Affirmed in Part, Reversed in Part, and Rendered, and Majority, Concurring, and Dissenting Opinions filed September 20, 2022.

In The

Fourteenth Court of Appeals

NO. 14-22-00217-CV

IN THE INTEREST OF R.R.A., H.G.A., H.B.A., CHILDREN

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Cause No. 2019-63090

MAJORITY OPINION

Appellant H.B.A., Jr. ("Father") appeals the trial court's final order terminating his parental rights to his three children, R.R.A., H.G.A., and H.B.A. In four issues, Father argues that (1) the evidence is legally and factually insufficient to support termination under Family Code § 161.001(b)(1)(D), (E), (P); (2) the evidence is legally and factually insufficient to support that termination was in the children's best interest; (3) the trial court erred in appointing the Department of Family and Protective Services ("the Department") as the children's primary managing conservator; and (4) the trial court erred in denying Father's motion for

new trial. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (P), (b)(2). Because we conclude that the evidence is legally insufficient to support termination under any of the three predicate grounds found by the trial court and legally insufficient for the appointment of the Department as the children's managing conservator, we reverse the trial court's final order as to the termination of Father's parental rights and the appointment of the Department as the children's managing conservator, and we render judgment, denying the relief requested in the Department's petition.[1]

I. BACKGROUND

In January of 2020, the three children subject to this suit were placed in the care of the Department after an investigation into allegations that Father was living out of his car with the children and using drugs. At that time, R.R.A. was two years old and twins H.B.A. and H.G.A. were one year old. During the investigation, Father tested positive for methamphetamine.

On March 3, 2020, the Department filed its petition seeking termination of the parental rights of Father and Mother and requesting that the Department be appointed the managing conservator of the children if the children could not be reunified with either parent or permanently placed with a relative or other suitable person. The Department alleged that Father's parental rights should be terminated because Father: (1) knowingly placed or allowed the children to remain in conditions that endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the children's physical or emotional well-being; (3) executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided

[1] The trial court's final order also terminated the parental rights of the children's Mother. The part of the trial court's final order terminating Mother's parental rights remains unchanged, as it was not challenged by any party on appeal.

by the Family Code; (4) constructively abandoned the children who had been in the permanent or temporary conservatorship of the Department for at least six months, during which the Department made reasonable attempts to return the children, but Father did not regularly visit or maintain significant contact with the children, and Father demonstrated an inability to provide the children with a safe environment; (5) failed to comply with the provisions of a court order that specifically established the actions necessary for the return of the children after they had been in the permanent or temporary managing conservatorship of the Department for at least nine months following the children's removal for abuse or neglect; and (6) used a controlled substance, as defined by Chapter 481 of the Texas Health and Safety Code, in a manner that endangered the health or safety of the children, and failed to complete a court-ordered substance abuse treatment program or continued to abuse a controlled substance. *See id.* § 161.001(b)(1)(D), (E), (K), (N), (O), (P).

The Department's family plan created after the children's removal noted that the children were in good health and developmentally on target.[2] The plan further provided that the Department:

> is worried that [Father] is not able to provide a safe and stable home environment for the children and himself. The [Department] is worried about [Father's] substance abuse history and testing positive for methamphetamines which lead to the removal of the children and [Father] and the children being homeless and living in the car.

The plan required Father, in relevant part, to: provide proof of employment and stable housing; attend all meetings, conferences, parent/child visits, and court hearings in regard to the children; refrain from criminal activity; complete a substance abuse assessment, follow the recommendations, and take monthly drug tests; complete a psycho-social assessment and follow recommendations; and

[2] The Department's family plan was admitted as an exhibit at trial.

communicate and meet with the Department's caseworker, Britney Jones ("Jones"), on a monthly basis at her office.

A. EVIDENCE AT TRIAL

The final hearing before the bench began on September 1, 2021.[3] The trial court heard testimony from: Terri Holstead ("Holstead") and Stephanie Cole ("Cole"), custodians of records for Texas Alcohol and Drug Testing Service; Jones, the Department's caseworker; Father; and Tammy Lamb ("Lamb"), the paternal grandmother.

1. Holstead & Cole

Holstead and Cole testified regarding the Texas Alcohol and Drug Testing Service records of the drug tests taken by Father during the pendency of the case, which were admitted into evidence by the trial court. The records show that Father tested positive for methamphetamine in April and June 2020 and for marijuana on 10/06/21, but tested negative for drugs on 4/27/20, 5/22/20, 7/10/20, 8/5/20, 8/14/20, 8/20/20, 8/25/20, 9/4/20, 10/20/20, and 2/27/21.

2. Jones

Jones testified that the children came into the Department's care because of a referral that Father was homeless and was possibly using drugs. In January 2020, after Father's positive drug test for methamphetamine, the children were removed from Father's care and placed into two separate foster homes. In September 2020, the children were placed with Lamb until they were removed from her care on February 23, 2021, after Lamb was hospitalized. At the time of the removal of the children from Lamb's home, Father was present despite being prohibited from

[3] At the time of the final hearing, the oldest child was four years old and the twins were two years old.

having unsupervised visits with the children. Jones also testified that while the children were being removed, Father made a comment that he might as well kill himself if the children go back into foster care. A female friend of Father's was also at the grandmother's house during the removal and was arrested for possession of drug paraphernalia and methamphetamine.

