IN THE
TENTH COURT OF APPEALS

No. 10-16-00394-CV

IN THE INTEREST OF A.N. AND I.R.N., CHILDREN

From the County Court at Law
Ellis County, Texas
Trial Court No. 91874CCL

MEMORANDUM OPINION

In four issues, appellant, Beth, challenges the trial court's order terminating her parental rights to A.N. and appointing non-relatives as permanent managing conservators of I.R.N.[1] Because we overrule all of Beth's issues on appeal, we affirm the judgment of the trial court.[2]

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[1] We use the pseudonym Beth for the mother of the children in compliance with the requirement of Texas Rule of Appellate Procedure 9.8 to protect the identities of the parties. *See* TEX. R. APP. P. 9.8. Furthermore, as this is a memorandum opinion and the parties are familiar with the facts, we only recite those necessary to the disposition of the case. *See id.* at R. 47.1, 47.4.

[2] On February 12, 2017, Beth filed a letter with this Court stating the following: "The appellant will not be filing a brief in this matter, as no error was found. A brief has been filed in the two companion cases." Upon receiving this letter, this Court informed Beth that her letter was insufficient to constitute an *Anders* brief and, thus, ordered her to file a compliant *Anders* brief within twenty-one days of March 21, 2017. After filing and receiving an extension of time to file her brief, Beth filed her present brief, which is

I. THE TRIAL COURT'S INTERVIEW OF THE CHILDREN IN CHAMBERS

In her first issue, Beth argues that the trial court abused its discretion when it interviewed the children in chambers about termination without a court reporter or attorneys present during a parental-termination trial brought by the Texas Department of Family and Protective Services (the "Department").

Section 153.009 of the Family Code provides the following, in relevant part:

> (a) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.
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> (b) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child or on the court's own motion, the court may interview the child in chambers to determine the child's wishes as to possession, access, or any other issue in the suit affecting the parent-child relationship.
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designated as an *Anders* brief, though it advances four points of error and "prays that this Court will reverse the order of the trial court and remand the case to the trial court with instructions to enter proper orders." In *Anders*, the United States Supreme Court established a procedure to be followed by court-appointed counsel "if counsel finds [the client's] case to be *wholly frivolous*." *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 493, 498 (1967) (emphasis added). This Court has further stated that an *Anders* brief must contain a "'professional evaluation of the record demonstrating why, in effect, there are no arguable grounds to be advanced.'" *In re J.A.H.*, 986 S.W.2d 39, 40 (Tex. App.—Waco 1998, order) (quoting *Johnson v. State*, 885 S.W.2d 641, 646 (Tex. App.—Waco 1994, order, pet. ref'd) (per curiam)). Given that Beth has advanced four points of error and requests reversal of the trial court's order, her brief does not constitute an *Anders* brief, despite Beth's assertion to the contrary. Accordingly, we will address Beth's four issues, in turn.

> (e) In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview.
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> (f) On the motion of a party, the amicus attorney, or the attorney ad litem for the child, or on the court's own motion, the court shall cause a record of the interview to be made when the child is 12 years of age or older. A record of the interview shall be part of the record in the case.

TEX. FAM. CODE ANN. § 153.009 (West 2014).

On the final day of trial, after closing arguments, the trial court specifically mentioned: "I will interview the two older children in chambers later today, and then later this week, you will have my decision. If there's nothing further, you are dismissed." A review of the record shows that Beth did not object to the in-chamber interviews of the children at any point during the trial. Furthermore, the record does not reflect that: (1) Beth requested that a record be made of the interviews; (2) Beth's attorney requested to be present during the interviews; or (3) Beth complained that the interviews were conducted without any attorneys present.

To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion, and state the specific grounds for the ruling sought. *See* TEX. R. APP. P. 33.1(a)(1); *see also In re J.S.*, No. 05-16-00138-CV, 2017 Tex. App. LEXIS 1857, at **4-5 (Tex. App.—Dallas Mar. 6, 2017, no pet.) (mem. op.). Absent a timely request, objection, or motion presented to the trial court, a complaint about an in-chamber interview of children under section 153.009 of the Family Code is not preserved. *See Ellason v. Ellason*, 162 S.W.3d 883, 888-89 (Tex. App.—Dallas 2005, no pet.) (concluding

