite a direct effect on the child involved, such evidence will weigh heavily in a best interest analysis of whether the parent poses a continuing danger.[300] Thus, for example, where a child is physically abused, witnesses domestic violence between parents, or is exposed directly to the parent's drug use, courts are more likely to find that the child's best interest favors termination of parental rights.[301]

The above principles and the cases which apply them amply demonstrate that where a parent continues to engage in conduct which endangers a child, courts of appeals will be hesitant to disturb a finding that termination of parental rights is in the child's best interest.[302] As a result, though this factor is not a difficult one to

---

[298] *In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.) (discussing allegations that the parent physically abused the child with an extension cord and a belt); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *6 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (examining evidence that the mother allowed her husband to physically abuse the child by hitting him with a stick and threatening him with a gun); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *7 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (noting, as evidence of danger, that mother's paramour hit the two-year old child in the head with a closed fist during an altercation with the mother.); *In re O.N.H.*, 401 S.W.3d 681, 685 (Tex. App.—San Antonio 2013, no pet.) (weighing evidence that the mother was inebriated while sleeping in the same bed as her child, causing the child's death, and noting another of her children's statements indicating he witnessed domestic violence between the parents.); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied) (discussing mother's positive results for illegal drugs while pregnant with her twins.).

[299] *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex.1987).

[300] *See generally, In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4; *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *6; *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *7; *In re O.N.H.*, 401 S.W.3d at 685; *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11.

[301] *See generally, In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *4; *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *6; *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *7; *In re O.N.H.*, 401 S.W.3d at 685; *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11.

[302] *See, e.g., In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied) (examining mother's history of drug use as well as progress she made in services to address it, and holding, "Although a reasonable fact finder

apply given that it will typically align with evidence presented under 161.001(b)(1), it is arguably the most probative of the *Holley* factors.[303] Practitioners are thus guided to thoroughly assess any evidence relating to the danger a parent has posed in the past, and any indication the parent is continuing to engage in dangerous conduct, or has demonstrated the ability to change and provide the child with a safe environment.[304]

Factor 4: The parental ability of the individuals seeking custody

As this factor addresses any evidence which might bear on parental ability, it is a broad category which allows for discussion of a parent's history and conduct not only with respect to the child involved, but as to past children as well.[305] Courts have stated, "We may… consider each parent's performance as a parent in evaluating their fitness to provide for the Child and the trial court's determination

---

could look at Mother's progress and decide it justified the risk of keeping her as a parent, we cannot say the trial court acted unreasonably in finding the children's best interest lay elsewhere."); s*ee also In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *9 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied)

[303] *See* Tex. Fam. Code Ann. § 263.307 (West Supp. 2017) (stating that, in consideration of factors enumerated as relevant to a best interest determination, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.")

[304] *In re M.G.D.*, 108 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (analyzing evidence of a mother's participation in services and her "turnaround" in light of her years-long struggle with abusive relationships and addiction, and reasoning:

> [the mother's] efforts to overcome the cycle of abusive relationships and addiction that have plagued her family for several generations should be applauded; but we cannot say they require every rational juror to return her children to her. Certainly reasonable people could look at [mother]'s progress and decide it justified the risk of keeping her as their parent rather than allowing anyone else the privilege. But these jurors did not; we cannot say they were unreasonable in firmly deciding the children's best interest lay elsewhere.)

[305] *See, e.g., In re I.R.*, 14-14-00626-CV, 2014 WL 6854747, at *10 (Tex. App.—Houston [14th Dist.] Dec. 4, 2014, no pet.) (stating, "We may also consider the Mother's past performance as a parent in evaluating her fitness to provide for the Child and the trial court's determination that termination of her parental rights would be in the Child's best interest."); *see also In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *16 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (stating, "Although evidence of past misconduct or neglect alone may not be sufficient to show present unfitness, a fact finder may measure a parent's future conduct by her past conduct and determine that it is in a child's best interest to terminate her parental rights.").

that termination would be in the Child's best interest."[306] Hence, discussions of the evidence relevant to this factor can cover any endangering conduct a parent has engaged in in the past; any neglectful supervision, abuse, or abandonment of a child; periods of instability or inability to provide for a child's needs; any services a parent has completed or failed to complete in order to assist them in caring for the child; and any outside support a parent has relied on or may utilize to help provide for the child.[307] Notably, however, courts focus not only on a parent's history, but also consider what changes a parent may have made since the Department's intervention.[308]

The following analysis, conducted by the Fourteenth District Court of Appeals, provides an example of the breadth of the evidence which is relevant under the fourth *Holley* factor, and the weight which may be given to it:

> The Mother has three other children, but they do not live with her. Her mother has custody of her oldest child, a son age fourteen, and her ex-husband has primary custody of her two other children. During its investigation, the Department spoke with the Mother's ex-husband who stated the Mother had supervised visits with their two children. He also stated she smoked marijuana, used prescription drugs, and was unable to care for the children. He stated he does not allow their children around her for these reasons. The Mother's divorce decree, admitted at trial, stated the Mother had "a history or pattern of child neglect," and she was required to have supervised visits with their children.

---

[306] *In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *16; *see also, e.g.*, *In Interest of K.M.R.*, 14-17-00651-CV, 2018 WL 614762, at *12 (Tex. App.—Houston [14th Dist.] Jan. 30, 2018, no pet. h.)

[307] *See, e.g.*, *In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484; *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *16 (Tex. App.—San Antonio Dec. 28, 2016, no pet.); *In Interest of J.J.S.*, 14-17-00359-CV, 2017 WL 4518595, at *13 (Tex. App.—Houston [14th Dist.] Oct. 10, 2017, pet. denied); *In Interest of J.E.M.M.*, 532 S.W.3d 874, 888 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

[308] *See In re M.G.D.*, 108 S.W.3d 508, 525 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (stating, "In evaluating parental abilities, however, the factfinder must consider not only the skills lacking at the time of CPS's intervention but also any skills acquired in the interim. A parent's material improvement in the areas identified as deficient is some indication of the prospects for success in the future.")

***

When the Department workers visited the parents' residence after receiving the referral alleging neglect, the residence was not clean, was filled with trash, and had a strong odor of cigarette smoke. The parents live in a one-bedroom apartment. The 4C's report noted the Mother had no bed for the Child and the Mother was instructed about "co-sleeping and safe sleep." At a meeting with the Department…the Child's clothes were extremely soiled, his bib was covered in cigarette ashes, and the baby's bottle was dirty with hair and lint around the nipple.

The foster mother testified that when the Child came into her care, he "reeked" of cigarette smoke. The Child's clothing was sticky, had ashes on it, and smelled of smoke. The Mother explained the baby's bottle had spilled in the diaper bag after the Department took the Child. After the Child was removed from the Mother's care, he was immediately seen by a doctor for diaper rash that required antibiotics. The rash was so severe it left an open wound and required five weeks to heal.

The caseworker testified at trial that although the Mother attended her court-ordered visits, she did not seem interested in the visits. She did not "really" play with the baby. She sometimes cancelled visits or ended them early. The Child Advocate reported that the Mother slurred her words and was lethargic during a visit...