As a result of Father's self-harm comment, Jones testified that Father was admitted into a psychiatric hospital. The discharge order provides that Father was diagnosed with anxiety and depression. Father's medical records from the psychiatric hospital indicate that Father was instructed to follow up with a psychiatrist and a therapist upon discharge. Jones was unaware of whether Father had complied with the recommendations.

Regarding the family service plan, Jones explained that Father performed well initially by participating in the services and completing parenting classes, individual counselling, and substance abuse treatment. After completing his substance abuse treatment, Father no longer wanted to participate in services, and also tested positive for marijuana in October 2020. The Department then asked Father to complete another substance abuse assessment, which he did, and another supporting out-patient treatment, which he refused. Father also subsequently stopped participating in drug tests.

Regarding Father's visitation with the children during the six months preceding trial in September 2021, Jones testified that Father was not allowed to visit the children in June of 2021 and that Father had not reached out to her to visit the children since the end of May 2021 or possibly June. According to Jones, the Department scheduled one visit in June of 2021, which the Department cancelled after R.R.A.'s therapist advised that the visitation would not be in R.R.A.'s best interest.

Jones testified there was no evidence that Father ever physically harmed the children, that he had ever used drugs around the children, or that he threatened the children when he made the comment of self-harm. Father had continued contact with the children until February 2021; the children had a good relationship with Father; Father had a loving relationship with his children "prior to his absence"; the children loved, hugged, and were physically interactive with Father; Jones never witnessed any sign during visitations that Father was inappropriate or endangered the children; and Jones never witnessed any evidence that Father physically harmed the children or placed them with someone who would physically harm them.

Regarding Lamb, Jones stated that the Department determined Lamb had a safe and stable household and that the Department did not have any concerns with Lamb's household until Lamb became ill in February 2021, leading to the children's second removal. Lamb did not tell Jones that Lamb's health would prevent her from being able to care for the children. However, prior to the beginning of the final hearing, Lamb told Jones that Lamb did not want to keep the children long term. During trial, Lamb sent Jones an email inquiring about having the children placed back with her. Jones stated that Lamb is not a viable placement because Lamb "already expressed previously she did not want long-term care of the children" and the Department's concern of "instability, as far as saying she will and she will not."

Finally, Jones testified that Father was arrested and convicted in 2013 for assault of a family member. According to Jones, termination was in the best interest of the children because Father had not eliminated or alleviated the Department's concerns regarding the children and because Father: had not tried to visit or contact the children, had not checked in on their welfare during the six months preceding trial and had not shown any stability, had not provided any living arrangements, and had not completed the court-ordered family service plan.

3. Father

Father testified that he loves the children; that he has never endangered them or placed them in an endangering environment; and that Lamb is willing to help him care for the children and house them until Father is able to get employment. Father is a seasonal blue-collar worker and, while unemployed at the time of trial, he was seeking employment.

According to Father, he did not visit the children in the six months preceding trial because the Department cancelled the visits he scheduled in May and June 2021—four and three months before trial in September of 2021, respectively. At the time of trial, Father lived with a friend in Crosby, Texas, and he agreed that he had not provided the Department with a lease or letter from his roommate indicating he had appropriate housing. Father testified he had been the children's primary caregiver before the children's removal and that the children's mother abandoned them when the twins were six months old.

4. Lamb

Lamb, the paternal grandmother, testified that she had never seen Father harm or endanger the children in any way and that Father loves the children and the children love Father. Lamb testified that she told the Department, following her hospitalization in February 2021, that her health precluded her from caring from the children at that time, but that she was now in better health, able to care for the children, and that she would allow the children and Father to live with her, if necessary, to support the children.

5. Trial Court's Ruling

The trial court found that termination of Father's parental rights was appropriate under § 161.001(b)(1)(D), (E), and (P) and in the children's best interest,

and terminated Father's parental rights to his three children. *See id.* § 161.001(b)(1)(D), (E), (P), (b)(2). Furthermore, the trial court found that the appointment of Father as managing conservator of the children would not be in the children's best interest because (1) the appointment would significantly impair the children's physical health or emotional development, and (2) it would not be in the best interest of the children to appoint a relative of the children or another person as managing conservator. *See id.* § 263.404. The trial court appointed the Department as the children's sole managing conservator. This appeal followed.

II. BACKGROUND

In his first issue, Father argues that the evidence is legally and factually insufficient to support termination under the statutory predicate grounds found by the trial court. *See id.* § 161.001(b)(1)(D), (E), (P). The Department argues there was sufficient evidence and references allegations against Father that can be categorized as follows: drug use, homelessness, criminal activity and past violence, failure to complete a parenting plan, and mental illness.

