Opinion issued September 27, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00054-CV

IN THE INTEREST OF T.S. AND E.S.S., CHILDREN

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Case No. 2020-02393J

MEMORANDUM OPINION ON REHEARING

Appellee, the Department of Family and Protective Services ("DFPS"), has filed a motion for rehearing and en banc reconsideration of our July 21, 2022 opinion and judgment.[1] We deny the motion for rehearing, withdraw our opinion and

[1] *See* TEX. R. APP. P. 49.1, 49.5.

judgment of July 21, 2022, and issue this opinion and new judgment in their stead. We dismiss DFPS's motion for en banc reconsideration as moot.[2]

In this accelerated appeal,[3] appellants, mother and father, challenge the trial court's order, entered after a bench trial, terminating their parental rights to their minor children, T.S. and E.S.S. (collectively, the "children"),[4] and awarding DFPS sole managing conservatorship of the children. In four issues, mother contends that the trial court erred in appointing DFPS as the sole managing conservator of the children and the evidence is legally and factually insufficient to support the trial court's findings that she constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months;[5] she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children;[6] and termination of her parental rights was in the best interest of the

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2 *See Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 472 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("Because we issue a new opinion with the denial of rehearing, [the] motion for en banc reconsideration of our prior opinion is moot.").

3 *See* TEX. FAM. CODE ANN. § 263.405(a); TEX. R. APP. P. 28.4.

4 At the time the trial court entered its termination order, T.S. was twelve years old and E.S.S. was nine years old.

5 *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N).

6 *See id.* § 161.001(b)(1)(O).

children.[7] In three issues,[8] father contends that the evidence is legally and factually insufficient to support the trial court's findings that he engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being;[9] he constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months;[10] and termination of his parental rights was in the best interest of the children.[11]

We affirm in part and reverse and remand in part.

Background[12]

On December 23, 2020, DFPS filed a petition seeking termination of mother's and father's parental rights to the children. DFPS also sought managing conservatorship of the children.

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7 *See id.* § 161.001(b)(2).

8 Although father lists four issues in the "Issues Presented" section of his appellant's brief, he concedes one issue in the argument section of the brief. Thus, we will treat father's appellant's brief as presenting three issues for appellate review.

9 *See id.* § 161.001(b)(1)(E).

10 *See id.* § 161.001(b)(1)(N).

11 *See id.* § 161.001(b)(2).

12 The background portion of the opinion discusses the evidence presented at trial. *See In re D.L.W.W.*, 617 S.W.3d 64, 70 n.10 (Tex. App.—Houston [1st Dist.] 2020, no pet.); *In re E.F.*, 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.) ("Although we recognize the trial court and the parties in this proceeding had many hearings before the date of trial, we emphasize that none of the previous hearings constitute evidence that can support the trial court's order terminating a parent's rights. The only evidence that can support the trial court's order is that evidence

DFPS Caseworker Jackson

DFPS caseworker Jessica Jackson testified that she became the DFPS caseworker assigned to the children in May 2021—about seven months before trial in December 2021. The children entered DFPS's care in December 2020. At the time of trial, T.S. was twelve years old and E.S.S. was nine years old. T.S. was in the sixth grade, and E.S.S. was in the third grade. The children had been living with their maternal grandparents since February 2021. The children's maternal grandfather was a professor, but Jackson did not know what the children's maternal grandmother did for a living. Jackson described the children's current placement with their grandparents as "an adoptive placement." The grandparents were "open to adopting the children."

According to Jackson, neither of the children had "special needs" and the children's "needs [were] being met in [their] placement" with their maternal grandparents. Jackson stated that the children were "bonded to their grandparents" and "want[ed] to be adopted." They enjoyed being in their current placement. When generically asked, "how are [the children] performing," Jackson stated, without providing context or a time frame, that they were "doing well." Jackson also stated

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admitted at trial." (emphasis added)); *see also In re F.M.E.A.F.*, 572 S.W.3d 716, 723 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) ("[N]o factual statements or allegations contained in the clerk's record, which were not admitted during [trial], may be considered evidence when reviewing the sufficiency of the evidence.").

that the children attended school while their grandparents worked, and the children were with their grandparents after school. The grandparents' home was "safe and stable."

As to why the children entered DFPS's care in December 2020, Jackson stated, "The children were locked outside of the home and . . . [f]ather refused to open the door and let them in." And father was charged with the offense of "child endangerment" related to that incident. Jackson noted that father's criminal case was "still pending" at the time of trial and he had not been convicted of the offense of "child endangerment." While his criminal case was pending, father had been released from custody on bond. As part of his bond conditions, he was required not to have contact with one of the children. According to Jackson, father had not violated the conditions of his release on bond and he had not "illegally attempted to contact the children or interfered with them in any way." Because of father's bond conditions, he had not had any visits with the children while they were in DFPS's care.

As to mother and father, Jackson testified that they each received a Family Service Plan ("FSP"). As part of her FSP, mother was required to:

> provide legal means of [caring] for the child[ren]; provide a safe and stable living environment; complete a psychological evaluation and follow all recommendations; maintain contact with [DFPS] to include monthly in-person visits; refrain from criminal activity and report any arrests[] [or] criminal charges to the [DFPS] caseworker within 24 hours of any offense; refrain from [narcotics] use; visit the children

> according to the visitation plan; submit [to] random . . . urinalysis, hair [follicle] [narcotics-use] test[ing]; [complete] a substance abuse assessment and follow [the] recommendations; sign a release of information as requested by [DFPS] or [DFPS] providers; attend court hearings, permanency hearings, [and] family group conferences; participate in parenting classes; financially support the children; provide an update to the [DFPS] caseworker on residency within 72 hours of changing [her] address; provide [the DFPS] caseworker with a working [tele]phone number[;] and cooperate with [DFPS] and the [DFPS] service providers.

According to Jackson, mother did not complete any of the requirements of her FSP. Jackson stated that mother had contacted her "[p]eriodically" while Jackson was the DFPS caseworker for the children. But mother had not had any visits with the children while Jackson was the DFPS caseworker. The "[l]ast time [that Jackson had] checked," mother was not employed. And Jackson did not know where mother lived. To Jackson's knowledge, mother had not provided "any level of support" to the children while they lived with their maternal grandparents.

As part of his FSP, father was required to:

> Provide . . . legal mean[s] of caring for the child[ren]; provide a safe and stable home living environment; allow [DFPS] to enter his home for the purpose of evaluating the appropriateness for the children; [complete] a psychological evaluation and follow all recommendations; maintain contact with [DFPS] to include monthly in-person visits; refrain from criminal activity; refrain from [narcotics] use; submit [to] random urinalysis and hair follicle [narcotics-use] test[ing]; submit to [a] substance abuse assessment and follow [the] recommendations; sign a release of information as requested by [DFPS] or [DFPS's] providers; attend court hearings, permanency hearings, [and] family group conferences; participate in parenting classes; financially support the children; provide and update the [DFPS] caseworker on residency within 72 hours of changing [his] address; provide [the DFPS]

> caseworker with a working [tele]phone number; [and] cooperate with [DFPS] and the [DFPS] service providers.

Jackson stated that father had completed his psychological evaluation and substance abuse assessment and he submitted to narcotics-use testing. Father submitted to two narcotics-use tests, although he had been ordered to participate in about twelve narcotics-use tests during the pendency of the termination-of-parental-rights case. Father did not participate in substance abuse counseling, which was recommended after he completed his substance abuse assessment.