The Mother testified her house is very clean, she has a baby bed, a playpen, a walker, bottles, and other items ready if the Child is returned to her. The Mother claimed she had a good relationship with her older children. She testified that her 14–year–old son usually comes over every day after school. Her other two children visit on weekends and she has them the entire summer. Although the Mother complained about lack of transportation to complete her services, she

> testified about taking her other children to the zoo, the Children's Museum, NASA, and for ice cream.[309]

The court went on to find sufficient evidence supported the best interest finding.[310] In doing so, it is plain the court here considered a broad array of details regarding the mother's parenting, including her history with her other children, her past divorce, and custody and visitation arrangements; the mother's past use of drugs and its impact on her ability to parent; the mother's residence, its cleanliness and the absence of a bed for the child; the condition and cleanliness of the child at removal, including his untreated diaper rash; the mother's attendance at and conduct during visits with the subject child; and the mother's testimony regarding improvements she made during the case, her good relationship with an older child, and the activities she participated in with her children.[311]

Consequently, practitioners are guided to undergo a careful consideration of any evidence which might weigh on a parent's ability when making a best interest assessment. In addition to the above, courts in past cases have considered the following as relevant to an analysis of parenting ability:

- The kind of supervision provided prior to the Department's intervention;
- Whether the child was left with improper or dangerous caregivers;
- Any neglect or abuse the child suffered in the parent's care;
- The parent's participation in services;
- Any history with regard to parenting other children;
- Evaluations of relatives or other family to help support parent;
- Investigations of reports of neglectful supervision or abuse;
- Cleanliness of the parent's home, or hazards in home;
- Parenting decisions which indicate appropriateness (e.g., co-sleeping with an infant, or leaving the child with dangerous or unknown caregivers);
- Care child received while in parent's custody (cleanliness, adequate food, medical and educational needs);
- Conduct of parent during visits;

[309] In re A.J.E.M.-B., 14-14-00424-CV, 2014 WL 5795484, at *16–17.
[310] *Id.*
[311] *Id.*

- Reliance or dependence on others to provide care for a child;
- Descriptions of child at removal;
- Attentiveness to child's needs during periods of interaction with child;
- Prioritizing or cancelling visits;
- Attendance of appointments with child;
- Participation in child's medical care;
- Failure to address or believe a child's outcry of abuse;
- Child's reaction to parent at visits;
- Evaluations of parenting skills by service providers;
- Any behaviors evidenced by children which may indicate the kind of parenting they received (hoarding food, e.g.).[312]

Factor 5: Programs available to assist in promoting the child's best interest

With respect to the fifth *Holley* factor, courts focus primarily on parents' participation in the rehabilitative services offered them by the Department during a child protection case.[313] Consequently, the evidence discussed under this factor

[312] *See generally, In re I.R.*, 14-14-00626-CV, 2014 WL 6854747, at *11 (Tex. App.—Houston [14th Dist.] Dec. 4, 2014, no pet.); *In re A.J.E.M.-B.*, 14-14-00424-CV, 2014 WL 5795484, at *16 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.); *In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *7 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied); *In Interest of J.J.S.*, 14-17-00359-CV, 2017 WL 4518595, at *13 (Tex. App.—Houston [14th Dist.] Oct. 10, 2017, pet. denied); *In Interest of J.E.M.M.*, 532 S.W.3d 874, 889 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *In re M.S.L.*, 14-14-00382-CV, 2014 WL 5148157, at *11 (Tex. App.—Houston [14th Dist.] Oct. 14, 2014, no pet.); *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *11 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.); *In Interest of V.D.A.*, 14-14-00561-CV, 2014 WL 7347776, at *13 (Tex. App.—Houston [14th Dist.] Dec. 23, 2014, no pet.); *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *16 (Tex. App.—San Antonio Dec. 28, 2016, no pet.); *In Interest of J.N.S.*, 13-17-00356-CV, 2018 WL 286090, at *8 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet. h.); *In re C.M.C.*, 273 S.W.3d 862, 877 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *9 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *11–13 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.)

[313] *See, e.g., In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *6 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (stating, "In determining the best interest of the children in proceedings for termination of parental rights, the trial court may properly consider that the parent did not comply with the court-ordered service plan for reunification with the child."); *See also In Interest of A.L.W.*, 01-14-00805-CV, 2015 WL 4262754, at *13 (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.) (discussing the mother's participation in the

often overlaps with any evidence supporting parental termination under section 161.001(b)(1)(O) of the Texas Family Code.[314] Under subsection (O), a parent's rights to a child may be terminated if they fail to comply with the provisions of a court order which specifically establishes the actions necessary for the parent to obtain the return of the child who was removed from the parent as a result of abuse or neglect.[315] These "actions necessary" are set forth in a family service plan, which the Department is required to develop with the parents, and encompasses the rehabilitative services deemed necessary for the parent to demonstrate the ability to provide the child with a safe environment.[316] As completion of a plan's requirements is generally required before a parent may be reunified with a child, a parent's participation in the plan is a primary focus of any child protection suit.[317] Moreover, as the purpose of the plan is defined by the Texas Family Code as being "to help [the parent] provide [the] child with a safe environment," whether a parent has been successful in meeting the requirements of the plan is an essential factor in determining whether the parent-child relationship is terminated or the family is reunited.[318]

In a *Holley* analysis, courts regard a parent's participation in the service plan as an indicator of a parent's ability to ensure a child is safely provided for in the

---

Department's service plan as evidence relevant to the fifth *Holley* factor); *see also In re O.N.H.*, 401 S.W.3d 681, 687 (Tex. App.—San Antonio 2013, no pet.) (stating, "Non-compliance with a service plan is probative of a child's best interest.").

[314] Tex. Fam. Code Ann. § 161.001(b)(1)(O) (West Supp. 2017).

[315] *Id.*

[316] Tex. Fam. Code Ann. §§ 263.101-02, .105-06 (West 2014 and West Supp. 2017) (requiring the Department to develop and file with the court a family service plan, created in conference with the parents, which states the steps necessary for family reunification to be achieved, and providing that the purpose of the plan is to help the parent provide the child with a safe environment.)

[317] *See* Tex. Fam. Code Ann. §§ 263.106, .201-02, .304-306 (West 2014 and West Supp. 2017) (requiring the trial court to review, approve, and order parents to comply with the family service plan, and to monitor the parents' progress on the plan during periodic hearings throughout a child protection suit.)

[318] Tex. Fam. Code Ann. § 263.102 (West Supp. 2017) (requiring that every service plan include an admonishment to the parent that, "This is a very important document. Its purpose is to help you provide your child with a safe environment…If you are unwilling or unable to provide your child with a safe environment, your parental and custodial duties and rights may be restricted or terminated or your child may not be returned to you…").

future.[319] Courts have stated the principle that, "A factfinder may infer from a parent's failure to take the initiative to complete the services required to regain possession of her children that she does not have the ability to motivate herself to seek out available resources needed now or in the future."[320] Consequently, courts will weigh evidence of a parent's failure to participate in or complete required services in considering the future safety and well-being of the child.[321] Thus, a parent's failure, for instance, to participate in required psychological evaluations, counseling, substance abuse assessments, parenting classes, drug tests, or visits with the child will weigh heavily in favor of parental termination under this factor.[322]

It is important to note, however, that merely participating in services may not avoid a termination finding.[323] Because the purpose of a family service plan is to ensure a child is provided with a safe environment, where the evidence shows the parent has not learned from services or demonstrated the ability to change, the parent's completion of the tasks required in a family service plan will not weigh in the parent's favor.[324] Rather, the court's primary consideration will be whether the

---

[319] *See In Interest of A.L.W.*, 01-14-00805-CV, 2015 WL 4262754, at *12 (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.) (noting that a parent who fails to participate in services may be deemed by the trial court as unable to seek out services which might be needed in the future.); *see also In re O.N.H.*, 401 S.W.3d 681, 687 (Tex. App.—San Antonio 2013, no pet.) (holding that a father's lack of progress in services and resistance to separating from a dangerous mother allowed the trial court to determine "that he does not have the ability to protect his children from abuse or neglect now or in the future and that he would not put his children's needs ahead of his own desire to keep the family intact.")

[320] *In Interest of A.L.W.*, 01-14-00805-CV, 2015 WL 4262754, at *12; *In Interest of J.M.T.*, 519 S.W.3d 258, 270 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *In Interest of A.C.*, 02-16-00325-CV, 2017 WL 817153, at *5 (Tex. App.—Fort Worth Mar. 2, 2017, no pet.).

[321] *See In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *6 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (discussing the mother's compliance with the terms of her family service plan in best interest analysis); *see also In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied) (weighing a mother's participation in the services required by her family service plan under the fifth *Holley* factor).