that appellant waived her right to complain that no record was made of an in-chamber interview of a child by failing to request that a record be made); *In re J.S.*, 2017 Tex. App. LEXIS 1857, at **4-5; *In re T.L.W.*, No. 12-10-00401-CV, 2012 Tex. App. LEXIS 2689, at *13 (Tex. App.—Tyler Mar. 30, 2012, no pet.) (mem. op.) (concluding that, by failing to complain to the trial court, appellant waived his complaint that no one representing his interests was allowed to be present at an in-chamber interview with a child). Therefore, because Beth failed to complain to the trial court by a request, objection, or motion regarding this issue, and because Beth did not request that a record be made of the in-chambers interview of the children, she has waived the issue on appeal. *See* TEX. R. APP. P. 33.1(a); *Ellason*, 162 S.W.3d at 888-89; *see also In re J.S.*, 2017 Tex. App. LEXIS 1857, at **4-5; *In re T.L.W.*, 2012 Tex. App. LEXIS 2689, at *13. We overrule Beth's first issue.

II. SUFFICIENCY OF THE EVIDENCE SUPPORTING THE BEST-INTEREST FACTORS

In her second issue, Beth contends that the evidence is legally and factually insufficient to support the trial court's conclusion that termination of her parental rights to A.N. was in the child's best interest. We disagree.

A. Applicable Law

In proceedings to terminate the parent-child relationship brought under section 161.001 of the Family Code, the petitioner must establish one predicate act listed under subsection (b)(1) of the statute and that termination is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001 (West Supp. 2016); *see In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005).

Both elements must be established; termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987).

Termination decisions must be supported by clear and convincing evidence. TEX. FAM. CODE ANN. §§ 161.001, 161.206(a) (West 2014). Evidence is clear and convincing if it "will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). Due process demands this heightened standard because termination results in permanent, irrevocable changes for the parent and child. *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002); *see In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007).

In evaluating the evidence for legal sufficiency in parental-termination cases, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or convictions that the grounds for termination were proven. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005). We review all the evidence in the light most favorable to the finding and judgment. *Id.* We resolve any disputed facts in favor of the finding if a reasonable factfinder could have done so. *Id.* We disregard all contrary evidence that a reasonable factfinder could have disbelieved. *Id.* We consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to termination if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *Id.* We cannot weigh witness-credibility issues that depend on the

appearance and demeanor of the witnesses, for that is the factfinder's province. *Id.* at 573-74. And even when credibility issues appear in the appellate record, we defer to the factfinder's determination, as long as they are not unreasonable. *Id.* at 573.

In reviewing the factual sufficiency of the evidence supporting termination, we give due deference to the factfinder's findings and do not supplant the judgment with our own. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We determine whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that the parent violated section 161.001(b)(1) and that the termination of the parent-child relationship would be in the best interest of the child. TEX. FAM. CODE ANN. § 161.001; *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction in the truth of its finding, then the evidence is factually insufficient. *In re H.R.M.*, 209 S.W.3d at 108.

In the instant case, the trial court determined that the Department established numerous predicate acts or omissions under section 161.001(b)(1) of the Family Code committed by Beth, though termination was ordered only as to A.N., not I.R.N. Nevertheless, on appeal, Beth does not challenge the predicate grounds for termination. *See In re C.H.*, 89 S.W.3d at 28 (holding that the same evidence may be probative of both section 161.001(b)(1) predicate grounds and the best-interest grounds); *In re S.L.*, 421 S.W.3d 34, 37 (Tex. App.—Waco 2013, no pet.) ("An unchallenged finding of a predicate

violation is binding and will support the trial court's judgment, and we may affirm the termination on that finding and need not address the other grounds for termination."); *see also In re G.S.*, No. 14-14-00477-CV, 2014 Tex. App. LEXIS 10563, at *30 (Tex. App.—Houston [14th Dist.] Sept. 23, 2014, no pet.) (mem. op.) ("The unchallenged predicate findings under section 161.001(1)(E), endangering conduct, are binding and may be considered as evidence related to the court's best interest finding."). Instead, she focuses on the sufficiency of the evidence of the trial court's best-interest finding supporting termination of her parental rights as to A.N.