A. APPLICABLE LAW & STANDARD OF REVIEW

Involuntary termination of parental rights involves fundamental constitutional rights and divests the parent and child of all legal rights, privileges, duties, and powers normally existing between them, except for the child's right to inherit from the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *see Stantosky v. Kramer*, 455 U.S. 745, 753 (1982). "Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the 'death penalty' of civil cases." *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring). Accordingly, termination proceedings must be strictly scrutinized. *Id.* at 112. In such cases, due process requires application of the "clear and convincing" standard of proof. *Id.* (citing *Stantosky*, 455 U.S. at 769; *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex.

2002)). This intermediate standard falls between the preponderance of the evidence standard of civil proceedings and the reasonable doubt standard of criminal proceedings. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). "'Clear and convincing evidence' means a 'measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019) (per curiam) (quoting Tex. Fam. Code Ann. § 101.007); *see In re K.M.L.*, 443 S.W.3d at 112–13 ("In cases requiring clear and convincing evidence, even evidence that does more than raise surmise and suspicion will not suffice unless that evidence is capable of producing a firm belief or conviction that the allegation is true.").

The trial court may order the termination of the parent-child relationship if the court finds by clear and convincing evidence that: (1) the parent committed an act or omission described Family Code § 161.001(b)(1) and (2) termination is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b); *In re N.G.*, 577 S.W.3d at 232. "To affirm a termination judgment on appeal, a court need uphold only one termination ground—in addition to upholding a challenged best interest finding—even if the trial court based the termination on more than one ground." *In re N.G.*, 577 S.W.3d at 232; *see* Tex. Fam. Code Ann. § 161.001(b). However, we must always review any sufficiency challenge to a termination on appeal under subsection (D) and (E). *See In re N.G.*, 577 S.W.3d at 235 ("When a parent has presented the issue on appeal, an appellate court that denies review of a section 161.001(b)(1)(D) or (E) finding deprives the parent of a meaningful appeal and eliminates the parent's only chance for review of a finding that will be binding as to parental rights to other children.").

In a legal sufficiency review, a court should view the evidence in a light most favorable to the finding to determine whether a reasonable trier of fact could have

formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d at 266. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* This does not mean that a court must disregard all evidence that does not support the finding. *Id.* Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.*

If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. *In re J.F.C.*, 96 S.W.3d at 266–67. In a factual-sufficiency review, the appellate court must consider whether disputed evidence is such that a reasonable fact finder could not have resolved it in favor of the finding. *In re A.C.*, 560 S.W.3d at 631. Evidence is factually insufficient if, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of a finding is so significant that the factfinder could not have formed a firm belief or conviction that the finding was true. *Id.*

B. STATUTORY PREDICATE GROUNDS

As alleged by the Department in this case, § 161.001(b)(1) of the Family Code provides that the trial court may order the termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has:

(D) knowingly placed or knowingly allowed the child to remain in

> conditions or surroundings which endanger the physical or emotional well-being of the child;
>
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
>
> . . .
>
> (P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
>
> > (i) failed to complete a court-ordered substance abuse treatment program; or
> >
> > (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (P). As to a parent's drug use, all of these grounds require a causal link between the parent's drug use and the endangerment to the child. *See id.*; *In re L.C.L.*, 599 S.W.3d 79, 84–86 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (en banc). "Endanger" means "to expose to loss or injury [or] to jeopardize." *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). The term means "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment," but "it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *Id.*; *see In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009).

1. § 161.001(b)(1)(D)

Subsection 161.001(b)(1)(D) allows for termination of parental rights if clear and convincing evidence supports a conclusion that the parent " knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." Tex. Fam. Code Ann. § 161.001(b)(1)(D). The relevant time frame to determine whether there is clear and convincing evidence of endangerment is before the child was removed. *In re J.R.*,

171 S.W.3d 558, 569 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Further, termination under subsection (D) may be based on a single act or omission. *See In re J.E.M.M.*, 532 S.W.3d 874, 884 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

The acceptability of living conditions and parental conduct in the home are subsumed in the endangerment analysis. *See In re V.A.*, 598 S.W.3d 317, 328 (Tex. App.—Houston [14th Dist.] 2020, pet. denied); *In re J.E.M.M.*, 532 S.W.3d at 880–81; *In re J.D.*, 436 S.W.3d 105, 114 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Likewise, "inappropriate, abusive, or unlawful conduct by persons who live in the child's home or with whom the child is compelled to associate on a regular basis in the home is a part of the 'conditions or surroundings' of the child's home" under subsection (D). *In re M.D.M.*, 579 S.W.3d 744, 764 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

2. § 161.001(b)(1)(E)

Subsection 161.001(b)(1)(E) allows for termination of parental rights if clear and convincing evidence supports a conclusion that the parent "engaged in conduct . . . which endangers the physical or emotional well-being of the child." Tex. Fam. Code Ann. § 161.001(b)(1)(E). The parent's conduct both before and after the child is born is relevant. *See In re J.O.A.*, 283 S.W.3d at 345; *Avery v. State*, 963 S.W.2d 550, 553 (Tex. App.—Houston [1st Dist.] 1997, no writ). The relevant inquiry is whether evidence exists that a parental course of conduct endangered the child's physical or emotional well-being. *Walker v. Tex. Dep't of Fam. & Protective Servs.*, 312 S.W.3d 608, 616–17 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