[322] *See, e.g., In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *10 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.); In Interest of T.R.M., 14-14-00773-CV, 2015 WL 1062171, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.);

[323] *See, e.g., In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied)

[324] *Id.*

parent has shown the ability, through services, to keep the child safe.[325] In a case where a mother participated in services, but failed to demonstrate a change in her behavior, the Court of Appeals of San Antonio analyzed the evidence as follows:

> It is undisputed that Mother completed portions of her service plan, including psychosocial and psychological assessments, negative drug testing, parenting classes, stable employment, and attendance at individual counseling. However, with regard to parenting classes, the trial court heard testimony from a number of witnesses highlighting the fact that Mother was unable to implement the skills she learned from the parenting classes. The record reflects Mother expressed discomfort with feeding the children or holding them to calm them down. There is also evidence Mother declined to help buckle the children into their car seats when asked by the foster parents. The trial court also heard evidence that Mother did not consistently attend the children's therapy sessions even after the foster family moved the sessions to a more convenient location. Moreover, the record also shows Mother failed to engage with the children during therapy. Rather, both Dr. Arizpe and Ms. Lailson testified Mother had a "flat expression" and did not express interest during therapy sessions. They also testified they were concerned Mother would be unable to handle two babies, who required additional care than normal due to their developmental delays. Dr. Arizpe emphasized one of the main issues with the children was ensuring they would be properly cared for, and she discussed with Mother the importance of being able to take care and ensure the safety of the children. Ms. Lailson noted, however, that based on her observations of Mother with the twins, she did not believe Mother fully comprehended the seriousness of A.T.'s injuries

[325] *See, e.g., In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *6 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (discussing the mother's failure to abstain from illegal drugs as required by her family service plan, and mother's reports during counseling of her extensive drug use while responsible for her children's care); *See also, e.g., In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6.

> and she did not believe Mother had a basic understanding of what raising twins would be like.[326]

Consequently, though the Mother participated in several of the services required of her, her continuing inability to show she could safely parent the children was evidence favoring the termination of her parental rights.[327]

Moreover, courts will hesitate to weigh in a parent's favor services the parent completed late in the case as trial approaches.[328] In *T.R.M.*, for example, the Court noted the mother's testimony that she completed domestic violence and parenting classes and had been living in a one-bedroom home for six months.[329] However, it weighed against the mother's testimony the evidence of her failure to complete psychological and psychosocial evaluations, a drug assessment, therapy, and drug testing, and reasoned that any change the mother demonstrated through the services she did complete were "too late to have an impact on the best interest determination."[330]

Consequently, the analyses provided by the courts of appeals demonstrate that it is only where a parent is able to show not only compliance with rehabilitative services, but also the ability as imparted by those services to keep the child safe that the fifth *Holley* factor will weigh solidly in a parent's favor.[331]

In summary, courts have applied the following principles in discussion of the fifth *Holley* factor:

---

[326] *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6.
[327] *Id.*
[328] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (stating, "the factfinder may conclude that a parent's changes shortly before trial are too late to have an impact on the best-interest determination."); *In re Z.C.*, 280 S.W.3d 470, 476 (Tex. App.—Fort Worth 2009, pet. denied) (holding a father's "minimal efforts to improve his ability to effectively parent on the eve of trial are not enough to overcome a decade of poor parenting and neglect.").
[329] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8–9
[330] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8–9.
[331] *See, e.g., In re D.T.*, 34 S.W.3d 625, 641 (Tex. App.—Fort Worth 2000, pet. denied) (holding the evidence legally insufficient to support termination where it was undisputed the mother participated in her service plan and there was no evidence she lacked the ability to parent the child or was unable to provide for the child's needs).

- "A factfinder may infer from a parent's failure to take the initiative to complete the services required to regain possession of her children that she does not have the ability to motivate herself to seek out available resources needed now or in the future."[332]

- Where the evidence shows the parent has not learned from services or demonstrated the ability to change, the parent's completion of the tasks required in a family service plan will not weigh in the parent's favor.[333]

- Changes made shortly before trial may be too late to impact the best interest determination.[334]

Further, in examining the evidence relevant to the fifth *Holley* factor, courts of appeals have weighed the following:

- A parent's honesty with service providers;
- Assessments from service providers regarding a parent's progress;
- A parent's ability to implement lessons learned from services;
- Any indication that the parent, despite services, failed to change;
- Any change in the parent's conduct as demonstrated during visits or other interactions with the child;
- The timing of service completion, and how much time was left for parent to demonstrate change.[335]

---

[332] *In Interest of A.L.W.*, 01-14-00805-CV, 2015 WL 4262754, at *12; *In Interest of J.M.T.*, 519 S.W.3d at 270; *In Interest of A.C.*, 02-16-00325-CV, 2017 WL 817153, at *5.

[333] *See, e.g.*, *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6.

[334] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.); *In re Z.C.*, 280 S.W.3d at 476.

[335] *See generally In Interest of A.L.W.*, 01-14-00805-CV, 2015 WL 4262754, at *12 (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.); *In re O.N.H.*, 401 S.W.3d 681, 687 (Tex. App.—San Antonio 2013, no pet.); *In Interest of J.N.S.*, 13-17-00356-CV, 2018 WL 286090, at *8 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet. h.); *In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *6 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *6–7 (Tex. App.—San Antonio Dec. 27, 2017, no pet. h.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *9 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.); *In Interest of X.R.L.*, 461 S.W.3d 633, 641 (Tex. App.—Texarkana 2015, no pet.); *In Interest of H.P.*, 13-16-

<u>Factor 6</u>: Plans for the child by those individuals or by the agency seeking custody

Under the sixth *Holley* factor, courts typically compare the parents' future plans for the child with the plans put forward by the Department.[336] Accordingly, courts consider evidence including a parent's current living arrangements, any history of instability, the parent's familiarity with the child's needs, and the parent's plan to provide for those needs, along with the Department's placement plans for the child, including whether it has located an adoptive home, the quality of care provided in that home, and whether, if several children are involved, the Department has been able to locate a placement that will house siblings together.[337]

As with each *Holley* factor, courts' analyses with regard to plans made for the child demonstrate that a child's safety and well-being are overriding concerns.[338] Courts will look first for the placement that provides a child with a safe, stable, and permanent home.[339] As has been stated, "Texas courts recognize as a paramount

---

00277-CV, 2016 WL 5846538, at *7 (Tex. App.—Corpus Christi Oct. 6, 2016, no pet.), reh'g overruled (Nov. 14, 2016); *In re M.G.D.*, 108 S.W.3d 508, 513–14 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[336] *See, e.g.,In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied) (stating, "these factors compare the Department's plans and proposed placement of the children with the plans and home of the parents seeking to avoid termination."); *In Interest of J.G.S.*, 08-17-00192-CV, 2018 WL 851257, at *4 (Tex. App.—El Paso Feb. 14, 2018, no pet. h.) (stating, "The factfinder may compare the parent's and the Department's plans for the child and determine whether the plans and expectations of each party are realistic or weak and ill-defined.");

[337] *See generally In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *8 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied); *In Interest of J.N.S.*, 13-17-00356-CV, 2018 WL 286090, at *8 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet. h.); *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *9 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.).

[338] *See, e.g., In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *11 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (weighing the sixth *Holley* factor in favor of termination where the evidence showed the Department had been unable to make permanent plans for several children, many of whom were placed in separate homes, in light of other evidence which supported the mother would not be able to meet the children's needs).