In determining the best interest of a child, a number of factors have been considered, including: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals; (6) the plans for the child by these individuals; (7) the stability of the home; (8) the acts or omissions of the parent that may indicate the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). This list is not exhaustive, but simply indicates factors that have been or could be pertinent. *Id.* at 372. Furthermore, undisputed evidence of just one factor may be sufficient in a particular case to support a finding that termination is in the best interest

of the child. *In re C.H.*, 89 S.W.3d at 27. On the other hand, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

The *Holley* factors focus on the best interest of the child, not the best interest of the parent. *Dupree v. Tex. Dep't Prot. & Reg. Servs.*, 907 S.W.2d 81, 86 (Tex. App.—Dallas 1995, no writ). The goal of establishing a stable permanent home for a child is a compelling state interest. *Id.* at 87. The need for permanence is a paramount consideration for a child's present and future physical and emotional needs. *In re S.H.A.*, 728 S.W.2d 73, 92 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (en banc).

The same evidence proving acts or omissions under section 161.001(b)(1) of the family code has been held to be probative of best interest of the child. *In re C.H.*, 89 S.W.3d at 28. Moreover, evidence of past misconduct or neglect can be used to measure a parent's future conduct. *See Williams v. Williams*, 150 S.W.3d 436, 451 (Tex. App.—Austin 2004, pet. denied); *Ray v. Burns*, 832 S.W.2d 431, 435 (Tex. App.—Waco 1992, no writ) ("Past is often prologue."); *see also In re A.M.*, 385 S.W.3d 74, 82-83 (Tex. App.—Waco 2012, pet. denied) (concluding that evidence of mother's history of neglecting and endangering children by exposing them to domestic violence supported trial court's finding that termination was in child's best interest). A parent's history, admissions, drug abuse, and inability to maintain a lifestyle free from arrests and incarcerations are relevant to the best-interest determination. *In re D.M.*, 58 S.W.3d 801, 814 (Tex. App.—Fort Worth 2001, no pet.). Evidence of a recent improvement does not absolve a parent of a history of

irresponsible choices. *See Smith v. Tex. Dep't Protective & Regulatory Servs.*, 160 S.W.3d 673, 681 (Tex. App.—Austin 2005, no pet.); *see also In re T.C.*, No. 10-10-00207-CV, 2010 Tex. App. LEXIS 9685, at *20 (Tex. App.—Waco Dec. 1, 2010, pet. denied) (mem. op.).

B. Discussion

Here, witnesses testified to Beth's history of drug use. *See In re C.A.J.*, 122 S.W.3d 888, 893 (Tex. App.—Fort Worth 2003, no pet.) (noting that a parent's continued drug use poses emotional and physical danger to the child now and in the future); *see also In re S.N.*, 272 S.W.3d 45, 52 (Tex. App.—Waco 2008, no pet.) (stating that a parent's illegal drug use is relevant to determining present and future risk to a child's physical and emotional well-being). Katy Kirkpatrick, formerly a CPS caseworker, testified that Beth used illegal drugs during this case. *See In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied) ("As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child."); *see also Karl v. Tex. Dep't of Protective & Regulatory Servs.*, No. 03-03-00655-CV, 2004 Tex. App. LEXIS 6288, at *11-12 (Tex. App.—Austin July 15, 2004, no pet.) (mem. op.) (noting that a parent's engaging in criminal conduct endangers the emotional well-being of a child because of the parent's resulting incarceration). Specifically, Beth tested positive for methamphetamine in October 2015 and marihuana in April 2016. Additionally, Beth refused to submit to drug tests in October and November 2015, as well as a court-ordered drug test in December 2015. She also failed to appear for drug testing in September and

October 2015 and September 2016. *See In re C.R.*, 263 S.W.3d 368, 374 (Tex. App.—Dallas 2008, no pet.) ("The trial court could reasonably infer Davis avoided taking the drug tests because she was using drugs." (citing *In re J.T.G.*, 121 S.W.3d 121, 131 (Tex. App.—Fort Worth 2003, no pet.))). At trial, Beth's former boyfriend stated that he and Beth smoked marihuana daily during the six months they were together during the case. He further stated that Beth was abusing methamphetamine during this time.

Beth also has a long history of opioid abuse, which continued during the case. Beth acknowledged at trial that she made numerous trips to the hospital for leg pain in the last five years and that she received pain medications. Treating physicians noted that Beth has "pain medication seeking behavior in the past," and they often refused to prescribe the pain medications that Beth was seeking. On one such occasion, Beth became enraged when the doctor refused to prescribe the medications she desired and exclaimed that the "doctor has to treat me with the medications I want." Beth's pain-medication-seeking behavior continued during trial and resulted in her visiting several hospitals complaining of leg pain and seeking narcotics. On one such occasion, she left Parkland Hospital without being treated or actually admitted after failing to obtain requested pain medication. As a result of Beth's history of drug abuse spanning the majority of the children's lives, the Department intervened several times and relatives were compelled to raise the children.