However, the relationship of the parent and child, as well as efforts to improve or enhance parenting skills, are also relevant in determining whether a parent's conduct results in endangerment under § 161.001(b)(1)(E). *See In re S.R.*, 452 S.W.3d 351, 362 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Further, in a

termination suit, acts done in the distant past, without showing a present or future danger to a child, cannot be sufficient to terminate parental rights. *See Hendricks v. Curry*, 401 S.W.2d 796, 800 (Tex. 1966) (stating that termination of parental rights should not be based solely on conditions that existed in the distant past but no longer exist); *In re S.M.L.*, 171 S.W.3d at 479 (placing "particular significance" on crimes committed after child's birth because parent committed them knowing they would result in incarceration, leaving the child without his or her support), *overruled on other grounds by L.C.L.*, 599 S.W.3d at 85–86 & n.3.

3. Criminal Activity

"[I]ncarceration alone will not support termination, [but] evidence of criminal conduct, convictions, and imprisonment may support a finding of endangerment under subsection (E)." *In re E.R.W.*, 528 S.W.3d 251, 264 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see Boyd*, 727 S.W.2d at 533. In considering the acts and omissions of a parent leading to the parent's incarceration, we consider whether it can be inferred from the criminal conduct that the parent endangered the safety of the child. *In re F.M.E.A.F*, 572 S.W.3d 716, 733 (Tex. App.—Houston [14th Dist.] 2019, pet. denied); *see In re C.T.E.*, 95 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). "Termination of parental rights should not become an additional punishment for imprisonment for any crime." *In re F.M.E.A.F.*, 572 S.W.3d at 733; *In re C.T.E.*, 95 S.W.3d at 466; *see also In re E.N.C.*, 384 S.W.3d 796, 805 (Tex. 2012) (rejecting proposition that any offense committed by a parent that could lead to imprisonment or confinement would establish endangerment to children). However, routinely subjecting a child to the probability that the child will be left alone because his parent is in jail endangers the child's physical and emotional well-being. *In re J.J.L.*, 578 S.W.3d 601, 612 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

4. Drug Abuse

"[A] parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct." *In re J.O.A.*, 283 S.W.3d at 345. However, a parent's illegal drug use is not, on its own, sufficient evidence of endangerment. *In re L.C.L.*, 599 S.W.3d at 84–86. There must be a showing of a causal connection between the parent's drug use and endangerment of the child. *Id.*; *see also In re M.P.*, 618 S.W.3d 88, 106 (Tex. App.—Houston [14th Dist.] 2020) (concluding that evidence was factually insufficient to support an endangerment finding under § 161.001(b)(1)(E) when there was "no evidence concerning the when, where, or to what extent Father used illegal drugs, and no evidence of a causal connection between Father's drug use and endangerment to [the child]"), *rev'd on other grounds*, 639 S.W.3d 700 (Tex. 2022).

5. Homelessness

A parent who lacks stability, income, and a home is unable to provide for a child's emotional and physical needs; evidence of these factors supports a finding of endangerment to the child. *See In re J.R.*, 171 S.W.3d at 578; *In re J.T.G.*, No. 14-10-00972-CV, 2012 WL 171012, at *17 (Tex. App.—Houston [14th Dist.] Jan. 19, 2012, no pet.) (mem. op.). However, poverty alone should not be a basis for termination of parental rights. *In re A.W.*, No. 14-20-00492-CV, 2020 WL 7068131, at *7 (Tex. App.—Houston [14th Dist.] Dec. 3, 2020, pet. denied) (mem. op.); *see also In re R.W.*, 627 S.W.3d 501, 512 (Tex. App.—Texarkana 2021, no pet.) ("Although there are certain circumstances that will support removal based on unsavory living conditions—or even homelessness—those cases do not generally uphold termination findings based solely on those factors.").

6. Domestic Violence & Propensity For Violence

Domestic violence, want of self-control, and propensity for violence may be considered as evidence of endangerment. *See In re N.J.H.*, 575 S.W.3d at 822, 832 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("[A]busive and violent criminal conduct by a parent can also produce an environment that endangers a child's well-being, and evidence that a person has engaged in such conduct in the past permits an inference that the person will continue violent behavior in the future."). Under certain circumstances, if a parent abuses the other parent or children, then that conduct can support a finding of endangerment even as to a child who was not born at the time of the conduct. *See In re J.F.C.*, 96 S.W.3d at 270–72; *see, e.g.*, *Allred v. Harris Cnty. Child Welfare Unit*, 615 S.W.2d 803, 806 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (concluding evidence supported termination based on endangerment when the father beat the mother upon learning she was pregnant, threatened to cause her to miscarry by pushing her down the stairs, and engaged in criminal conduct resulting in the revocation of his parole).