[339] *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied) ("A child's need for permanence through the establishment of a

consideration in the best-interest determination a child's need for permanence through the establishment of a stable, permanent home."[340] Thus, where a parent has demonstrated the ability to plan and provide for the child's care in a stable, safe environment, reunification is more likely.[341]

In *In re R.W.*, for instance, the First District Court of Appeals found sufficient evidence to support that the mother failed to complete the services required of her in her family service plan.[342] Moreover, the mother's explanation for her failure was that she had been in a relationship with an abusive man who "would not allow her to obtain the services necessary to complete the family service plan."[343] Nonetheless, by the time of trial the mother had been in a new relationship for nine months with a man in a "clean and suitable" home, and the evidence demonstrated her new paramour had been employed for thirteen years, was able to provide for the family, and had support from relatives.[344] And, while it was true the mother had not divorced from her abusive husband and had no legal right to stay in the new home, the Department had yet to locate an adoptive home for the mother's three children, and the Department's caseworker could not say whether the three siblings would remain together if the mother's parental rights were terminated.[345] Lastly, though the mother's conduct which led to the Department's intervention weighed in favor of termination under the eighth *Holley* factor, it was not so egregious as to

---

stable, permanent home has been recognized as the paramount consideration in a best-interest determination."); *In Interest of J.N.B.*, 11-15-00292-CV, 2016 WL 2766283, at *2 (Tex. App.—Eastland May 12, 2016, no pet.) (stating, "the goal of establishing a stable, permanent home for a child is a compelling government interest."); *see also In Interest of M.P.*, 13-17-00500-CV, 2018 WL 771914, at *6 (Tex. App.—Corpus Christi Feb. 8, 2018, pet. denied); *also In Interest of A.R.R.*, 04-16-00817-CV, 2017 WL 2791318, at *7 (Tex. App.—San Antonio June 28, 2017, no pet.); *also In Interest of K.V.*, 07-16-00188-CV, 2016 WL 5929597, at *4 (Tex. App.—Amarillo Oct. 11, 2016, no pet.); *In Interest of D.K.W.*, Jr., 01-17-00622-CV, 2017 WL 6520439, at *3 (Tex. App.—Houston [1st Dist.] Dec. 21, 2017, no pet. h.).

[340] *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *7 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied).

[341] *See, e.g., In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *11 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (reversing a termination finding where there was sufficient evidence supporting termination of a mother's rights under subsection (O), but the mother had established a safe and stable environment for the child by the time of trial.)

[342] *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *7.

[343] *Id.* at *7, 9-10.

[344] *Id.* at 11.

[345] *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *11.

directly impact the children's health or safety.[346] On balance, the court of appeals found the evidence legally sufficient to terminate the mother's rights, but factually insufficient to do so, and remanded the case for a new trial.[347]

The court's analysis of the best interest evidence in *R.W.* thus demonstrates that even where a parent may not address through services the concerns initially raised by the Department, if she is able to show the ability to meet the children's needs in a stable and safe environment the evidence under the sixth *Holley* factor will weigh in favor of reunification, particularly where the Department has failed to produce permanent plans for the children.[348]

However, in cases where a parent's conduct is more severe, or the evidence shows the parent remains unstable, the Department's failure to obtain an adoptive placement will not preclude termination.[349] As discussed above, it is not a bar to termination that the Department has not yet located a permanent, adoptive home for a child, "otherwise, determinations regarding best interest would regularly be subject to reversal on the sole ground that an adoptive family has yet to be located."[350] Accordingly, in a case where the evidence shows that keeping a child in an impermanent foster home where the child's needs will be met is the best way to ensure safety and stability, courts will favor termination.[351]

In *In re Q.M.*, for instance, the Department placed six children in three separate homes, only two of which were willing to adopt.[352] In contrast, however, the evidence showed the mother had a history of using illegal drugs and had not yet achieved a stable residence by the time of trial.[353] In this case, given the mother's

---

[346] *Id.* at 9, 12-13 (describing that the mother subjected the children to unsanitary living conditions, including that the residence had animal urine and feces on the floor, and the children were dirty, unclothed, and had to be cleaned and changed by their daycare, but noting nonetheless that "the children appeared healthy and exhibited no signs of physical abuse.")
[347] *Id.* at 13, 15.
[348] *Id.* at 12-13.
[349] *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); s*ee also, e.g., In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013).
[350] *In re C.H.*, 89 S.W.3d at 28.
[351] *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *3, 12 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied).
[352] *Id.* at *3.
[353] *Id.* at *12.

inability to provide the children with a safe home, the stability and care afforded the children by their foster parents weighed in favor of termination regardless of the fact that permanent solutions had not been found for each child involved:

> Four out of the six children are placed in adoptive foster homes. The foster parents are working with the school-age children to ensure their success in school. The foster parents of the twins are ensuring that the twins' healthcare needs are met. The foster parents of the girls are willing to keep the girls and care for them until an adoptive home can be found. By contrast, Mother is living at a reduced rent in a family member's apartment, but does not know if she will need to find another place to live when her lease expires. Father is incarcerated awaiting trial on two felony offenses.[354]

Thus, the case law illustrates that while permanent solutions are best, courts will favor termination if it is necessary to ensure a child is provided with safety and stability even where no permanent home has been identified.[355]

In summary, past decisions demonstrate that courts will consider the following when weighing the evidence relevant to the sixth *Holley* factor:

- Whether the parent is able to provide the care a child needs;
    - any indication the parent remains a danger to the child;
    - evidence demonstrating the parent has addressed their past conduct;
    - the safety and stability of the parent's residence;
- any relatives who are willing and able to provide care;
- whether children are placed with or have access to relationships with their siblings or other relatives;
- any support the parent has from family members, or evidence showing the parent is dependent on family members;
- the care children have received while living in the proposed placement or foster home;

---

[354] *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12.

[355] *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12; *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *11 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.); *In Interest of M.G.*, 14-15-00644-CV, 2015 WL 9241300, at *10 (Tex. App.—Houston [14th Dist.] Dec. 15, 2015, no pet.).

- whether the parent's or Department's proposed plan for the children is speculative or concrete;
- whether the parent's or Department's proposed plan is sustainable;
- whether the proposed home will offer the child permanency.[356]

Factor 7: Stability of the home or proposed placement

Courts' best interest analyses show that the sixth *Holley* factor and the seventh are closely related in that they both focus on a parent's stability and what the evidence indicates about the parent's ability to safely provide for the child.[357] Courts have stated under the seventh *Holley* factor the principle that, "A parent's failure to show that she is stable enough to parent a child for any prolonged period entitles the trial court to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption."[358] The focus under the seventh factor is somewhat broader, therefore, than with the sixth factor, which

[356] *See generally In Interest of M.G.*, 14-15-00644-CV, 2015 WL 9241300, at *11 (Tex. App.—Houston [14th Dist.] Dec. 15, 2015, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *8 (Tex. App.—San Antonio Dec. 27, 2017, no pet. h.); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *12 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied); *In Interest of J.N.S.*, 13-17-00356-CV, 2018 WL 286090, at *8 (Tex. App.—Corpus Christi Jan. 4, 2018, no pet. h.); *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *11 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.).

[357] *See In Interest of A.H.L.*, 01-16-00784-CV, 2017 WL 1149222, at *5 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied) (stating, "Without stability, a parent cannot provide for the child's emotional and physical needs.") *citing In re C.A.J.*, 122 S.W.3d 888, 894 (Tex.App.—Fort Worth 2003, no pet.) (quotation marks omitted); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *7 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (stating, "A parent's failure to show that she is stable enough to parent a child for any prolonged period entitles the trial court to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption.") *citing In re B.S.W.*, No. 14–04–00496–CV, 2004 WL 2964015, at *9 (Tex.App.–Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem.op.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *5 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied) (stating, "Lack of stability, including a stable home, supports a finding that the parent is unable to provide for a child's emotional and physical needs.") *citing In Interest of A.J.–A.*, No. 14–16–00070–CV, 2016 WL 1660858, at *5 (Tex. App.–Houston [14th Dist.] Apr. 26, 2016, no pet.) (mem. op.).

[358] *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *7 *citing In re B.S.W.*, No. 14–04–00496–CV, 2004 WL 2964015, at *9 (Tex.App.–Houston [14th Dist.] Dec. 23, 2004, no pet.) (mem.op.); *see also In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *7 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.) (stating the same).

examines evidence relating to proposed plans for the placement of the children.[359] Under the seventh factor, courts examine not only the stability of the parent's living situation, but also the history of their conduct which may demonstrate an inability to safely provide for a child.[360]

Consequently, the evidence under this factor also overlaps somewhat with the third factor, which regards any danger to a child, and the eighth, which observes a parent's inappropriate conduct.[361] Hence, discussions regarding stability can be

---

[359] *See, e.g., In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *10 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (discussing under the seventh factor mother's conduct which demonstrated her instability, and under the sixth factor evidence regarding the Department's proposed home for the children.)