In addition to her troubles with drugs, Beth has untreated mental-health issues. Beth's psychiatric records revealed that she has a long history of mental illness dating to at least 2006. While diagnoses varied, Beth was most recently diagnosed with bipolar affective disorder and borderline personality disorder. Beth noted that she received mental-health services "off and on" for the last ten years. However, Beth's records also showed that Beth had a history of starting and stopping treatment and, according to one doctor, "seems to have little insight into med tx." Kirkpatrick noted that, despite recommendations to take medications to treat her mental-health issues, Beth has not been taking her medications. Beth countered that she took medication to treat her bipolar disorder at times "because of what was going on in [her] life at that point." Kirkpatrick testified that Beth's mental-health issues are a safety concern for the children, especially if they are untreated. Beth's records also describe several instances where she became anxious, angry, and panicked when she was off her prescribed medications for mental illness. Additionally, Beth was court-ordered to attend counseling for her mental-health issues; however, she was ultimately discharged for nonattendance. *See, e.g.*, *In re C.C.*, 2016 Tex. App. LEXIS 12277, at **39-40 (Tex. App.—Waco Nov. 16, 2016, no pet.) (mem. op.) ("A factfinder may infer that a parent's failure to complete her court-ordered services, and in particular drug-treatment services, indicate a continuing danger to the children." (citing *In re B.A.*, No. 04-13-00246-CV, 2013 Tex. App. LEXIS 10841, at **4-5 (Tex. App.—San Antonio Aug. 28, 2013, no pet.) (mem. op.))).

Moreover, Beth's history with the Department dates back to 2006, which involved neglectful supervision pertaining to Beth's ongoing drug use and exposure of A.N. and I.R.N. to an inappropriate and abusive caregiver who sexually abused I.R.N. One of Beth's former boyfriends testified that Beth let the children do whatever they wanted while they were in her care and that the "house was dirty. No food was done." Indeed, during the Department's investigation in this case, Beth used Vyvanse, a drug she bought off the street, and did not require another child that is not the subject of this appeal to attend school, though the child was six years old. In any event, Beth testified that a former boyfriend "was violent. He choked me. He threw a drill at me" and that his abuse caused her to go into labor when she was pregnant with A.N. Furthermore, Beth and her boyfriends would often get into shouting matches and physical altercations in front of the children. On one occasion, Beth busted the lip of a boyfriend. The dysfunctional relationship with this boyfriend resulted in the boyfriend jumping out of a car to get away from Beth.

After the Department obtained custody of the children, Beth was court-ordered to participate in a family-service plan. Under the plan, Beth was required to complete a psychological evaluation, substance-abuse assessment, parenting classes, and counseling, as well as refrain from substance abuse and criminal activity and maintain stable housing and employment. Kirkpatrick recounted that Beth was not in compliance with the service plan at any point during the case. *See, e.g., In re R.T.*, No. 14-16-00970-

CV, 2017 Tex. App. LEXIS 4047, at *18 (Tex. App.—Houston [14th Dist.] May 4, 2017, no pet.) (mem. op.) ("In determining the best interest of the child 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." (citing *In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013))). Indeed, Beth failed to complete a psychological evaluation, though she completed a substance-abuse assessment; however, she was not honest about her drug use in the assessment. In fact, she asserted that "she had no history with drugs, no mental health history . . . ." Beth also provided no records to the Department regarding employment, and the record reveals that Beth was homeless at one point during the case and that she has failed to pay any child support.

A.N.'s caregiver testified that she wanted A.N. to remain in her home regardless of termination, and that she believed adoption was in A.N.'s best interest. A.N.'s caregivers wished to adopt her. Additionally, A.N. is bonded with all of the members of the caregivers' family and has "adjusted" and is "doing good" in the home. A.N.'s performance in school has improved in her current placement, and A.N. receives specialized tutoring to assist with her dyslexia. A.N. has told others that she wants to be adopted by her current caregivers. And finally, Courtney Lavasz, a CPS caseworker, noted that termination of Beth's parental rights and adoption by the current caregivers is in A.N.'s best interest because it will provide her with permanency and a safe, stable home free of abuse and neglect. Lavasz further explained that Beth,

> has not shown progress in the case. She has refused to submit to drug testing in order for the Department to evaluate her progress. She has also not completed her services that are provided to her. She has not completed her counseling, she has not followed the recommendations that were provided to her by the services that she did complete. And it is the Department's position that she has not rectified the concerns that led to this case.