According to Jackson, father stopped completing his FSP's requirements in June 2021 after DFPS told him that it was "going to give" the children's maternal grandparents permanent managing conservatorship over the children no matter what father did. After that, father "felt like [there] was no point in completing his [FSP because] he didn't have a chance" to have the children returned to his care. When Jackson was asked whether "[f]ather [was] working services until [DFPS] informed him that the grandparents would get" permanent managing conservatorship of the children, she responded, "Correct." Jackson did not know whether father was employed or where father lived. And she did not know whether father had "provided anything" to support the children.

Jackson testified that DFPS sought to terminate the parental rights of mother and father because the children needed permanency. Jackson stated that it was in the children's best interest for mother's and father's parental rights to be terminated.

Child Advocates Representative First

Child Advocates Inc. ("Child Advocates") representative Matthew First testified that he agreed with Jackson's testimony. As to the children, First stated that they were "happy where they[] [were] at" and they were "bonding with their grandparents." The maternal grandparents were "protective of the children." In First's opinion, the children's current placement with their grandparents was "the best place for them at th[e] time." And First believed that it was in the children's best interest for the parental rights of mother and father to be terminated.

Although First testified that he had "spoken with the children . . . about adoption," First did not provide details about what he discussed with the children or explain whether he had spoken to the children about the implications of being adopted. And First later contradicted himself during his testimony, stating that he had not had a chance to speak to the children about being adopted, but if he were to speak with T.S. about the possibility of adoption, he thought that T.S. would agree to being adopted by his grandparents.[13] According to First, the children's grandparents "want[ed] to be able to support the children the best way that they c[ould] without any interference [from mother and father] and adoption g[ave] them that best chance."

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[13] Specifically, First stated: "I said I believe he'll be in agreement with it after our talk."

Maternal Grandmother

The children's maternal grandmother testified that the children had been living with her and their maternal grandfather since February 2021—about ten months before trial. The children had adjusted well to living in her home, and over the last "four or five months," the children had "settled in," "become more open," and began "doing well in school." According to the children's grandmother, she has had a relationship with the children since their birth, and she and the children's maternal grandfather were willing to adopt the children. She believed that it was in the children's best interest to be adopted.

As to mother, the children's maternal grandmother stated that mother had "FaceTime[d]"[14] the children while they had been living with their grandparents, and mother spoke to the children "once a week" or "once every couple weeks." The children's grandparents had "tried to block" mother from calling the children, but because mother "ke[pt] getting new [cellular] [tele]phone numbers," she was able to talk to the children. The children enjoyed talking to mother, but "there [was] some trauma afterwards" because they would not understand "what [mother was] saying."

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[14] "Facetime is a[] [cellular telephone] application that allows individuals to make video calls from telephones. FaceTime also may run from other electronic devices." *Oballe v. State*, No. 01-20-00075-CR, 2020 WL 6494191, at *3 n.4 (Tex. App.—Houston [1st Dist.] Nov. 5, 2020, no pet.) (mem. op., not designated for publication) (alterations in original) (internal quotations omitted).

The children's grandmother did not have a problem with mother talking to the children, as long the contact was monitored.

As to the children, the children's grandmother testified that the children had previously lived with her, probably about "five or six, [or] seven times." T.S. had previously lived with her for "a year and a half," and E.S.S. had previously lived with her for "almost two years." The children's grandmother added, without explanation, that the children had been "bounced around" because of "the instability of" mother and father. In the children's grandmother's opinion, the best way for the children to have stability was to be adopted by her and the children's grandfather.

Maternal Grandfather

The children's maternal grandfather testified that it was in the children's best interest to be adopted by him and the children's grandmother.

Mother

Mother testified that she was the children's mother. As to why the children entered DFPS's care, mother stated that it was her understanding that father was "on the other side of the block" and the children were "playing." T.S. "locked" E.S.S. out of the house. E.S.S. then "went to a neighbor's [house] and said he was hungry," and the neighbor "called for a welfare check." When father arrived home, law enforcement officers "wanted to see if there was food inside the house," and father did not allow officers to go inside the house. Father was arrested, and DFPS "took

the [children]." At the time, mother was not living in the house; she had moved out in April 2018 and was living elsewhere. Before the children entered DFPS's care, mother saw them "regularly as much as [she] could."

Mother also testified that she received an FSP, but she did not complete the FSP's requirements. When asked why she did not complete the requirements, mother explained that she did not receive the FSP until April or May 2021, and she did not meet with DFPS caseworker Jackson until June 2021 about her FSP. Mother thought that it would cost her money to complete her FSP, and she "didn't have any money." She did not find out until August or September 2021 that DFPS "would . . . pa[y]" for the services required by the FSP. And by that time, she had been told by DFPS that her parental rights to the children were going to be terminated.

Mother testified that she had visits with the children every two weeks until June 2021. Then, after a visit with the children was canceled, mother "never got another date to see them again." Mother had not had a visit with the children since

June 2021. Mother explained, however, that she talked to the children daily using "Snapchat"[15] or "Duo."[16]

Mother agreed that the children were being well taken care of by their maternal grandparents. And mother believed that the children needed a stable environment and to be safe. The children needed "not [to] have so much in their lives right now because they need[ed] to worry about learning." But mother also felt that the children deserved a chance to be reunited with her at some point because she was "very close to them" and the children often asked her if they could "come see" her and "come stay with" her. Mother wanted the children to "be with [her]," but if they could not be, then she wanted the children to live with their maternal grandparents. Even if her parental rights to the children were terminated, mother believed that the children's grandparents would still allow her to "video" with the children, but she did not know if she would be allowed to see the children in person.

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15 "Snapchat is a messaging application that allows users to share pictures, videos, and messages that are only available for a short time before they become inaccessible. 'Snaps' can be directed privately to selected contacts or to a semi-public 'story.'" *Igboji v. State*, 607 S.W.3d 157, 161 n.1 (Tex. App.—Houston [14th Dist.] 2020, pet. granted); *see also In re X.M.*, No. 07-19-00046-CV, 2020 WL 2203303, at *5 (Tex. App.—Amarillo May 6, 2020, no pet.) (mem. op., not designated for publication) (describing "Snapchat" as "[a] cell[ular] [tele]phone . . . application").

16 *See Saleh v. N.J. Dep't of Corrections*, No. A-0681-20, 2022 WL 38861, at *1 (N.J. Jan. 5, 2022) (describing "Google Duo" as a "video call app[lication]" similar to "FaceTime"); *see also* GOOGLE DUO, https://duo.google.com/about/ (last visited July 15, 2022) (explaining "Duo" is a free video calling application that works with "Android phones, iPhones, tablets, computers, and smart displays").

When asked if she "believe[d] that it [was] in the best interest [of the children] to be with [their maternal grandparents] at this time," mother responded, "At th[e] current time, but not permanent[ly]." Mother could not comment on the stability of father's home and lifestyle because she did not "know his situation."

As to her current residence, mother stated that she had a stable place to live that was "long-term temporary." In three or four months, she would be "stable enough to get . . . [her] own house." Mother was not employed at the time of trial, but she was "looking for employment." She was last employed in 2018, but she had done "odd jobs" since then like "handyman stuff," so she had been "self-employ[ed]." Mother stated that she had disabilities, including attention deficit hyperactivity disorder ("ADHD") and "eight fractured vertebras in [her] back." Her "disks [were] shrinking," and she had "no balance in [her] right shoulder down into [her] right hip."