[360] *In Interest of A.H.L.*, 01-16-00784-CV, 2017 WL 1149222, at *5 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied) (stating, "A parent's drug use may indicate instability in the home because it exposes the children to the possibility that the parent may be impaired or imprisoned."); *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *9 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (reasoning, "…the trial court could have reasonably inferred that Father was either continuing to use illegal drugs and/or continuing to associate with people who were engaging in such conduct until the time of trial, and that such conduct is indicative of instability in Father's home."); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.) (discussing mother's history of homelessness and lack of employment.); *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *9 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.) (discussing mother's history of transience, drug use, and exposing the children to domestic violence and drug users as evidence that she was unstable in best interest analysis).

[361] *See, e.g. In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *5 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (discussing the trial court's findings that the mother endangered the children, failed to participate in services, and abandoned the children as relevant to the third *Holley* factor that termination of the mother's parental rights was in her children's best interest.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *8 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (discussing the parent's history of criminal conduct and drug use as weighing in favor of the conclusion that the parent's lacked stability.); *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *8 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied) (finding the evidence of a father's drug use relevant to the trial court's endangering finding as well as an indication of the father's instability in a best interest analysis.); *In re J.M.*, 2-08-259-CV, 2009 WL 112679, at *8 (Tex. App.—Fort Worth Jan. 15, 2009, no pet.) (holding that mother's use of cocaine while pregnant supported the findings that she endangered her child and engaged in acts or omissions indicating inappropriate parenting as is relevant to the eighth *Holley* factor.); *also In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *17 (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (stating, "The evidence of acts or omissions by Mother that indicate she had an improper relationship with her children are those set forth above in our discussion of Mother's acts that physically and emotionally endangered them.").

wide-ranging, and address any facet of a parent's conduct or history which bears on the parent's ability to provide the child with a stable environment.[362]

In *In re B.G.*, for example, the court traced as relevant to a father's stability the several changes in residence the children experienced before the Department's intervention; domestic violence between the father and mother; the mother's flight to a woman's shelter and the parent's unsuccessful attempts to reconcile; the father's failure to obtain a stable residence or employment during the suit; that the father lived in several different motels; his continued participation in domestic violence while the children were in the Department's care; and the recommendation from a psychologist that the father "demonstrate stability in his day-to-day life" prior to reunification with the child.[363] The Court in *B.G.* therefore addressed the entirety of the history of the father's conduct from before the Department became involved with the family through the pendency of the child protection suit which followed, including discussions of the father's many residences, his violent conduct, his inability to address his conduct through services, and recommendations from service providers regarding impediments to reunification.[364]

The Court of Appeals of Forth worth engaged in a similarly inclusive analysis under the seventh *Holley* factor when it weighed a mother's stability in its best interest determination in *In re D.S.*:

> During the seventeen months the case was pending, Mother had at least five different residences. Mother had two different boyfriends with whom there were concerns of domestic violence and drug use. Mother used various drugs throughout the case and could not keep a job. There was testimony that drugs impaired a person's ability to parent, and there was testimony that the persons selling drugs to Mother could be dangerous. In short, Mother could not provide any semblance of permanence or stability to the children's lives, and she

[362] *See, e.g., In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *7 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.); *see also In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *9 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.).
[363] *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *9.
[364] *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *9.

> was exposing the children to persons whose mental faculties and judgments were impaired by drugs, to persons who either engaged in domestic violence or had a history of domestic violence, and to drug dealers. Mother had not shown herself capable of meeting the children's emotional and physical needs and was, by the very nature of her lifestyle, exposing her children to emotional and physical danger. Mother never attended any parenting classes. In contrast, the children's great aunt, with whom they were placed, had received some training and had taken some classes to become a foster parent and seemed to do a good job handling the children's behaviors. [365]

Like the discussion in *In re B.G.*, the Fort Worth Court in *D.S.* provided an expansive analysis covering the mother's many moves, her endangering conduct including her violent relationships and drug use, her lack of employment, and her failure to participate in rehabilitative services.[366] It is apparent, therefore, that the seventh *Holley* factor is not limited to examinations of a home or placement, but incorporates all aspects of a parent's history which may impact their ability to provide a child with safety and stability. Consequently, practitioners involved in child protection cases are guided to examine the evidence broadly, and consider the history of a parent's living circumstances and conduct, both before the Department's involvement and after, in assessing whether termination is necessary to ensure a child is provided with a stable environment.[367]

The following is a list of factors courts have considered relevant to a best interest determination regarding a parent's stability:

- The parent's history of maintaining a stable home, or failing to;
- evidence of a parent's endangering conduct, particularly drug use;

---

[365] *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *9 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.).
[366] *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *9.
[367] *See In Interest of J.E.M.M.*, 532 S.W.3d 874, 890 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (holding that even in light of the mother's lack of adequate finances or a home, the record nonetheless failed to support termination where "no evidence shows how removing the mother from the children's lives would enhance stability or even maintain the stability two parents provide. Nor does the evidence address how other caregivers could fill the stability gap if the children's ties to mother are severed permanently.")

- any history of criminal conduct;
- a parent's relationships with significant others;
    - supportive or stabilizing relationships;
    - association with dangerous adults;
    - divorce;
    - domestic violence;
    - addiction to drugs or alcohol;
- a parent's efforts with regard to required services;
- details regarding a parent's ability to obtain or maintain housing;
- reliance on others to care for a child;
- the parent's employment history;
- a child's history of living in different homes or placements;
- any safety hazards in the proposed home;
- the child's progress or development while in the parent's or Department's care.[368]

Factor 8: The parent's acts or omissions which may indicate the existing parent-child relationship is not a proper one

When the Texas Supreme Court applied the eighth factor in *Holley* it simply referenced the same conduct the mother engaged in which supported her unfitness under the first prong of Texas' termination statute – in that case, her failure to

[368] *See generally, In Interest of A.H.L.*, 01-16-00784-CV, 2017 WL 1149222, at *5 (Tex. App.—Houston [1st Dist.] Mar. 28, 2017, pet. denied); *In Interest of J.H.G.*, 01-16-01006-CV, 2017 WL 2378141, at *9 (Tex. App.—Houston [1st Dist.] June 1, 2017, pet. denied); *In Interest of T.R.M.*, 14-14-00773-CV, 2015 WL 1062171, at *8 (Tex. App.—Houston [14th Dist.] Mar. 10, 2015, no pet.), *In re O.N.H.*, 401 S.W.3d 681, 687 (Tex. App.—San Antonio 2013, no pet.); *In Interest of B.G.*, 14-14-00729-CV, 2015 WL 393044, at *9 (Tex. App.—Houston [14th Dist.] Jan. 29, 2015, no pet.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *5 (Tex. App.—San Antonio Dec. 27, 2017, no pet. h.); *In re M.G.D.*, 108 S.W.3d 508, 513 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *In Interest of D.S.*, 02-15-00350-CV, 2016 WL 1267808, at *9 (Tex. App.—Fort Worth Mar. 31, 2016, no pet.); *In re M.S.L.*, 14-14-00382-CV, 2014 WL 5148157, at *9 (Tex. App.—Houston [14th Dist.] Oct. 14, 2014, no pet.); *In Interest of J.E.M.M.*, 532 S.W.3d 874, 889–90 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *17 (Tex. App.—San Antonio Dec. 28, 2016, no pet.); *In Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at *8–9 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.).

provide support for the child.[369] Courts of appeals have since followed this lead and typically examine under this factor the same parental conduct which warranted termination under 161.001(b)(1).[370] The eighth factor therefore overlaps largely with the third *Holley* factor, which regards any danger to the child.[371] Accordingly, just as with the third factor, where there is evidence supporting parental termination based on findings that the parent endangered the child, violated the family service plan, abandoned the child, or engaged in any of the other kinds of conduct enumerated under the first prong of 161.001, that evidence will also support that the parent engaged in an act or omission weighing in favor of termination as part of an analysis under the eighth factor.[372] Consequently, the

[369] *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976) (stating, under the eighth *Holley* factor, "the record does support the finding…that [the mother] failed to support her child in accordance with her ability and this failure to support is one of the factors that is to be considered in ascertaining the best interest of the child."); *see also* Tex. Fam. Code Ann. § 161.001(b)(1)(F) (West Supp. 2017).