The Court Appointed Special Advocate concurred with Lavasz's assessment. *See In re O.R.F.*, 417 S.W.3d 24, 39 (Tex. App.—Texarkana 2013, no pet.) (noting that evidence offered to prove grounds for termination, the amount of contact between the natural parents and child, the natural parent's ability to provide financial support, and the quality of care rendered by the child's caregiver are all relevant to determining if termination is in the best interest of the child (citing *In re C.H.*, 89 S.W.3d at 28)))[3]; *see also In re C.C.*, 2016 Tex. App. LEXIS 12277, at **40-41 ("A parent's failure to show that he or she is stable enough to parent children for any prolonged period entitles the factfinder to determine that this pattern would likely continue and that permanency could only be achieved through termination and adoption. A factfinder may also consider the consequences of its failure to terminate parental rights and that the best interest of the children may be served by termination so that adoption may occur rather than the temporary foster-care arrangement that would result if termination did not occur." (internal citations & quotations omitted)).

[3] Despite a December 2015 permanency-hearing order that detailed what she needed to do to re-establish visitation, Beth admitted at trial that it had been eleven months since she had last seen her children.

Based on our review of the record, we find that the above-mentioned evidence touches on several of the *Holley* factors and that those factors weigh in favor of the trial court's order terminating Beth's parental rights to A.N. Therefore, considering all the evidence in relation to the *Holley* factors in the light most favorable to the trial court's best-interest finding, we hold that a reasonable factfinder could have formed a firm belief or conviction that termination of Beth's parental rights was in A.N.'s best interest. *See Holley*, 544 S.W.2d at 371-72; *see also In re J.P.B.*, 180 S.W.3d at 573. We further hold that, viewing the evidence in a neutral light in relation to the *Holley* factors, the trial court could have reasonably formed a firm belief or conviction that termination was in A.N.'s best interest. *See Holley*, 544 S.W.2d at 371-72; *see also In re C.H.*, 89 S.W.3d at 28. Accordingly, we conclude that the evidence is legally and factually sufficient to support the trial court's best-interest finding. As such, we overrule Beth's second issue.

III. THE TRIAL COURT'S VISITATION SCHEDULE FOR I.R.N.

In her third issue, Beth asserts that the trial court abused its discretion by creating an unenforceable visitation schedule for her. Specifically, Beth argues that: (1) visitation must be in I.R.N.'s best interest because she was appointed possessory conservator; (2) visitation will only occur if the managing conservators determine it is in I.R.N.'s best interest and, thus, amounts to no visitation; and (3) the terms of visitation in the trial court's order are ambiguous.

"The best interest of a child is always the court's primary consideration in determining the issues of conservatorship and possession of and access to the child." *Smith v. Smith*, 143 S.W.3d 206, 214 (Tex. App.—Waco 2004, no pet.) (citing TEX. FAM. CODE ANN. § 153.002 (West 2014)). "A trial court has wide discretion when determining the best interest of a child, and its judgment will not be reversed on appeal unless it has abused that discretion." *Id.* (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)). A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to guiding principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). A trial court also abuses its discretion if it does not analyze or apply the law properly. *Id.*

The Family Code provides guidelines to follow when determining the periods of possession for a possessory conservator. TEX. FAM. CODE ANN. § 153.192(b) (West 2014); *see In re T.J.S.*, 71 S.W.3d 452, 458 (Tex. App.—Waco 2002, pet. denied). "There is a rebuttable presumption that this Standard Possession Order provides a possessory conservator minimum possession of the child and that the order is in the best interest of the child." *In re T.J.S.*, 71 S.W.3d at 458 (citing TEX. FAM. CODE ANN. § 153.252 (West 2014)). "The Family Code, however, allows the court to deviate from the Standard Possession Order." *Id.* "The court is allowed to consider (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named possessory conservator; and (3) any other relevant factor." *Id.* (citing TEX. FAM. CODE ANN. § 153.256 (West 2014)).