Father

Father testified that he is the children's father. Father was given an FSP, but "[n]o one reviewed it with [him]." He completed some of the FSP's requirements. According to father, he completed the psychological evaluation, the substance abuse assessment, and parenting classes. He stopped completing the requirements in June or July 2021 because he "didn't really see the point in working with [DFPS] if they were just going to . . . terminate" his parental rights to the children. Additionally,

about that time, he was told by DFPS caseworker Jackson that the children's maternal grandparents were going to become the children' s permanent managing conservators, which was another reason why he stopped completing the FSP's requirements.

When asked what his "understanding [was as to] how the [children] came into [DFPS's] care," father asserted his Fifth Amendment privilege against self-incrimination based on his attorney's advice.[17] He noted that he had not violated any court order regarding "visitation or access to [the] children" that had been put in place related to his "criminal case." He would follow any court order about "visitation and access to [the] children." He had not been convicted of any offense in his pending criminal case.

As to his employment, father stated that he was unemployed and had not had a job since the children entered DFPS's care. Father became unemployed at the beginning of the COVID-19 pandemic because he "needed to take care of the [children] because they couldn't go to school."[18] Father had "two job opportunities"

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17 *See* U.S. CONST. amend. V. As DFPS caseworker Jackson noted in her testimony, father had been charged with the offense of "child endangerment" and his criminal case was "still pending" at the time of trial.

18 *See In re Landstar Ranger, Inc.*, No. 06-20-00047-CV, 2020 WL 5521136, at *4 (Tex. App.—Texarkana Sept. 15, 2020, orig. proceeding) (mem. op.) (noting "[a]s a result of the onset of the COVID-19 pandemic, on March 13, 2020, Texas Governor Greg Abbott issued a disaster proclamation certifying that COVID-19 posed an imminent threat of disaster for all counties in the state of Texas[,] [and] . . . Governor Abbott instituted health protocols, such as minimizing in-person

since the children had entered DFPS's care, but he did not get hired after a "background check" was completed. After his criminal case is resolved, father plans to obtain employment. Father noted that he had been supporting himself by receiving income through "unemployment until a few months" before trial and his family had been helping him.

He stated that the children had been "well taken care of their entire lives" and he loved them. He believed that the children were "okay" in their maternal grandparents' home. But it would not be in the children's best interest for his parental rights to be terminated. Father was willing to pay child support if his parental rights to the children were not terminated. Father tried to speak to the children's maternal grandparents during the pendency of the

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contact, maintaining six feet between individuals, and suggesting that people wear masks when in the presence of other individuals" (internal footnotes omitted)); *see also Howell v. Abbott*, No. 04-21-00119-CV, 2022 WL 947190, at *1 (Tex. App.—San Antonio Mar. 30, 2022, pet. filed) (mem. op.) ("On March 13, 2022, Governor Abbott issued a proclamation certifying under the Texas Disaster Act of 1975 that the novel coronavirus COVID-19 pose[d] an imminent threat of disaster in all Texas counties. The Governor thereafter issued a flurry of lengthy and detailed executive orders designed to mitigate COVID-19's spread. The first of these, Executive Order GA-08, meaningfully changed Texans' day-to-day activities. . . . GA-08 . . . discouraged in person patronage of restaurants, bars, and gyms, temporarily closed schools, and directed Texans to avoid social gatherings in groups of more than 10 people." (internal quotations and citations omitted)); *In re Hilburn*, No. 05-20-01068-CV, 2022 WL 831547, at *6–7 (Tex. App.—Dallas Mar. 21, 2022, orig. proceeding) (mem. op.) (noting, as result of COVID-19 pandemic, schools "closed to in-person instruction" and "move[d] to . . . virtual learning").

termination-of-parental-rights case, but they did not want to speak to him because "of [a] fear of [DFPS] doing something to them."

Mother's FSP

The trial court admitted into evidence a copy of mother's FSP. The FSP stated that the "[p]rimary [p]ermanency [g]oal" for the children was "[f]amily [r]eunification." As to the children's "[s]trengths and [n]eeds," the FSP was not completed and listed nothing for either T.S. or E.S.S. As a "[g]oal [s]tatement[]," the FSP stated, "[Mother] will participate in the recommended services to identify and evaluate [her] needs [in] an effort to reunify the family."

Mother's FSP required her to complete parenting classes; "[v]isit the children according to the visitation schedule"; "[f]inancially support the child[ren]," "not necessarily . . . in the form of money," but mother could provide "clothes, shoes, coats, [and] socks" for the children; provide a safe and stable living environment; obtain "[l]egal mean[s] of caring for [the] child[ren]"; maintain contact with DFPS; attend court hearings, permanency hearings, and family group conferences; provide and update the DFPS caseworker "on residency within 72 hours of changing [her] address"; provide the DFPS caseworker with a working telephone number; "[c]ooperate with [DFPS] and [its] service[] provider[s]"; participate in random narcotics-use testing; complete a substance abuse assessment and follow its recommendations; refrain from engaging in criminal activity and report "any

arrest[s] [or] criminal charges" to the DFPS caseworker within twenty-four hours of any offense; refrain from narcotics use; complete a psychological evaluation and follow its recommendations; and release information as requested by DFPS.

The FSP repeatedly noted that DFPS was "[u]nable to communicate or locate" mother at the time the FSP was created. It stated that mother did not "participate" or "sign" the FSP. It also listed as "[u]nknown" or provided no information as to mother's "[h]opes and [d]reams for [the] child[ren]," strengths and needs, parenting skills, "[s]ubstance [a]buse/[u]se," or cognitive abilities. There is no date listed for the "[d]ate [a] [c]opy [was] [g]iven" to mother.[19]

Father's FSP

The trial court admitted into evidence a copy of father's FSP. The FSP stated that the "[p]rimary [p]ermanency [g]oal" for the children was "[f]amily [r]eunification." As to the children's "[s]trengths and [n]eeds," the FSP was not completed and listed nothing for either T.S. or E.S.S. As a "[g]oal [s]tatement[]," the FSP stated, "[Father] will participate in the recommended services to identify and evaluate [his] needs [in] an effort to reunify the family."

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[19] The trial court, in its February 25, 2021 status hearing order, found that mother had reviewed her FSP, understood her FSP, and had been advised that unless she was willing and able to provide the children with a safe environment, even with the assistance of her FSP, within the reasonable period of time specified in her FSP, her parental and custodial duties and rights would be subject to restriction or to termination or the children would not be returned to her. At trial, the trial court admitted into evidence at trial a copy of the February 25, 2021 status hearing order.

Father's FSP required him to complete parenting classes; "[f]inancially support the child[ren]," "not necessarily . . . in the form of money," but father could provide "clothes, shoes, coats, [and] socks" for the children; provide a safe and stable home living environment; obtain "[l]egal mean[s] of caring for [the] child[ren]"; allow DFPS to enter father's home for the purpose of evaluating the appropriateness for the children; maintain contact with DFPS; attend court hearings, permanency hearings, and family group conferences; provide and update the DFPS caseworker "on residency within 72 hours of changing [his] address"; provide the DFPS caseworker with a working telephone number; "[c]ooperate with [DFPS] and [its] service[] providers"; participate in random narcotics-use testing; complete a substance abuse assessment and follow its recommendations; refrain from engaging in criminal activity and report "any arrest[s] [or] criminal charges" to the DFPS caseworker within twenty-four hours of any offense; refrain from narcotics use; "[v]isit the children according to the visitation schedule"; complete a psychological evaluation and follow its recommendations; and release information as requested by DFPS.