[370] *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. denied) (examining the father's failure to participate in services and his criminal history as relevant to the eighth *Holley* factor); *In Interest of K.R.G.*, 01-16-00537-CV, 2016 WL 7368082, at *12 (Tex. App.—Houston [1st Dist.] Dec. 15, 2016, pet. denied) (stating, "In regard to acts or omissions that may indicate that the parent-child relationship is not proper, a parent's use of narcotics, inability to provide a stable home, and failure to comply with his FSP support a finding that termination of his parental rights is in the best interest of the children."); *In re C.M.C.*, 273 S.W.3d 862, 877 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (discussing the mother's failure to comply with her family service plan under the eighth *Holley* factor.); *In re U.P.*, 105 S.W.3d 222, 231 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (addressing the father's drug use and criminal history).

[371] *E.g., In Interest of B.Z.S*, 14-16-00825-CV, 2017 WL 536671, at *5 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied) (holding that the trial court's findings that the mother endangered the children, failed to complete services, and constructively abandoned the children supported under the third *Holley* factor that was in the children's best interest.); *In Interest of T.T.*, 04-17-00377-CV, 2017 WL 6597832, at *5 (Tex. App.—San Antonio Dec. 27, 2017, no pet.) (holding that the evidence the mother endangered her children under subsections (D) and (E) of 161.001(b)(1) also supported that she posed a danger to the children as part of best interest analysis.); *see* Tex. Fam. Code Ann. §§ 161.001(b)(1) (West Supp. 2017).

[372] *See, e.g., In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *17 (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (stating, "The evidence of acts or omissions by Mother that indicate she had an improper relationship with her children are those set forth above in our discussion of Mother's acts that physically and emotionally endangered them…").

same principles discussed above in relation to the third *Holley* factor also apply to the eighth.[373]

It should be noted, however, that the eighth factor is not limited to an examination of parental conduct which supports termination under 161.001(b)(1).[374] While evidence that a parent continues to pose a danger based on their past conduct will, as discussed above, outweigh many other best interest considerations, the eighth factor allows for an examination of conduct which appears antithetical to, or representative of, what it means to be a proper parent, even though that conduct does not necessarily fit into one of the categories described by 161.001(b)(1).[375] For instance, in *C.M.C.*, the appellate court discussed the mother's failure to interact with her children during a visit and to comfort one child when the child was upset.[376] In *Q.M.* the Court addressed the parents' failure to make concrete plans for how they would support and house their children.[377] And in *A.A.T.*, the Court weighed a mother's refusal to accept that her child was abused, or to take any responsibility for that abuse.[378] In contrast, in *J.E.M.M.*, the court weighed in the mother's favor that she accepted responsibility for leaving her children unattended, and appeared to have learned from that mistake.[379]

Thus, whereas this factor often focuses primarily on parents' conduct as described under 161.001(b)(1), it allows for a broader application of evidence relevant to the question of whether a parent demonstrates conduct consistent with what might be

---

[373] *See* discussion *supra* pp.48-54.

[374] Tex. Fam. Code Ann. § 161.001(b)(1) (West Supp. 2017); *see, e.g., In re C.M.C.*, 273 S.W.3d at 877 (discussing the mother's failure to interact with children during a visit or to comfort the child when he was upset); *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11 (examining the father's speculative employment plans and mother's unstable living arrangements under the eighth factor); *In re U.P.*, 105 S.W.3d at 231 (including in its discussion that the father failed to visit the child "more than four times over sixteen months."); *In Interest of J.E.M.M.*, 532 S.W.3d 874, 891 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (weighing against the trial court's best interest finding that the mother took responsibility for her actions); *In re R.W.*, 01-11-00023-CV, 2011 WL 2436541, at *9 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (noting that the mother lived in a home where she had no legal right to stay and had no contingency plan for what she would do if her paramour asked her to leave).

[375] *See* cases cited *supra* note 286; *see also* cases cited *supra* note 374.

[376] *In re C.M.C.*, 273 S.W.3d at 877.

[377] *In Interest of Q.M.*, 14-17-00018-CV, 2017 WL 1957746, at *11.

[378] *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *17.

[379] *In Interest of J.E.M.M*, 532 S.W.3d at 890.

expected from a parent who acts with a child's best interest in mind.[380] In *In re J.R.W.*, for example, the Fourteenth District Court of Appeals provided a detailed discussion of a parent's history of visitation with the child as illustrative of the nature of the parent-child relationship in that case, and the parent's conduct which demonstrated her failure to prioritize that relationship:

> The evidence reflects that during his visits with appellant, the child was happy. The evidence suggests that he and appellant bonded some as they played, read books, and sang songs together during their visits. But, the record also reflects that the child referred to appellant by a surname or a nickname derivation of her first name, which suggests that they have not bonded as a parent-child. Appellant admitted that her attendance at the scheduled visitations with the child were inconsistent in the beginning of the case, citing transportation issues as the main reason she could not consistently attend the planned visits. She testified that on some occasions, if she was one minute late to a visit with the child, the visit would be cancelled. She denied missing any visitations in…the months leading up to trial. The paternal grandmother asserted that appellant had engaged in conduct injurious to the physical and emotional welfare of the child through inconsistent visitation. Other witnesses testified that appellant's attendance at the visitations remained inconsistent even up to and throughout the trial proceedings and that appellant had missed forty-three percent of her visits with the child in a span of nearly two years. The evidence in the record reflects that when appellant missed these visits, the child would act out aggressively toward others, suggesting that the child had bonded with appellant and was unhappy when she missed the visitation. A parent's inconsistent visits may serve as an example of acts or omissions indicating that termination is in the child's best interest.[381]

[380] *E.g.*, *In re J.R.W.*, 14-12-00850-CV, 2013 WL 507325, at *8 (Tex. App.—Houston [14th Dist.] Feb. 12, 2013, pet. denied).
[381] *In re J.R.W.*, 14-12-00850-CV, 2013 WL 507325, at *8.

This analysis demonstrates a deeper examination of the evidence as relevant to the eighth *Holley* factor than a simple reiteration of the parent's conduct which warranted termination under 161.001(b)(1). As demonstrated, the court's focus was on the nature of the relationship between the parent and the child as illustrated by the child's enjoyment of their visitations together, and that despite the child's enjoyment of the visits the parent failed to attend them regularly.[382] Thus, the parent's failure to prioritize the child's desire for visits constituted an act or omission weighing in favor of termination.[383]

This precedent indicates, therefore, that the eighth *Holley* factor invites an assessment not only of evidence relevant to parental termination under 161.001(b)(1), but also of any conduct indicating a parent has, or has not, prioritized the child's interests as would be expected in the context of what the eighth factor describes as a "proper" parent-child relationship.

Factor 9: Any excuse for the acts or omissions of the parent

As discussed above, in *Holley*, the ninth best interest factor played a pivotal role in that it operated to preclude termination of the mother's parental rights based on the finding that the conduct she engaged in which supported termination was excused.[384] There, although the mother failed to provide support for the child, the Court held that she was excused from her duty to support where she was never ordered to pay support, the father never sought support from the mother, and it was undisputed that the child was adequately provided for.[385] *Holley* seemingly demonstrates, therefore, that the ninth best interest factor can be a powerful determinant in a best interest analysis.