7. Family Service Plan & Communication With The Department

Missed visitations and failure to complete a court ordered service plan may constitute evidence supporting an endangerment finding because such conduct subjects children to instability and uncertainty, which endangers the children. *See In re C.W.M.P.*, No. 14-20-00571-CV, 2021 WL 244865, *7 (Tex. App.—Houston [14th Dist.] Jan. 26, 2021, pet. denied) (mem. op.); *see also In re M.L.G.J.*, No. 14-14-00800-CV, 2015 WL 1402652, *10 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (mem. op.) (noting that "Mother failed to complete parenting classes, participate in individual therapy, and undergo drug abuse treatment demonstrates that the Mother did not prioritize improving her ability to parent the Children" and that these facts were relevant in determining whether a parent's conduct results in

endangerment).

8. Mental Illness

Mental illness is not, in and of itself, a ground for terminating the parent-child relationship, but untreated mental illness can expose a child to endangerment and is a factor the court may consider. *See In re E.R.*, 555 S.W.3d 796, 807 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *In re S.R.*, 452 S.W.3d 351, 363 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see, e.g.*, *In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (concluding that parent's persistent and untreated mental illness was evidence of endangerment); *see also In re A.W.*, No. 14-20-00492-CV, 2020 WL 7068131, at *7 (Tex. App.—Houston [14th Dist.] Dec. 3, 2020, pet. denied) (mem. op.). However, evidence sufficient to support termination must show that a parent's mental illness or deficiency prevents him from providing for his children now and in the future. *In re E.R.*, 555 S.W.3d at 807–08; *see also In re T.G.R.-M.*, 404 S.W.3d 7, 14 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("A parent's mental instability and attempt to commit suicide may contribute to a finding that the parent engaged in a course of conduct that endangered a child's physical or emotional well-being.").

C. ANALYSIS

Here, the trial court terminated Father's parental rights to his three children based on statutory predicate grounds (D), (E), and (P). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (P). The Department argues that the evidence supports termination under all grounds found by the trial court and points to evidence of Father's drug use, previous conviction for assault of a family member in 2013, threat of suicide in front of the children in 2021, failure to provide a stable home, and failure to complete his family service plan and visit the children during the six months preceding trial.

The Department places great emphasis on Father's drug use. Here, the children were removed in April 2020 after allegations were made that Father and the children were homeless and sleeping in a car. When the Department investigated the family, Father tested positive for methamphetamine, and the children were removed. Father tested positive for methamphetamine during the pendency of the case in April and June 2020 and for marijuana on 10/06/21, while testing negative for drugs on 4/27/20, 5/22/20, 7/10/20, 8/5/20, 8/14/20, 8/20/20, 8/25/20, 9/4/20, 10/20/20, and 2/27/21. Father did not take any drug tests after October 2021, despite being asked by the Department and mandated by the court's order, and despite the court order providing that failure to take a drug test would be treated as a positive result. Crucially, however, the Department presented no evidence of a causal link between Father's drug use and any endangerment of the children. *See In re L.C.L.*, 599 S.W.3d at 85; *see also In re M.P.*, 618 S.W.3d at 104 ("It is entirely possible that Father used these substances outside of the home (or otherwise away from [the child], . . . under which circumstances it is difficult to determine how Father's drug use caused an endangering environment for [the child]."). There was no evidence that Father used drugs around the children, allowed the children to be around the presence of drugs or drug users, or was unable to care for the children or provide for their needs as a result of his drug use. Therefore, we conclude that the evidence of Father's drug use is legally insufficient to support a finding that Father endangered the children under any of the predicate statutory grounds for termination found by the trial court.[4] *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (P); *In re M.P.*,

[4] Jones was asked during the final hearing whether she had "any evidence that [Father] ever used drugs around the children." Jones answered "no." Our opinion in this case is not intended to be interpreted as supporting a conclusion that no inference may ever be made that a parent's drug use endangered the children. In this case, the Department did not present any evidence or testimony that would allow a fact finder to infer how Father endangered the children through drug use.

As to the trial court's finding that there was sufficient evidence to terminate Father's parental rights under § 161.001(b)(1)(P), we note that there is nothing in the Family Code

618 S.W.3d at 104; *In re L.C.L.*, 599 S.W.3d at 85–86.

We also note that, while Father's friend was arrested for possession of methamphetamine and drug paraphernalia at Lamb's home during the children's second removal, the Department did not present any evidence showing that Father knew that his friend possessed drugs, that the children were exposed to the drugs, or that the friend's possession of drugs otherwise endangered the children. Therefore, this evidence is legally insufficient to support termination under either § 161.001(b)(1)(D) nor (E). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D)–(E); *In re E.N.C.*, 384 S.W.3d at 803–04; *In re M.P.*, 618 S.W.3d at 104.