If the trial court appoints a possessory conservator, it "may grant, deny, restrict[,] or limit any rights, privileges, duties[,] and responsibilities with respect to the child as are necessary to protect the child's best interest." *Hopkins v. Hopkins*, 853 S.W.2d 134, 137 (Tex. App.—Corpus Christi 1993, no writ). "Complete denial of parent access amounts to a near-termination of a parent's rights to his child and should be reserved for situation rising nearly to the level that would call for a termination of parental rights." *Philipp v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00418-CV, 2012 Tex. App. LEXIS 2760, at *23 (Tex. App.—Austin Apr. 4, 2012, no pet.) (mem. op.) (citing TEX. FAM. CODE ANN. § 161.001). Therefore, a complete denial of access should be rare and reserved only for the most extreme of circumstances. *Id.* (internal citations omitted). However, "a severe restriction of limitation, even one that amounts to a denial of access, is permissible if it is in the best interest of the child." *In re Walters*, 39 S.W.3d 280, 286 n.2 (Tex. App.—Texarkana 2001, no pet.).

Here, the trial court found that Beth endangered the children through her conduct and by exposing them to an endangering environment and failed to complete court-ordered services necessary for the return of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D)-(E), (O). Beth does not challenge these findings.

In any event, the final order provided that Beth "shall have supervised possession of [I.R.N.] at times mutually agreed to in advance by [I.R.N.'s caregivers] and, in the absence of mutual agreement, as specified in Attachment A to this order." Attachment

A stated that "[Beth] shall have no visitation with the child [I.R.N.], due to [Beth's] present conditions and the safety concerns regarding [Beth], unless [I.R.N.'s caregivers] determines [sic] in their sole discretion that visitation between [Beth] and [I.R.N.] is in the best interest of the child." This language suggests that it is not in I.R.N.'s best interest for Beth to have access in the near term due to "present conditions" and "safety concerns"—findings that are supported by ample evidence in the record.

Furthermore, the testimony relied upon by Beth does not support her argument. In this issue, Beth states that I.R.N.'s caregivers testified that they "don't want to deal with any kind of drama in that if I was to give the supervised visits, you know." Beth argues that this testimony is tantamount to no visitation at all. However, this testimony is not attributable to I.R.N.'s caregivers. Rather, it was A.N.'s caregiver who said this. One of I.R.N.'s caregivers testified that he would "absolutely" be willing to accept permanent managing conservatorship of I.R.N. if Beth's parental rights were terminated. He also noted that he would be willing to allow I.R.N. contact with Beth and to supervise such contact. In fact, I.R.N.'s caregiver emphasized the importance of I.R.N. maintaining relations with his blood line, as long as the contact is positive.

And finally, with respect to Beth's argument that the visitation order is ambiguous, we note that section 153.006(c) permits the trial court to issue a visitation order that lacks specificity if a party shows why specific orders would not be in the best interest of the child. *See* TEX. FAM. CODE ANN. § 153.006(c) (West 2014) ("The court shall

specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child."). As noted earlier, Beth's visitation was limited because of her "present conditions" and the "safety concerns" they posed for I.R.N. Moreover, Beth's visitation was not completely denied, as I.R.N.'s caregivers were authorized to resume visitation when they believed it would be in I.R.N.'s best interest—something I.R.N.'s caregivers are open to exploring, as long as the contact is positive. Given Beth's long history of substance abuse, untreated mental-health issues, and violent and abusive relationships, we cannot say that the trial court abused its discretion in refusing to issue specific visitation orders for Beth and I.R.N. based on a finding that such specificity would not be in I.R.N.'s best interest at this time. *See id.; see also Iliff*, 339 S.W.3d at 78; *Smith*, 143 S.W.3d at 214. We therefore overrule Beth's third issue.

IV. THE APPOINTMENT OF NON-PARTIES AS PERMANENT MANAGING CONSERVATORS FOR THE CHILDREN

In her fourth issue, Beth contends that the trial court abused its discretion when it ordered non-parties as permanent managing conservators for the children. Specifically, Beth argues that the non-relatives were not parties to the suit and, thus, could not obtain relief—namely, be named permanent managing conservators of the children—from the trial court.

> Section 161.205 of the family code states that in the event termination of the parent-child relationship is not ordered by the trial court in a suit seeking termination, the trial court shall either deny the petition or render any order

> in the best interest of the child. And, section 153.002 states that the child's best interest shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child.