Nonetheless, in child protections cases decided since *Holley* the ninth factor has rarely, if ever, operated to reverse a termination finding.[386] The issue of whether a

---

[382] *Id.*
[383] *Id.*
[384] *Holley*, 544 S.W.2d at 371; *see* discussion *supra*, pp.7-8.
[385] *Id.*
[386] *See, e.g., In Interest of Z.M.*, 456 S.W.3d 677, 688 (Tex. App.—Texarkana 2015, no pet.) *citing In Interest of S.H.A.*, 728 S.W.2d 73, 89 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (stating, "A parent's lack of education, training, or misfortune is considered when reviewing excuses for acts or omissions of a parent; however, these considerations do not negate evidence tending to show that termination is in the child's best interest."); *but see Matter of R------ E------*

parent's conduct is excused often comes up in the context of determinations regarding whether a parent has violated the terms of their family service plan.[387] The principle rule applied when a parent presents reasons for their failure to participate in services is "the Family Code does not provide for excuses for failure to comply in assessing a statutory violation. Rather, any excuse for failing to complete a family services plan goes only to the best interest determination."[388] Often, however, the deference given to the fact-finder's credibility determinations dispenses with excuses parents provide regarding their compliance with a service plan.[389]

W------, 545 S.W.2d 573, 582 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (stating, "However, the harsh and irrevocable remedy of termination is not justified where the evidence shows that a parent's failure to provide a desirable degree of care and support of the child is due *solely* to lack of intelligence, training, or misfortune.") (emphasis added). The author has been unable to find a case in which the ninth *Holley* factor worked as it did in *Holley* to avoid parental termination. If you have read this far, perhaps your research skills will better those of the author and he kindly asks for correction if such a case exists.

[387] *See, e.g., In Interest of I.G.*, 04-17-00554-CV, 2018 WL 442509, at *3 (Tex. App.—San Antonio Jan. 17, 2018, pet. denied); *In Interest of B.M.C.*, 01-16-00300-CV, 2016 WL 5787286, at *7 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, pet. denied); *In Interest of I.L.G.*, 531 S.W.3d 346, 356 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *D.F. v. Texas Dept. of Family & Protective Services*, 393 S.W.3d 821, 836 (Tex. App.—El Paso 2012, no pet.); *In re S.W.*, 10-12-00470-CV, 2013 WL 5807920, at *12 (Tex. App.—Waco Sept. 19, 2013, no pet.).

[388] *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *See also In Interest of B.M.C.*, 01-16-00300-CV, 2016 WL 5787286, at *7 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, pet. denied) (stating, "the Family Code does not make provision for excuses for a parent's failure to comply with the trial court's order to complete a family service plan…") (internal quotations and citations omitted); *see also, e.g., K.C. v. Texas Dep't of Family & Protective Services*, 03-17-00184-CV, 2017 WL 3585255, at *2 (Tex. App.—Austin Aug. 17, 2017, no pet.) (holding, "Incarceration…is not a legal excuse or defense to a parent's failure to comply with a service-plan order."); *but see In re A.J.L.*, 04-14-00013-CV, 2014 WL 4723129, at *4 (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (reversing a termination finding in part based on reasoning that a mother's incarceration prohibited her from complying with her service plan:

> Further, the record reflects that Mother did comply with all the requirements of her family service plan up until the time she was incarcerated. [The caseworker] did not state whether services were available to Mother while she was incarcerated. [The caseworker] had not had any contact with Mother during the approximately five months that she had been incarcerated prior to trial, but did note that she had been informed that Mother was trying to reach her.)

[389] *In Interest of I.L.G.*, 531 S.W.3d at 356 (stating, "Mother's excuse for the failure to complete the service plan was poor communication with the Department caseworker. We note the fact

In other contexts as well, the case law demonstrates that where the Department presents sufficient proof of a parent's conduct which endangered a child, a parent will rarely present evidence sufficient to excuse it.[390] In *In re A.A.T.*, the San Antonio Court of Appeals declined to credit the evidence presented by the mother that the injuries done to a child were not caused by physical abuse:

> Mother presented a myriad of excuses for her acts and omissions. The excuses consisted of, with regard to the abuse, her contention that she was never presented with "a shred" of evidence that J.G. was abused. In support, she presented evidence from private investigator Frederick Knoll Jr.—a former and subsequent Del Rio police officer—who opined it was highly possible J.G.'s facial injuries were the result of a fall. He also opined that at least the left leg fractures were caused when an older child dropped J.G. As to the other fractures, Officer Knoll testified he did not believe they were the result of abuse due to an absence of bruising, swelling, and redness. He dismissed the abuse allegations provided by Mother's three older children in forensic interviews and to L.R., stating the children "seemed a little confused," but not expanding on this claim. However, Officer Knoll admitted he

---

finder had discretion to determine the weight and credibility of Mother's testimony."); *D.F. v. Texas Dept. of Family & Protective Services*, 393 S.W.3d at 836–37 ("The trial court, as fact finder, was entitled to disbelieve some, none, or all of D.F.'s excuses based on the evidence presented, and reasonably could have formed a firm belief or conviction that D.F. excuses for her actions and inactions were simply inadequate."); *In Interest of B.M.C.*, 01-16-00300-CV, 2016 WL 5787286, at *7 (Tex. App.—Houston [1st Dist.] Oct. 4, 2016, pet. denied) (holding, where the mother's testimony conflicted with the caseworker's, "A reasonable factfinder could have chosen to believe [the caseworker]'s testimony that Mother could have completed the family safety plan in the time given."); *In re S.W.*, 10-12-00470-CV, 2013 WL 5807920, at *12 (Tex. App.—Waco Sept. 19, 2013, no pet.) (As set forth above, [the father] offered excuses for why he did not complete his service plan and why he stopped contacting and visiting [the child]. [The caseworker] disputed much of [the father]'s excuses, and the trial court was free to believe [the caseworker] over [the father].")

[390] *See, e.g. In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *17–18 (Tex. App.—San Antonio Dec. 28, 2016, no pet.) (discounting the evidence a mother presented that the child's injuries were not caused by abuse); *In re U.P.*, 105 S.W.3d 222, 232 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (declining to credit father's excuses for his failures to support or visit the child, or to stop the mother from taking drugs while pregnant.); *In Interest of L.D.A.*, 01-14-00782-CV, 2015 WL 293118, at *5 (Tex. App.—Houston [1st Dist.] Jan. 22, 2015, no pet.) (declining to credit mother's denials of her drug use and physical abuse ot the child.)

> was never told that Dr. Sanchez believed J.G.'s facial bruising was the result of multiple slaps, stating he wished he had been told. Although he was aware Dr. Lukefahr believed the fractures were the result of abuse, he was never advised that a full skeletal survey of J.G. was ordered and completed…, and that it was clear. He also admitted R.T. had access to J.G. at the times his injuries must have occurred. Officer Knoll also admitted the only person he interviewed who was in the home at the time of the alleged abuse was Mother. Despite this, the officer continued to opine there was no abuse.

The Court went on to affirm termination, holding, "The jury could have…determined Mother exposed her children to risk, and ultimately actual abuse, endangering their physical and emotional well-being."[391] The case demonstrates what is typically true, that where the Department presents sufficient evidence of a parent's conduct which warrants termination under 161.001(b)(1), the parent will have a difficult time presenting an excuse which will sufficiently avoid the termination finding in a best interest analysis.[392]

It should be noted, however, that despite *Holley*'s allowance for an evaluation of excuses, the Texas Legislature recently amended the Family Code so that it may now "provide for excuses for failure to comply" with a family service plan.[393] The code now states that a court may not terminate parental rights for a failure to comply with a family service plan if a parent, despite a good faith effort and through no fault of their own, was unable to comply.[394] Thus, where a parent presents "by a preponderance of evidence" that they made good faith efforts, but despite those efforts compliance was not possible, the parent may avoid

---

[391] *In Interest of A.A.T.*, 04-16-00344-CV, 2016 WL 7448370, at *18.

[392] *In re S.G.S.*, 130 S.W.3d 223, 238, 240-41(Tex. App.—Beaumont 2004, no pet.) (affirming that termination was in the child's best interest where the evidence demonstrated the mother neglected the child, causing him to be "critically ill from lack of nourishment," even where the court found the mother's conduct "was at least partly attributable to forces beyond the parent's control."); *Yonko v. Dep't of Family & Protective Services*, 196 S.W.3d 236, 248 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (affirming termination despite the mother's excuses for failing to enroll her child in school and her explanation that her incarceration was the result of choices she made "to further the needs of her family and her son.").

[393] *In re M.C.G.*, 329 S.W.3d at 675; *see* Tex. Fam. Code Ann. § 161.001(d) (West Supp. 2017).