As to Father's homelessness, the Department did not introduce any testimony or evidence regarding the length of Father's homelessness, the conditions, or how it endangered the children; the only evidence the Department points to is the family service plan, which simply states Father was homeless and living out of a car. The family service plan, however, reported during the period of Father's alleged homelessness, that the children were in good health and had no developmental delays. Because of the vagueness and lack of detail regarding Father's homelessness, and the evidence in the record regarding the health and condition of the children, we conclude that this evidence is legally insufficient because no reasonable factfinder could form a firm belief or conviction that Father endangered the children or placed the children in an endangering environment because of homelessness. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E); *In re A.C.*, 560 S.W.3d at 631; *see also In re*

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providing that the causal link required to support termination under predicate grounds (D) and (E), as explained in this Court's decision in *L.C.L.*, is inapplicable to termination under predicate ground (P). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (P); *In re L.C.L.*, 599 S.W.3d at 84–86. Because there is no evidence of a causal link between Father's drug use and any endangerment of the children, we conclude that the evidence is legally insufficient to support termination under § 161.001(b)(1)(P). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(P); *In re L.C.L.*, 599 S.W.3d at 84–86.

R.W., 627 S.W.3d at 512 (concluding there was no evidence that mother's housing instability endangered child's physical and emotional well-being because of "scant testimony" regarding mother's "housing instability"); *In re S.B.*, 597 S.W.3d 571, 584 (Tex. App.—Amarillo 2020, pet. denied) ("The jury heard evidence that both [parents] jeopardized the children's physical and emotional health by allowing them to live in unsanitary conditions."); *In re E.A.G.*, No. 14-01-01046-CV, 2002 WL 31525633, at *7 (Tex. App.—Houston [14th Dist.] Nov. 14, 2002, no pet.) (mem. op.) ("Courts have long held that mere poverty of the parents is seldom, if ever, a sufficient ground for depriving them of the natural right to the custody of their child or children. . . . We distinguish between the unfortunate fact of a parent's poverty and appellant's case, which involves an attitude of indifference towards providing a safe and stable environment for her child.").

The Department also references Father's conviction for assault of a family member in 2013. However, there were no details of that offense introduced at trial, and it occurred approximately seven years prior to the Department's petition for termination and before the birth of the children. *See In re E.N.C.*, 384 S.W.3d 796, 803–04 (Tex. 2012) (holding evidence was legally insufficient to support termination under § 161.001(b)(1)(E) where evidence indicated that father's conviction, probation violation, and deportation were remote in time and did not suggest father engaged in course of endangering conduct); *Hendricks*, 401 S.W.2d at 800; *see, e.g.*, *In re L.M.*, 572 S.W.3d 823, 835 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("We agree in part that the record does not reflect that Father's distant-past convictions necessarily posed a present or future danger to Louise to the extent they involved conduct unrelated to the reasons prompting Louise's removal."). Furthermore, the Department did not introduce any evidence of any future danger of violence to the children posed by Father resulting from this conviction. *See In re*

E.N.C., 384 S.W.3d at 804–05 ("We agree that an offense occurring before a person's children are born can be a relevant factor in establishing an endangering course of conduct, . . . but the Department bears the burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being."). During trial, Jones testified that the Department had no evidence that Father had ever physically harmed the children or placed them with an individual that would harm the children. Thus, we conclude that this evidence is legally insufficient to support termination under § 161.001(b)(1)(D) and (E). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D)–(E); *In re E.N.C.*, 384 S.W.3d at 803–04.

Regarding Father's circumstances involving his comment of self-harm, it occurred after the children were placed with Lamb, six months after the children were placed into the Department's care and living in foster homes. After living with Lamb for approximately six months, Lamb was taken to the hospital unexpectedly, and Father's sister called the Department because Father was at Lamb's home with the children unsupervised, in contravention of a trial court's order. The Department arrived and took the children into custody, at which point Father told his sister that "if his kids go back into foster care he may as well kill himself."

Father's mental health records, which were admitted at trial, show that the medical providers assessed Father and determined there was no homicidal ideation or other mania. The medical providers noted as to Father that he:

> has been feeling sad and depressed because "I worry about losing my kids into foster home." Patient reports that he made a suicidal threat, but he did not have any plan. He was not suicidal, he just made the statement in the heat of the moment. . . . No homicidal ideation No evidence or reports of mania, hypomania, eating disorder, somatization, phobia.

Further, the discharge order provides that Father was diagnosed with anxiety and depression. Importantly, there is no evidence that Father's diagnoses poses a future danger to the children. Additionally, the children were four and two years of age at the time Father made the statement, and there was no evidence that the children heard or understood the nature of Father's comment of self-harm. Therefore, we conclude that Father's comment of self-harm is also legally insufficient evidence to support termination under either § 161.001(b)(1)(D) and (E). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D)–(E); *In re E.N.C.*, 384 S.W.3d at 803–04; *In re E.R.*, 555 S.W.3d at 807–08.