In re R.A., No. 10-14-00352-CV, 2015 Tex. App. LEXIS 5958, at *3 (Tex. App.—Waco June 11, 2015, no pet.) (mem. op.) (internal citations & quotations omitted).

"Under section 263.3026, the Department can seek to have the trial court award the 'permanent managing conservatorship of the child to a relative or other suitable individual' in accordance with the goals of its permanency plan." *In re A.J.I.L.*, No. 14-16-00350-CV, 2016 Tex. App. LEXIS 11253, at **19-20 (Tex. App.—Houston [14th Dist.] Oct. 18, 2016, pet. denied) (mem. op.) (quoting TEX. FAM. CODE ANN. § 263.3026(a)(3) (West 2014)); *see In re A.D.*, 480 S.W.3d 643, 644-46 (Tex. App.—San Antonio 2015, pet. denied) ("The Department had pleadings on file requesting that M.M.'s parental rights to A.D. and I.W. be terminated and that the child be permanently placed with a relative or other suitable person as the sole permanent managing conservator. . . . Both grandmothers were identified in the permanency plan as appropriate relative caregivers for A.D. and I.W., respectively. Thus, we cannot agree that the grandparents were required to either be parties to the case or file pleadings in the case before the trial court could appoint them as managing conservators."); *see also In re G.B.*, No. 09-15-00285-CV, 2016 Tex. App. LEXIS 414, at *19 (Tex. App.—Beaumont Jan. 14, 2016, no pet.) ("We conclude the Family Code allowed the trial court to name Aunt as G.B.'s managing conservator even though she was never formally named as a party in the proceedings.");

In re R.A., 2015 Tex. App. LEXIS 5958, at *5 ("We hold that the trial court had statutory authority under the applicable family code provisions, when read as a consistent and logical whole, to find that Grays was not at the time of trial an appropriate managing conservator and also to name Lopez as R.A.'s managing conservator without the necessity of Lopez presenting evidence or otherwise participating in the trial."); *In re Z.G.*, No. 11-11-00078-CV, 2012 Tex. App. LEXIS 1849, at **9-10 (Tex. App.—Eastland Mar. 8, 2012, no pet.) (mem. op.) (holding that the trial court had authority to appoint a paternal cousin as the child's managing conservator without the cousin's intervention because: (1) the trial court's jurisdiction was invoked by the Department's pleadings requesting that the mother's parental rights be terminated and that the child be permanently placed with a relative or other suitable person as the permanent sole managing conservator; (2) the child had been placed with the cousin prior to trial; (3) the cousin was identified in the permanency plan as an appropriate relative caregiver for the child; and (4) it was the Department's recommendation that the child remain with the cousin and that the cousin be appointed as the child's conservator).

The Department initiated the proceedings in this case by filing its original petition seeking the termination of Beth's parental rights to A.N. and I.R.N. and requesting that the children be permanently placed with a relative or other suitable person as the sole managing conservator. At the conclusion of the trial, the trial court made a finding that appointment of a parent as permanent managing conservator would not be in the

children's best interest because the appointment would significantly impair the children's health or emotional development. The record reflects that I.R.N. was placed with fictive kin prior to trial. A.N. has lived with her maternal aunt and uncle since the inception of the Department's case. Both families were identified in the permanency plan as appropriate caregivers for the children. Moreover, the Department, as well as the children's Court Appointed Special Advocate, recommended that the children remain with the respective placements for purposes of adoption. Furthermore, the record contains testimony from the families regarding their commitment to the permanent care of A.N. and I.R.N., whether through conservatorship or adoption. Given the above, we cannot agree with Beth's assertion that these families were required to either be parties to the case or file pleadings in the case before the trial court could appoint them as managing conservators. *See In re A.D.*, 480 S.W.3d at 644-46; *see also In re A.J.I.L.*, 2016 Tex. App. LEXIS 11253, at **19-20; *In re G.B.*, 2016 Tex. App. LEXIS 414, at *19; *In re R.A.*, 2015 Tex. App. LEXIS 5958, at *5; *In re Z.G.*, 2012 Tex. App. LEXIS 1849, at **9-10. Accordingly, we overrule Beth's fourth issue.

V. CONCLUSION

Having overruled all of Beth's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed September 13, 2017
[CV06]