The FSP repeatedly noted that DFPS was "[u]nable to communicate/locate" father at the time the FSP was created. It stated that father did not "participate" or "sign" the FSP. It also listed as "[u]nknown" or provided no information as to father's "[h]opes and [d]reams for [the] child[ren]," strengths and needs, parenting

skills, "[s]ubstance [a]buse/[u]se," or cognitive abilities. There is no date listed for the "[d]ate [a] [c]opy [was] [g]iven" to father.[20]

September 2021 Permanency Hearing Order

The trial court admitted into evidence a copy of a September 2021 permanency hearing order, which stated that mother was "only . . . permitted" to have "virtual visits" with the children. No reason for this change was provided.

November 2021 Permanency Report

The trial court admitted into evidence a copy of a November 2021 permanency report filed by DFPS. As to the termination-of-parental-rights case, the report stated it arose from an allegation of neglectful supervision in December 2020.

As to T.S., the report stated that he and his sibling, E.S.S., lived with their maternal grandparents. From December 23, 2020 until February 8, 2021, T.S. lived in a "[f]oster [h]ome." He began living with his maternal grandparents on February 8, 2021. He had "adjusted well to [his] placement" with his grandparents, and he was smart and active. He participated in the Boy Scouts of America. T.S. was in the sixth grade. The report did not provide information as to T.S.'s "[s]chool [p]erformance."

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[20] The trial court, in the February 25, 2021 status hearing order, found that father had not reviewed his FSP and had not signed his FSP.

For the "[p]rimary [p]ermanency [g]oal" for T.S., the report listed "relative adoption" because T.S. was "in need of stability and a long-term placement." T.S.'s maternal grandparents were willing to adopt him. For a "[c]oncurrent [p]ermanency [g]oal," the report listed "relative conservatorship" because T.S. was in "need of stability and a long-term placement." Both the "[p]rimary [p]ermanency [g]oal" and the "[c]oncurrent [p]ermanency [g]oal" were described as "the most appropriate goal" for T.S.

As to T.S.'s needs and strengths, the report stated that he would "benefit from [a] grief and loss support group, mental health case management, targeted/specific therapy[,] and . . . follow up with [his primary care physician] on self-harm." T.S. last saw a medical doctor for a "checkup" on December 28, 2020, and his last dental exam was on August 5, 2021. T.S. attended individual therapy bi-weekly. T.S. did not take any medication.

The report listed the following recommendations for T.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [T.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care. Psychotherapy services provided by a professional therapist will assist [T.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the

> prospects of a successful adoption will be limited. Therefore, [b]asic level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [m]oderate level services.

As to E.S.S., the report stated that he was nine years old, and he and his sibling, T.S., lived with their maternal grandparents. From December 23, 2020 until February 8, 2021, E.S.S. lived in a "[f]oster [h]ome." He began living with his maternal grandparents on February 8, 2021. E.S.S. had "adjusted to being placed in the home," and he was "very outspoken" and active. E.S.S. was in the third grade. There were no concerns about his "[s]chool [p]erformance."

For the "[p]rimary [p]ermanency [g]oal" for E.S.S., the report listed "relative adoption" because E.S.S. was "in need of stability and a long-term placement." E.S.S.'s grandparents were willing to adopt him. For a "[c]oncurrent [p]ermanency [g]oal," the report listed "relative conservatorship" because E.S.S. was in "need of stability and a long-term placement." Both the "[p]rimary [p]ermanency [g]oal" and the "[c]oncurrent [p]ermanency [g]oal" were described as "the most appropriate goal" for E.S.S.

As to E.S.S.'s needs and strengths, the report stated that he would "benefit from [a] grief and loss support group, mental health case management, [and] targeted/specific therapy." He would also "benefit from community supports such as [the] Boy Scouts [of America] or [the] Boys and Girls Club." E.S.S. last saw a medical doctor for a "checkup" on December 28, 2020, and his last dental exam was

on August 5, 2021. E.S.S. attended individual therapy bi-weekly. E.S.S. took medication for ADHD. The last appointment E.S.S. had to review his medication was on February 22, 2021.

The report listed the following recommendations for E.S.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [E.S.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care. Psychotherapy services provided by a professional therapist will assist [E.S.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the prospects of a successful adoption will be limited. Therefore, [m]oderate level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [s]pecialized level services.

As to mother, the report stated that mother had not been consistent with her visitation schedule with the children but did not state what mother's visitation schedule was with the children. Related to mother's required narcotics-use testing, the report stated that mother failed to "[s]how" for narcotics-use testing on February 23, 2021, March 23, 2021, May 13, 2021, May 26, 2021, June 15, 2021, July 12, 2021, July 26, 2021, July 28, 2021, August 4, 2021, August 12, 2021, August 31, 2021, and October 14, 2021.

As to father, the report stated that he had completed his psychological evaluation on June 24, 2021. Based on his evaluation, the following was recommended: substance-abuse-community-based program, random narcotics-use testing, parenting classes, individual therapy, visitation with the children, and a "support system." Father completed his substance abuse assessment on May 5, 2021. And based on that assessment, it was recommended that father participate in substance abuse counseling.

Related to father's required narcotics-use testing, the report stated that father tested negative for narcotics use on May 26, 2021. He tested positive for amphetamine and methamphetamine use on May 13, 2021. He failed to "[s]how" for narcotics-use testing on February 23, 2021, March 23, 2021, June 15, 2021, July 12, 2021, July 28, 2021, August 12, 2021, August 31, 2021, and October 14, 2021. As to his "[n]o show" on June 15, 2021, the report explained that father had "stated that[,] according to his [FSP,] he [was] supposed to receive a [tele]phone call by 9:00 am" if he was going to be required to submit to narcotics-use testing and "he was waiting for the call." But "if the call [did not] come in before 9:00 am[,] he w[ould] not know the call came in."[21]

[21] Father's FSP stated that he "w[ould] be contacted by the [DFPS] caseworker or [a DFPS] representative to submit to a [narcotics-use] test by 9:00 am on the day of [the test]. He w[ould] [then] have until 4:00 pm to submit to the random [narcotics-use] test."

Child Advocates Report

The trial court admitted into evidence a copy of a November 2021 Court Report by Child Advocates (the "Child Advocates report"). The Child Advocates report recommended that DFPS be given permanent managing conservatorship of the children and mother's and father's parental rights be terminated. According to the report, on December 22, 2020, DFPS "received a referral stating that [l]aw [e]nforcement [officers] were called to the home" because "[t]here were concerns that [E.S.S.] was locked out of the home all day." T.S. was at a friend's home but returned home when law enforcement officers arrived. Once law enforcement officers were at the home, father purportedly refused to unlock the door to allow the children to get anything from inside the home. The children were not wearing jackets.[22]

The report stated that mother was asked to complete certain requirements in her FSP, including to maintain contact with DFPS, attend court hearings, permanency hearings, family group conferences, complete a psychological evaluation and follow all recommendations, attend parenting classes, maintain a safe and stable home, "provided updated residency and [tele]phone numbers," and submit

[22] We note that the high temperature in Houston, Texas on December 22, 2020 was seventy-two degrees Fahrenheit. *See J. Weingarten, Inc. v. Tripplett*, 530 S.W.2d 653, 656 (Tex. App.—Beaumont 1975, writ ref'd n.r.e.) ("We are permitted to take judicial [notice] of a weather report for a particular day.").

to random narcotics-use testing. According to the report, mother had been in contact with DFPS during the pendency of the termination-of-parental-rights case, but she had not participated in narcotics-use testing. She missed visits with the children and had not completed her FSP's requirements.