[394] Tex. Fam. Code Ann. § 161.001(d) (West Supp. 2017)

termination under subsection (O).[395]Accordingly, despite the past difficulty parents have had presenting sufficient evidence under the ninth *Holley* factor to avoid termination, practitioners have new reason to carefully track and assess the evidence with regard to a parent's participation in a family service plan.

IV. Guidance from the Texas Family Code

In addition to the substantial body of case law which has addressed best interest determinations in parental termination cases, the Family Code itself provides some guidance regarding additional factors to consider.[396] Though no definition of best interest is supplied by the parental termination statute at section 161.001, Chapter 263 of the Code provides a significant list of relevant factors to consider in determining the best interest of a child.[397] Courts frequently reference section 263.307 in combination with the *Holley* factors when engaging in best interest analyses, as well as for this provision's statement that, "the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest."[398] Accordingly, any practitioner attempting to assess a child's best interest can seek helpful guidance among the factors the Code enumerates. Many

---

[395] *Id.* (stating that a parent must prove their efforts and inability "by a preponderance of evidence.")

[396] *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (citing Tex. Fam. Code § 263.307 as a resource for determining what factors to consider in a best interest analysis.); *In Interest of J.M.T.*, 519 S.W.3d 258, 268 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (referencing 263.307 as providing best interest factors).

[397] Tex. Fam. Code Ann. § 263.307 (West Supp. 2017).

[398] *Id.*; *see, e.g.*, *In Interest of C.A.W.*, 01-16-00719-CV, 2017 WL 3081792, at *7 (Tex. App.—Houston [1st Dist.] July 20, 2017, pet. denied); *In Interest of M.D.*, 02-14-00305-CV, 2015 WL 729506, at *10 (Tex. App.—Fort Worth Feb. 19, 2015, no pet.); *J.M. v. Texas Dep't of Family & Protective Services*, 03-17-00754-CV, 2018 WL 1076825, at *5 (Tex. App.—Austin Feb. 28, 2018, no pet. h.); *In Interest of J.I.M.*, 517 S.W.3d 277, 284 (Tex. App.—San Antonio 2017, pet. denied); *In re C.J.*, 392 S.W.3d 763, 767 (Tex. App.—Dallas 2012, pet. denied); *In re A.W.*, 06-07-00118-CV, 2008 WL 360825, at *2 (Tex. App.—Texarkana Feb. 12, 2008, no pet.); *In Interest of C.S. III*, 07-17-00062-CV, 2017 WL 3298384, at *5 (Tex. App.—Amarillo Aug. 2, 2017, no pet.); *In Interest of D.H.*, 09-16-00163-CV, 2016 WL 4485735, at *3 (Tex. App.—Beaumont Aug. 25, 2016, no pet.); *In Interest of P.E.M.*, 10-17-00174-CV, 2017 WL 4293211, at *2 (Tex. App.—Waco Sept. 27, 2017, pet. denied); *In re B.H.*, 12-12-00355-CV, 2013 WL 1342540, at *9 (Tex. App.—Tyler Apr. 3, 2013, no pet.); *In re C.U.M.H.*, 13-13-00477-CV, 2014 WL 346036, at *11 (Tex. App.—Corpus Christi Jan. 30, 2014, no pet.); *Interest of V.K.S.*, 14-15-00729-CV, 2016 WL 552480, at *3 (Tex. App.—Houston [14th Dist.] Feb. 11, 2016, no pet.).

of the factors overlap with those announced by *Holley*, but the list in 263.307 is decidedly more detailed, and therefore aids in the development of evidence necessary to determinations made in child protection cases. The list is as follows:

> (a) In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.
>
> (b) The following factors should be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment:
>
> > (1) the child's age and physical and mental vulnerabilities;
> >
> > (2) the frequency and nature of out-of-home placements;
> >
> > (3) the magnitude, frequency, and circumstances of the harm to the child;
> >
> > (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;
> >
> > (5) whether the child is fearful of living in or returning to the child's home;
> >
> > (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;
> >
> > (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;
> >
> > (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;
> >
> > (9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.

(c) In the case of a child 16 years of age or older, the following guidelines should be considered by the court in determining whether to adopt the permanency plan submitted by the department:

(1) whether the permanency plan submitted to the court includes the services planned for the child to make the transition from foster care to independent living; and

(2) whether this transition is in the best interest of the child.[399]

In addition to the above list of factors, the Code requires the development of significant evidence relevant to the child at statutorily required hearings during the course of a case.[400] Thus, any testimony or documentary evidence offered during these statutory hearings should be seen as part of the necessary evidence to address should the case ultimately go to trial on the question of whether termination will best serve the child.[401] Included among the many findings a trial court is required to make at these hearings are:

- Whether the Department has exercised due diligence in locating "all necessary persons," including missing fathers and other relatives;
- the family service plans filed by the Department and the parents' progress toward alleviating the necessity of the child's placement in foster care;
- the continuing necessity and appropriateness of the child's placement and whether the placement continues to serve the child's best interest;
- the appropriateness of the Department's goal with respect to the child;
- whether the child has had the opportunity to express an opinion, where developmentally appropriate, regarding the permanency goal in the suit and any necessary medical care for the child;

[399] Tex. Fam. Code Ann. § 263.307 (West Supp. 2017).

[400] Tex. Fam. Code Ann. §§ 263.201-02 (West 2014 and West Supp. 2017 (requiring the court to hold a status hearing and make findings regarding whether the Department has made diligent efforts to locate missing fathers and other relatives of a child, as well as the service plan developed by the Department and whether the plan adequately ensures that efforts are made to enable the parents to provide the child with a safe environment.); Tex. Fam. Code Ann. §§ 263.304-05 (West 2014 and West Supp. 2017) (requiring regular Permanency Hearings at which the court must make numerous findings, including regarding missing parents or relatives of the child, the parents' progress with their service plans, and the child's progress and any needs the child may have.)

[401] *See In Interest of B.D.A.*, 01-17-00065-CV, 2018 WL 761313, at *13 (Tex. App.—Houston [1st Dist.] Feb. 8, 2018, no pet. h.) (noting the sparse evidence in the record and stating that it would be helpful to have "a more extensive trial record containing evidence presented during the various prior hearings…")

- whether educational goals and needs of the child have been set and addressed;
- any services needed to assist the child;
- whether the child's continued removal from the parents is necessary.[402]

In addition to requiring that these findings be made every three months during a child protection case, the Family Code also mandates that the Department file a Permanency Progress Report with the court "not later than the 10th day before the date set for each permanency hearing," and distribute that report to all parties involved in the suit, including the child's attorney and volunteer advocate.[403] These reports, too, are required to contain significant information relevant to a best interest assessment, including information relevant to the required findings listed above, any information the Department determines is appropriate or that is requested by the court, and information relevant to a "significant event," which the Code defines as relating to:

- A child's placement change, including any failure to locate an appropriate placement;
- a significant change in the child's medical condition;
- any initial prescription made for the child of a psychotropic medication;
- a major change in school performance or regarding a disciplinary event at school.[404]

Plainly, these reports and required findings are highly relevant to a best interest assessment conducted utilizing both the *Holley* factors as well as the enumerated list of considerations in 263.307.[405] Consequently, any practitioner who tracks the information presented at statutory hearings and in the Department's reports should have the ability to make an informed best interest assessment, as well as adduce helpful evidence at trial to ensure a court's determination is as well informed as possible.

---

[402] Tex. Fam. Code Ann. § 263.306 (West Supp. 2017).
[403] Tex. Fam. Code Ann. § 263.303-305 (West 2014 and West Supp. 2017).
[404] Tex. Fam. Code Ann. §§ 263.303, 264.018 (West Supp. 2017).
[405] *Holley v.* Adams, 544 S.W.2d 367, 371-372; Tex. Fam. Code Ann. § 263.307 (West Supp. 2017).

V. CONCLUSION

Given the central importance of the best interest determination, all practitioners are well-advised to be fluent in the laws which aid in answering the question of what is best for a child. And, though the factors and principles set forth in both case law and statute are voluminous, they plainly indicate the necessity of detailed attention to each child involved in a suit, and the circumstances particular to that child which will determine where his or her best interest lay.