As to Father's failure to complete his service plan, by failing to submit to scheduled drug tests, attend visitations, and obtain housing, there is no evidence that this constituted a course of endangering conduct or that it placed the children in an endangering environment. *See In re L.C.L.*, 599 S.W.3d at 84–86. As noted above, there is no evidence that Father endangered the children through his drug use, and or by his failure to submit to scheduled drug tests. Jones testified that up until February 2021, when the children were removed from Lamb's home, the children had a good relationship with Father, they loved their Father, Jones had not witnessed any inappropriate or endangering behavior during any of Father's visits with the children, and the Department had no evidence that Father ever physically harmed the children. As to housing, while Father was unable to obtain housing by himself where the children could be placed, Father was able to provide Lamb's home as safe and adequate housing for the children before and after Lamb's illness. Lamb was determined by the Department to be a family member with acceptable living conditions and testified at trial that she was again healthy enough and willing to take care of the children. Additionally, there was no specific evidence or testimony presented as to how Father's homelessness or lack of housing endangered or would

endanger the children.[5] As to missed visitations, while Father did not visit the children for the six months preceding trial, it was undisputed that the Department cancelled Father's visitation four months prior to trial in June 2021. Additionally, it was undisputed that Father regularly visited the children until they were removed from Lamb's home in February 2021. More importantly, while missed visitations may support an endangerment finding because such conduct can subject children to instability and uncertainty, there is no evidence that the lack of visitation by Father between March and May 2021, as well July and August 2021, resulted in any instability or uncertainty for the children. No testimony was presented about the effect on any of the children resulting from the lack of parental contact. We conclude that this evidence is legally insufficient to support termination under (D) or (E) because no reasonable factfinder could form a firm belief or conviction that Father endangered the children or placed the children in an endangering environment because of his failure to complete his service plan. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D)–(E); *In re E.N.C.*, 384 S.W.3d at 803–04; *see also, e.g.*, *In re L.G.*, Nos. 06-18-00099-CV, 2020 WL 4229330, at *9 (Tex. App.—Texarkana July 24, 2020, no pet.) (mem. op.) (concluding that evidence of missed visitations was legally insufficient to support finding under statutory ground (E) because there was no evidence of the effect on a child resulting from the lack of parental contact).

Finally, the Department argues that all of this evidence in the aggregate was sufficient evidence to support termination under subsections (D) and (E). However, the evidence in support of the termination of Father's parental rights is insufficient and undeveloped. The facts of this case present no more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment. *See In re*

[5] Again, we note that this opinion is not intended to support a conclusion that homelessness or lack of housing never supports a trial court's finding of endangerment under (D) or (E); rather, in this case, the Department failed to present any evidence allowing for such an inference.

K.M.L., 443 S.W.3d at 112–13; *In re J.O.A.*, 283 S.W.3d at 345. We conclude that there was legally insufficient evidence to support termination of Father's parental rights as to all three children under any of the three statutory predicate grounds found by the trial court. We sustain Father's first issue.

III. THE DEPARTMENT AS PRIMARY MANAGING CONSERVATOR

In his third issue, Father argues the trial court erred in appointing the Department as the children's primary managing conservator. In its petition, the Department alleged it should be appointed as the children's primary managing conservator because, pursuant to Family Code § 153.131, "the appointment of the parent . . . would not be in the best interest of the children because the appointment would . . . significantly impair the child's physical health or emotional development." *See* Tex. Fam. Code Ann. §§ 153.131, 263.404.

A. STANDARD OF REVIEW

Conservatorship determinations are subject to review for abuse of discretion and may be reversed only if the decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007) (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)). Legal and factual sufficiency are not independent grounds of error under this standard but are factors considered in determining whether the trial court abused its discretion. *In re K.S.*, 492 S.W.3d 419, 426 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Under this standard, an appellate court considers whether the trial court had sufficient information on which to exercise its discretion and, if so, whether the trial court erred in its application of discretion. *Day v. Day*, 452 S.W.3d 430, 433 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied). Further, the findings necessary to support the trial court's conservatorship decisions need be supported by only a preponderance of the evidence, rather than clear and convincing

evidence. *See* Tex. Fam. Code Ann. § 105.005; *J.A.J.*, 243 S.W.3d at 616. A trial court does not abuse its discretion if there is some substantive, probative evidence to support its decision. *In re King's Estate*, 244 S.W.2d 660, 661–62 (Tex. 1951); *Zeifman*, 212 S.W.3d at 587.

B. APPLICABLE LAW

The primary consideration in determining issues of conservatorship, possession of, and access to the child, is always the child's best interest. Tex. Fam. Code Ann. § 153.002. The Family Code creates a rebuttable presumption that a parent will be named a child's managing conservator unless the court finds that such appointment would not be in the child's best interest "because the appointment would significantly impair the child's physical health or emotional development" or makes a finding that there is a history of family violence involving the parents. *Id.* § 153.131; *see id.* § 263.404.

Family Code § 263.404 allows the trial court to render a final order appointing the Department as the child's conservator without terminating parental rights if the court finds that (1) a parent's appointment would not be in the child's best interest because the appointment would significantly impair the child's physical health or emotional development, and (2) appointment of a relative of the child or another person would not be in the child's best interest. *Id.* § 263.404(a). In deciding whether to appoint the Department as conservator without terminating the parents' rights, the court must take the following factors into consideration: (1) that the child will reach eighteen years of age in not less than three years; (2) that the child is twelve years of age or older and has expressed a strong desire against termination or being adopted; and (3) the needs and desires of the child. *Id.* § 263.404(b); *see In re J.A.J.*, 243 S.W.3d at 614.