The report stated that father was asked to complete certain requirements in his FSP, including to maintain contact with DFPS, attend court hearings, permanency hearings, and family group conferences, refrain from engaging in criminal activity, complete a psychological evaluation and follow all recommendations, attend parenting classes, and maintain a safe and stable home. Father had been in contact with DFPS during the pendency of the termination-of-parental-rights case, but when DFPS told him that its "goal was for the [children's maternal] grandparents . . . to receive permanent managing conservatorship" of the children, father stopped communicating with DFPS. Father tested negative for narcotics use on May 26, 2021. At the time of the report, father had "an active criminal case for abandoning the children" and was subject to "a no contact order" related to the children. When a Child Advocates volunteer asked father for a "home visit" on July 29, 2021, father explained that "he d[id] not believe it[] [was] necessary for Child Advocates to visit the home because the [children's maternal] grandparents [were] going to keep the children and the home he [was] . . . residing in [at the time] was not where the children would be staying."

As to the children's placement with their maternal grandparents, the report explained that the children began living with their grandparents on February 8, 2021.[23] The children's needs were being met. A "health check" was completed on August 11, 2021, and the children attended dental appointments on August 5, 2021. E.S.S. took medication daily and wore prescription eyeglasses. E.S.S. received accommodations at school. T.S. did not take medication and did not require accommodations at school. T.S. participated in band and in the Boy Scouts of America. The children were performing well in school.

The report stated that it would be in the children's best interest for the parental rights of mother and father to be terminated because mother and father had not completed their FSPs. Mother and father had not "proven" that they were able to provide a safe and stable placement for the children. Mother had not visited the children consistently, and father had a "pending criminal case." The children had been living with their grandparents, who provided "a safe and stable placement for the children." The children had made "positive improvements" in their lives. The children were bonded with their maternal grandparents and had "verbalized wanting to be adopted by and stay[] with their grandparents fulltime." The children's grandparents had expressed a desire to adopt the children.

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[23] The children were first placed in a foster home when they entered DFPS's care.

Standard of Review

A parent's right to "the companionship, care, custody, and management" of her children is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (internal quotations omitted). The United States Supreme Court has emphasized that "the interest of [a] parent[] in the care, custody, and control of [her] children . . . is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Likewise, the Texas Supreme Court has concluded that "[t]his natural parental right" is "essential," "a basic civil right of man," and "far more precious than property rights." *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (internal quotations omitted). Consequently, "[w]e strictly construe involuntary termination statutes in favor of the parent." *In re E.N.C.*, 384 S.W.3d 796, 802 (Tex. 2012).

Because termination of parental rights is "complete, final, irrevocable and divests for all time that natural right . . . , the evidence in support of termination must be clear and convincing before a court may involuntarily terminate a parent's rights." *Holick*, 685 S.W.2d at 20. Clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007; *see also In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). Because the

standard of proof is "clear and convincing evidence," the Texas Supreme Court has held that the traditional legal and factual standards of review are inadequate. *In re J.F.C.*, 96 S.W.3d at 264–68.

In conducting a legal-sufficiency review in a termination-of-parental-rights case, we must determine whether the evidence, viewed in the light most favorable to the finding, is such that the fact finder could reasonably have formed a firm belief or conviction about the truth of the matter on which DFPS bore the burden of proof. *Id.* at 266. In viewing the evidence in the light most favorable to the finding, we "must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so," and we "should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (internal quotations omitted). But this does not mean we must disregard all evidence that does not support the finding. *In re J.F.C.*, 96 S.W.3d at 266. Because of the heightened standard, we must also be mindful of any undisputed evidence contrary to the finding and consider that evidence in our analysis. *Id.* If we determine that no reasonable trier of fact could have formed a firm belief or conviction that the matter that must be proven is true, we must hold the evidence to be legally insufficient and render judgment in favor of the parent. *Id.*

In conducting a factual-sufficiency review in a termination-of-parental-rights case, we must determine whether, considering the entire record, including evidence both supporting and contradicting the finding, a fact finder reasonably could have formed a firm conviction or belief about the truth of the matter on which DFPS bore the burden of proof. *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002). We should consider whether the disputed evidence is such that a reasonable fact finder could not have resolved the disputed evidence in favor of its finding. *In re J.F.C.*, 96 S.W.3d at 266. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) (internal quotations omitted).

Termination of Mother's Parental Rights

In her first, second, and third issues, mother argues that the trial court erred in terminating her parental rights to the children because the evidence is legally and factually insufficient to support the trial court's findings that she constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months, she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children, and termination of her parental rights was

in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N), (b)(1)(O), (b)(2).

In order to terminate the parent-child relationship, DFPS must establish, by clear and convincing evidence, one or more of the acts or omissions enumerated in Texas Family Code section 161.001(b)(1) and that termination of parental rights is in the best interest of the children. *See id.* § 161.001(b). Both elements must be established, and termination may not be based solely on the best interest of the children as determined by the trier of fact. *Id.*; *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). "Only one predicate finding under section 161.001[(b)](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child[ren]'s best interest." *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

A. FSP

In a portion of her first issue, mother argues that the evidence is legally insufficient to support the trial court's finding that she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children because she was never actually "subject to a court [o]rder." In the alternative, mother asserts that "she is entitled to prevail on th[e] affirmative defense" provided by Texas Family Code section 161.001(d).

Parental rights may be terminated under Texas Family Code section 161.001(b)(1)(O) if clear and convincing evidence supports 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[ren] who ha[d] been in the permanent or temporary managing conservatorship of [DFPS] for not less than nine months as a result of the child[ren's] removal from the parent under Chapter 262 for the abuse or neglect of the child[ren].

TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *see also In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019). Essentially, to terminate parental rights under this section, DFPS is required to prove that (1) it had been the children's temporary or permanent managing conservator for at least nine months, (2) it took custody of the children as a result of a removal from a parent under Chapter 262 for abuse or neglect,[24] (3) a court issued an order establishing the actions necessary for the parent to obtain the return of the children, and (4) the parent did not comply with the court order. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *In re J.M.T.*, 519 S.W.3d 258, 266 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see also In re D.G.*, No. 02-17-00332-CV, 2018 WL 547787, at *5 (Tex. App.—Fort Worth Jan. 25, 2018, no pet.) (mem. op.) (Texas Family Code section 161.001(b)(1)(O) "requires the

[24] *See In re A.J.H.*, No. 01-18-00673-CV, 2019 WL 190091, at *4 (Tex. App.—Houston [1st Dist.] Jan. 15, 2019, no pet.) (mem. op.) (parent who failed to comply with trial court's order need not be same parent whose abuse or neglect warranted children's initial removal).

existence of a valid, predicate court order that a parent has failed to comply with to obtain the return of the child[ren]").

Here, mother does not dispute that at the time of trial the children had been in the temporary or permanent managing conservatorship of DFPS for at least nine months and DFPS took custody of the children as a result of the children's removal from a parent under Chapter 262 for abuse or neglect. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *In re J.M.T.*, 519 S.W.3d at 266. Mother also does not dispute that she failed to complete the requirements of her FSP. Instead, mother asserts that she was never actually "subject to a court [o]rder" specifically establishing the actions necessary for her to obtain the return of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O); *In re J.M.T.*, 519 S.W.3d at 266.

At trial, the trial court admitted into evidence a copy of mother's FSP, showing that it was filed with the trial court on January 21, 2021. The FSP does not contain mother's signature,[25] but the lack of mother's signature on her FSP does not render the evidence legally insufficient to support the trial court's finding that mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children. *See In re L.L.N-P.*, No. 04-18-00380-CV, 2018 WL 6069853, at *2 (Tex. App.—San

[25] Mother's FSP is signed by Deshondra Johnson, a DFPS caseworker, and Cheryl Craver, a DFPS supervisor. It is not signed by mother.

Antonio Nov. 21, 2018, pet. denied) (mem. op.) (overruling parent's complaint evidence insufficient to support trial court's finding parent failed to comply with provisions of court order that specifically established actions necessary for him to obtain return of child because parent never signed his FSP); *see also In re J.B.*, No. 02-18-00173-CV, 2018 WL 4626427, at *7 n.1 (Tex. App.—Fort Worth Sept. 27, 2018, no pet.) (mem. op.) (parent bound by FSP even if she did not participate in its formation); *In re T.T.F.*, 331 S.W.3d 461, 478 (Tex. App.—Fort Worth 2010, no pet.) (holding filing of FSP without parent's signature did not violate parent's procedural due process rights).

Texas Family Code section 263.101 requires DFPS to file an FSP with the trial court no later than the forty-fifth day after the trial court renders a temporary order appointing DFPS as the temporary managing conservator of the children. TEX. FAM. CODE ANN. § 263.101; *In re T.T.F.*, 331 S.W.3d at 478. Although generally the children's parent signs the FSP, Texas Family Code section 263.103(c) allows DFPS to file an FSP without a parent's signature if it determines that the children's parent is unable or unwilling to participate in the development of the FSP or sign the FSP. TEX. FAM. CODE ANN. § 263.103(b), (c); *In re T.T.F.*, 331 S.W.3d at 478. If the FSP does not contain the parent's signature, the FSP takes effect when the trial court issues an order giving effect to the FSP. TEX. FAM. CODE ANN. § 263.103(d)(2); *In re L.L.N-P.*, 2018 WL 6069853, at *2.

On January 7, 2021, the trial court held "a full adversary hearing pursuant to" Texas Family Code section 262.201. *See* TEX. FAM. CODE ANN. § 262.201(a). Mother appeared through counsel at that hearing. After the hearing, on January 12, 2021, the trial court signed a temporary order appointing DFPS as the temporary managing conservator of the children.[26] The trial court's January 12, 2021 temporary order also ordered mother "to comply with each requirement set out in [DFPS's] original, or any amended [FSP] during the pendency of th[e] suit." The trial court noted that an FSP would be approved by the trial court at a status hearing on a later date.

On January 21, 2021, DFPS filed mother's FSP with the trial court. On February 16, 2021, the trial court held a status hearing at which mother and her attorney were present. Following the status hearing, on February 25, 2021, the trial court signed a status hearing order, a copy of which the trial court admitted into evidence at trial. In its February 25, 2021 status hearing order, the trial court found that mother was "before the [trial] [c]ourt," mother's FSP was "reasonable, accurate, and in compliance with the previous orders of the [trial] [c]ourt," the goal of mother's FSP was "to return the children to [mother]," the FSP "adequately ensure[d] that reasonable efforts [were] being made to enable [mother] to provide a

[26] At trial, the trial court admitted into evidence a copy of its January 12, 2021 temporary order following adversary hearing.

safe environment for the children," mother's FSP was "tailored to address any specific issues identified" by DFPS, and a DFPS representative had signed the FSP. The trial court further found that mother had "reviewed" and "underst[ood]" her FSP and "ha[d] . . . been advised that unless she [was] willing and able to provide the children with a safe environment, even with the assistance of [her FSP], within a reasonable period of time specified in the [FSP], her parental and custodial duties and rights [could] be subject to restriction or termination or the children [could] not be returned to her." At this point, mother's FSP became an order of the trial court specifically establishing the actions necessary for her to obtain the return of the children. *See In re J.M.T.*, 519 S.W.3d at 261.

Mother argues that because she was not "served" until February 26, 2021, the day "after the [trial] court signed its [February 25, 2021] [s]tatus [h]earing [o]rder," she "was not subject to" the trial court's February 25, 2021 status hearing order and it could not constitute an order of the trial court specifically establishing the actions necessary for her to obtain the return of the children. Mother does not provide any authority in her brief to support her argument. *See* TEX. R. APP. P. 38.1(i) ("[Appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). And we note that the San Antonio Court of Appeals has rejected this argument. *See In re L.L.N-P.*, 2018 WL 6069853, at *2 (disagreeing with parent's argument that "evidence [was]

insufficient" to support trial court's finding that parent failed to comply with provisions of court order that specifically established actions necessary for parent to obtain return of child because "trial court signed order giving effect to the [FSP]" before parent was served).

We also note that mother appeared with counsel at the trial court's February 16, 2021 status hearing, after which the trial court entered its February 25, 2021 status hearing order specifically establishing the actions necessary for mother to obtain the return of the children. The trial court has jurisdiction to enter an order against a person if the record shows proper service of citation on that person, *an appearance by the person*, or a waiver of service before the date of the order. *In re Tex. Dep't of Family & Protective Servs.*, 415 S.W.3d 522, 528 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding [mand. denied]). And a party's personal appearance before the trial court indicates a submission to the court's jurisdiction, constituting a general appearance and waiving any complaint as to service. *See In re D.M.B.*, 467 S.W.3d 100, 103 (Tex. App.—San Antonio 2015, pet. denied). Here, the trial court's February 25, 2021 status hearing order, entered by the trial court after a hearing where mother appeared, constituted a valid order specifically establishing the actions necessary for mother to obtain the return of the children from DFPS. *See In re J.B.*, 2018 WL 4626427, at *3–5 (after parent waived service, trial court signed order incorporating parent's FSP, which constituted order specifically

establishing actions necessary for parent to regain custody of child); *see also W.C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00713-CV, 2020 WL 1281643, at *2, *4 (Tex. App.—Austin Mar. 18, 2020, pet. denied) (mem. op.) (holding evidence sufficient to support trial court's finding that parent "failed to comply with specific, itemized actions contained with trial court's order that were required to obtain the return of his child" where although initially difficult to locate, parent was appointed counsel and appeared at status hearing where trial court entered order stating parent was present and reviewed and understood his FSP and order included actions necessary for parent to obtain return of child); *In re J. I. T.*, No. 01-17-00988-CV, 2018 WL 3131158, at *23–24 (Tex. App.—Houston [1st Dist.] June 27, 2018, pet. denied) (mem. op.) (record supported trial court's finding parent failed to comply with provision of court order that specifically established actions necessary for parent to obtain return of children where, even though parent claimed he had never been served, parent appeared at status hearing and trial court's order after status hearing adopted parent's FSP); *In re A.L.W.*, No. 01-14-00805-CV, 2015 WL 4262754, at *9 (Tex. App.—Houston [1st Dist.] July 14, 2015, no pet.) (mem. op.) (evidence legally sufficient to support trial court's termination under Texas Family Code section 161.001(b)(1)(O) where record contained order from status hearing, at which parent appeared with her attorney, because that order specifically established actions necessary for parent to obtain return of her children).

Mother also asserts that even if she was subject to an order of the trial court requiring her to complete the requirements of her FSP, "this Court must find that [she] was unable to comply with the order . . . and she had [a] good faith intent to comply but failure to do so was not her fault." *See* TEX. FAM. CODE ANN. § 161.001(d).