Evidence of a parent's "specific actions or omissions" that demonstrate the

award of custody to the parent would have a detrimental effect on the child is sufficient proof to rebut the parental presumptions in § 153.131; but the evidence must do more than raise mere suspicion or speculation of possible harm. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 166–67 (Tex. 1990) (holding that best interest of the child is served by awarding custody to natural parent absent "evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child"); *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (op. on reh'g) (explaining that "link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm" and that "[t]here must be evidence to support the logical inference that some specific, identifiable behavior or conduct of the parent will probably cause that harm"); *see also In re S.T.*, 508 S.W.3d 482, 492 (Tex. App.—Fort Worth 2015, no pet.) (providing examples of types of parental conduct that may constitute significant impairment, such as severe neglect or drug abuse). The "material time to consider is the present," and "evidence of past conduct may not, by itself, be sufficient to show present unfitness." *In re S.T.*, 508 S.W.3d at 492. The relevant circumstances need not rise to a level that warrants termination of parental rights in order to support a finding that the appointment of a parent as managing conservator would significantly impair the child's physical health or emotional development. *See In re J.A.J.*, 243 S.W.3d at 615–16; *In re C.L.J.S.*, No. 01-18-00512-CV, 2018 WL 6219615, at *4 (Tex. App.—Houston [1st Dist.] Nov. 29, 2018, no pet.) (mem. op.).

C. ANALYSIS

Here, the trial court appointed the Department as the children's managing conservator based on its findings that (1) the appointment of Father as managing conservator would significantly impair the children's physical health or emotional

development, and (2) it would not be in the best interest of the children to appoint a relative of the children or another person as managing conservator. *See* Tex. Fam. Code Ann. § 263.404(a).

As previously concluded, there was legally insufficient evidence supporting the termination of Father's parental rights under any of the predicate grounds found by the trial court. On appeal, the Department relies on this same evidence to aver that the trial court did not abuse its discretion when it appointed the Department as the children's managing conservator. Despite the less onerous evidentiary burden, the Department's evidence is still sparse and lacks any causal connection to endangerment of the children. The evidence is legally insufficient to support the trial court's finding that the appointment of Father as managing conservator would significantly impair the children's physical health or emotional development.[6] *See* Tex. Fam. Code Ann. § 263.404(a)(1); *J.F.C.*, 96 S.W.3d at 266–67; *In re L.C.L.*, 599 S.W.3d at 85–86. Therefore, we conclude that the trial court abused its discretion when it appointed the Department as the children's managing conservator. *See* Tex. Fam. Code Ann. §§ 153.131, 263.404(a)(1); *In re J.A.J.*, 243 S.W.3d at 616; *Lewelling*, 796 S.W.2d at 166–67; *In re K.S.*, 492 S.W.3d at 426.

We sustain Father's third issue.

[6] The only evidence in the record is that the children were well fed, up to date on their vaccinations, and well taken care of at the time that Father was homeless, and that there was a complete lack of other evidence concerning Father's homelessness. Additionally, there is no causal link between Father's drug use and any endangerment to the children, and Jones testified there was no evidence that Father had used drugs around the children. The testimony by Jones adduces that the children were well bonded with Father, and the trial court heard testimony that the children would be allowed to live with Lamb if Father's rights were not terminated. While Jones testified that Lamb was not a viable placement for the children because she previously expressed she did not want to take care of them long term, both Lamb and Father testified the children could stay in Lamb's home, which is a home previously found by the Department to be acceptable for the children.

IV. THE DEPARTMENT'S REQUESTED RELIEF

The Department asks this court to determine that the evidence was sufficient to support termination under subsection (O), which was alleged as a ground for termination by the Department but not found as a basis for termination by the trial court. *See* Tex. Fam. Code Ann. § 161.001(b)(1)(O). Under subsection (O), a trial court may terminate a parent's parental rights if it finds by clear and convincing evidence that the parent failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department for not less than nine months as a result of the child's removal from the parent under Family Code Chapter 262 for the abuse or neglect of the child. *Id.*

However, the Department did not file a notice of appeal, and thus, it did not properly invoke this court's jurisdiction. *See* Tex. R. App. P. 25.1(c) ("A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal."); *In re C.A.B.*, 289 S.W.3d 874, 880 n.7 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (noting that the Department's complaint of error was not properly preserved because the Department did not file a statement of points and a notice of appeal); *see also, e.g.*, *In re J.B.*, No. 14-21-00463-CV, 2022 WL 54875, at *2 n.1 (Tex. App.—Houston [14th Dist.] Jan. 6, 2022, pet. denied) (mem. op.) ("[B]ecause the Department did not file a notice of appeal or join in the Mother's notice of appeal, it did not properly invoke this court's jurisdiction."). Accordingly, we reject the Department's argument that we should affirm the termination of Father's parental rights based on § 161.001(b)(1)(O).

V. CONCLUSION

We reverse the trial court's final order terminating Father's parental rights to his three children and appointing the Department as the children's managing

conservator. We render judgment denying the Department's petition for the termination of Father's parental rights and for the appointment of the Department as the children's managing conservator.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Zimmerer, Spain, and Poissant. (Spain, J., concurring; Zimmerer, J., dissenting).