Texas Family Code section 161.001(d) provides an affirmative defense to the termination of parental rights based on a parent's failure to comply with a court order specifically establishing the actions necessary for the parent to obtain the return of the children. *See id.* Under Texas Family Code section 161.001(d), the trial court "may not order termination under []section [161.001(b)(1)(O)] based on the failure by [a] parent to comply with a specific provision of a court order if a parent proves by a preponderance of [the] evidence that: (1) the parent was unable to comply with [the] specific provisions of the court order; and (2) the parent made a good faith effort to comply with the order and the failure to comply with the order [was] not attributable to any fault of the parent." *See id.*; *see In re L.L.-M.C.*, No. 01-21-00233-CV, 2021 WL 4898076, at *4 (Tex. App.—Houston [1st Dist.] Oct. 21, 2021, pet. denied) (mem. op.). Here, the trial court found that mother

> failed to raise a defense based on Texas Family Code [section] 161.001(d) to the court's finding under [section] 161.001(b)(1)(O) of the Family Code; and, even if presented, . . . there was no proof by a preponderance of [the] evidence that [mother]: (1) was unable to comply with specific provisions of a court order; and (2) [mother] made a good faith effort to comply with

> the order and the failure to comply with the order [was] not attributable to any fault of [mother].

DFPS argues that mother waived the affirmative defense under Texas Family Code section 161.001(d) because she did not plead or prove the affirmative defense. *See* TEX. R. CIV. P. 94. Even were we to presume that mother did not waive her affirmative defense, mother failed to meet her burden to prove that she was unable to comply with her FSP, she made a good faith effort to comply with her FSP, and her failure to comply with her FSP was not attributable to her own fault. *See* TEX. FAM. CODE ANN. § 161.001(d).

Mother's FSP required her to complete parenting classes; "[v]isit the children according to the visitation schedule"; "[f]inancially support the child[ren]," "not necessarily . . . in the form of money," but mother could provide "clothes, shoes, coats, [and] socks" for the children; provide a safe and stable living environment; obtain "[l]egal mean[s] of caring for [the] child[ren]"; maintain contact with DFPS; attend court hearings, permanency hearings, and family group conferences; provide and update the DFPS caseworker "on residency within 72 hours of changing [her] address"; provide the DFPS caseworker with a working telephone number; "[c]ooperate with [DFPS] and [its] service[] providers"; participate in random narcotics-use testing; complete a substance abuse assessment and follow its recommendations; refrain from engaging in criminal activity and report "any arrest[s] [or] criminal charges" to the DFPS caseworker within twenty-four hours of

any offense; refrain from narcotics use; complete a psychological evaluation and follow its recommendations; and release information as requested by DFPS.

Mother testified that she received an FSP, but she did not complete the FSP's requirements. When asked why she did not complete any of the requirements of her FSP, mother stated that she did not receive the FSP until April or May 2021, and she did not meet with DFPS caseworker Jackson about her FSP until June 2021. Mother thought it would cost her money to complete the requirements of her FSP, and she did not find out until August or September 2021 that DFPS "would . . . pa[y]" for the services required by the FSP. And by then, she had already been told by DFPS that her parental rights to the children were going to be terminated.

Contrary to mother's testimony, as discussed above, the evidence presented at trial showed that on January 7, 2021, the trial court held "a full adversary hearing pursuant to" Texas Family Code section 262.201. *See id.* § 262.201(a). Mother appeared through counsel at that hearing. After the hearing, on January 12, 2021, the trial court signed a temporary order appointing DFPS as the temporary managing conservator of the children. The trial court's January 12, 2021 temporary order also ordered mother "to comply with each requirement set out in [DFPS's] original, or any amended [FSP] during the pendency of th[e] suit." The trial court noted that an FSP would be approved by the trial court at a status hearing on a later date.

On January 21, 2021, DFPS filed mother's FSP with the trial court. On February 16, 2021, the trial court held a status hearing at which mother and her attorney were present. Following the status hearing, on February 25, 2021, the trial court signed a status hearing order. In its February 25, 2021 status hearing order, the trial court found that mother was "before the [trial] [c]ourt," mother's FSP "adequately ensure[d] that reasonable efforts [were] being made to enable [mother] to provide a safe environment for the children," mother's FSP was "tailored to address any specific issues identified" by DFPS, and a DFPS representative had signed the FSP. The trial court further found that mother had "reviewed" and "underst[ood]" her FSP and "ha[d] . . . been advised that unless she [was] willing and able to provide the children with a safe environment, even with the assistance of [her FSP], within a reasonable period of time specified in the [FSP], her parental and custodial duties and rights [could] be subject to restriction or termination or the children [could] not be returned to her."

DFPS caseworker Jackson testified that mother received her FSP, but mother did not complete any of the requirements of the FSP. According to Jackson, mother only contacted her "[p]eriodically" while Jackson was the DFPS caseworker for the children. And mother had not had any visits with the children while Jackson was the DFPS caseworker. The "[l]ast time [that Jackson had] checked," mother was not employed. And Jackson did not know where mother lived. To Jackson's

knowledge, mother had not provided "any level of support" to the children while they had been in the care of DFPS.

The November 2021 permanency report, a copy of which the trial court admitted into evidence at trial, noted that mother had not been consistent with her visitation schedule with the children during the pendency of the termination-of-parental-rights case, and mother had failed to "[s]how" for her required narcotics-use testing on February 23, 2021, March 23, 2021, May 13, 2021, May 26, 2021, June 15, 2021, July 12, 2021, July 26, 2021, July 28, 2021, August 4, 2021, August 12, 2021, August 31, 2021, and October 14, 2021.

Mother had the burden to prove by a preponderance of the evidence that she was unable to comply with her FSP, she made a good faith effort to comply with her FSP, and her failure to comply with the FSP was not attributable to any fault of her own. *See* TEX. FAM. CODE ANN. § 161.001(d); *In re L.E.R.*, No. 14-21-00590-CV, --- S.W.3d ---, 2022 WL 1088592, at *12–13 (Tex. App.—Houston [14th Dist.] Apr. 12, 2022, no pet.) (Texas Family Code section 161.001(d) places burden on parent to prove she was unable to comply with her court-ordered FSP, she made good faith effort to comply, and her failure to comply was not attributable to any fault of her own). But mother *did not* present evidence at trial establishing that she was unable to comply with her FSP, she made a good faith effort to comply with her FSP, and her failure to comply with her FSP was not

attributable to any fault of her own. *See* TEX. FAM. CODE ANN. § 161.001(d); *see also In re G.A.*, No. 01-21-00001-CV, 2021 WL 1686721, at *2 (Tex. App.—Waco Apr. 28, 2021, no pet.) (mem. op.); *In re D.K.J.J.*, No. 01-18-01081-CV, 2019 WL 2455623, at *16 (Tex. App.—Houston [1st Dist.] June 13, 2019, pet. denied) (mem. op.); *In re A.J.H.*, No. 01-18-00673-CV, 2019 WL 190091, at *6–7 (Tex. App.—Houston [1st Dist.] Jan. 15, 2019, no pet.) (mem. op.). Thus, she cannot rely on the affirmative defense provided by Texas Family Code section 161.001(d) to negate the trial court's termination of her parental rights for failure to comply with a court order specifically establishing the actions necessary for her to obtain the return of the children.

Viewing the evidence in the light most favorable to the trial court's findings, we conclude that the trial court could have formed a firm belief or conviction that mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children and mother failed to prove by a preponderance of the evidence that she could not comply with the specific provisions of the trial court's order, but she made a good faith effort to comply with the order and any failure to comply was not attributable to her fault. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(O), (d). We hold that the evidence is legally sufficient to support the trial court's findings that mother failed to comply with the provisions of a court order that specifically established the actions necessary

for her to obtain the return of the children and mother failed to prove by a preponderance of the evidence that she could not comply with the specific provisions of the trial court's order, but she made a good faith effort to comply with the order and any failure to comply was not attributable to her fault. *See id.* § 161.001(b)(1)(O), (d).

We overrule a portion of mother's first issue.

Having held that the evidence is legally sufficient to support the trial court's finding that mother failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children, we need not address the remaining portion of mother's first issue in which she asserts that the evidence is legally insufficient to support the trial court's finding that she constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months. *See id.* § 161.001(b)(1)(N); *In re A.V.*, 113 S.W.3d at 362 (only one predicate finding under Texas Family Code section 161.001(b)(1) necessary to support judgment of termination); *In re M.A.J.*, 612 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2020, pet. denied); *see also* TEX. R. APP. P. 47.1.

Additionally, due to our disposition below, we need not address mother's second issue in which she asserts that the evidence is factually insufficient to support the trial court's findings that she constructively abandoned the children, who had

been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months and she failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N), (b)(1)(O). This is because, even were we to sustain any of the factual-sufficiency challenges raised in mother's second issue, mother would not be granted any more relief than we have afforded her below. *See In re M.A.J.*, 612 S.W.3d at 408; *In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *18 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.); *see also* TEX. R. APP. P. 47.1.

B. Best Interest of Children

In her third issue, mother argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of her parental rights was in the best interest of the children because "[t]here [was] very little best interest evidence" presented at trial, mother "had contact with the children through[out] the entire case," the "children enjoy[ed] talking to . . . mother," the children's maternal grandmother testified that "[m]other having visits with the children would be fine," the November 2021 permanency report stated that the children would "benefit from contact with members of [their] family," mother was "not responsible for the children coming into [DFPS's] care," mother had no criminal history or history of assaultive behavior, mother was not in a relationship with father, and "a portion of

the [trial] court's decision to find that termination of [m]other's parental rights was in the children's best interest rest[ed] on evidence that [m]other [was] economically disadvantaged." (Emphasis omitted.)

The best-interest analysis evaluates the best interest of the children. *See In re M.A.A.*, No. 01-20-00709-CV, 2021 WL 1134308, at *20 (Tex. App.—Houston [1st Dist.] Mar. 25, 2021, no pet.) (mem. op.); *In re D.S.*, 333 S.W.3d 379, 384 (Tex. App.—Amarillo 2011, no pet.). It is presumed that the prompt and permanent placement of the children in a safe environment is in their best interest. *See* TEX. FAM. CODE ANN. § 263.307(a); *In re D.S.*, 333 S.W.3d at 383.

There is also a strong presumption that the children's best interest is served by maintaining the parent-child relationship. *In re L.M.*, 104 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Thus, we strictly scrutinize termination proceedings in favor of the parent. *See In re M.A.A.*, 2021 WL 1134308, at *20; *In re N.L.D.*, 412 S.W.3d 810, 822 (Tex. App.—Texarkana 2013, no pet.). And because of the strong presumption in favor of maintaining the parent-child relationship and the due process implications of terminating a parent's rights to her minor children without clear and convincing evidence, "the best interest standard does not permit termination merely because [the] child[ren] might be better off living elsewhere." *In re J. G. S.*, 574 S.W.3d 101, 121–22 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (internal quotations omitted); *see also In re W.C.*, 98 S.W.3d 753,

758 (Tex. App.—Fort Worth 2003, no pet.). Termination of parental rights should not be used as a mechanism to merely reallocate children to better and more prosperous parents. *In re J. G. S.*, 574 S.W.3d at 121–22; *In re W.C.*, 98 S.W.3d at 758; *see also In re E.N.C.*, 384 S.W.3d at 809; *In re C.R.*, 263 S.W.3d 368, 375 (Tex. App.—Dallas 2008, no pet.).

Moreover, termination is not warranted "without the most solid and substantial reasons." *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (internal quotations omitted); *see also In re N.L.D.*, 412 S.W.3d at 822. And in termination-of-parental-rights cases, DFPS's burden is not simply to prove that a parent should not have custody of her children; DFPS must meet the heightened burden to prove, by clear and convincing evidence, that the parent should no longer have any relationship with her children whatsoever. *See In re M.A.J.*, 612 S.W.3d at 409–10; *In re K.N.J.*, 583 S.W.3d 813, 827 (Tex. App.—San Antonio 2019, no pet.); *see also In re J.A.J.*, 243 S.W.3d 611, 616–17 (Tex. 2007) (distinguishing proof required for conservatorship decisions versus termination decisions).

In determining whether the termination of mother's parental rights was in the best interest of the children, we may consider several factors, including: (1) the desires of the children; (2) the current and future physical and emotional needs of the children; (3) the current and future emotional and physical danger to the children; (4) the parental abilities of the parties seeking custody; (5) whether programs are

available to assist those parties; (6) plans for the children by the parties seeking custody; (7) the stability of the proposed placement; (8) the parent's acts or omissions that may indicate that the parent-child relationship is not proper; and (9) any excuse for the parent's acts or omissions. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *In re L.M.*, 104 S.W.3d at 647. We may also consider the statutory factors set forth in Texas Family Code section 263.307. *See* TEX. FAM. CODE ANN. § 263.307; *In re A.C.*, 560 S.W.3d 624, 631 n.29 (Tex. 2018); *In re C.A.G.*, No. 01-11-01094-CV, 2012 WL 2922544, at *6 & n.4 (Tex. App.—Houston [1st Dist.] June 12, 2012, no pet.) (mem. op.).

These factors are not exhaustive, and there is no requirement that DFPS prove all factors as a condition precedent to the termination of parental rights. *See In re C.H.*, 89 S.W.3d at 27; *see also In re C.L.C.*, 119 S.W.3d 382, 399 (Tex. App.—Tyler 2003, no pet.) ("[T]he best interest of the child does not require proof of any unique set of factors nor limit proof to any specific factors."). The absence of evidence about some of the factors does not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the children's best interest. *In re C.H.*, 89 S.W.3d at 27; *In re J. G. S.*, 574 S.W.3d at 122.

Likewise, a lack of evidence on one factor cannot be used as if it were clear and convincing evidence supporting termination of parental rights. *In re E.N.C.*, 384 S.W.3d at 808; *In re J. G. S.*, 574 S.W.3d at 122. In some cases, undisputed evidence

of only one factor may be sufficient to support a finding that termination is in the children's best interest, while in other cases, there could be "more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice" to support termination. *In re C.H.*, 89 S.W.3d at 27; *see also In re J. G. S.*, 574 S.W.3d at 122. The presence of scant evidence relevant to each factor will generally not support a finding that termination of parental rights is in the children's best interest. *In re M.A.J.*, 612 S.W.3d at 410; *In re R.H.*, No. 02-19-00273-CV, 2019 WL 6767804, at *4 (Tex. App.—Fort Worth Dec. 12, 2019, pet. denied) (mem. op.); *In re A.W.*, 444 S.W.3d 690, 693 (Tex. App.—Dallas 2014, pet. denied).

Our focus is on whether the termination of mother's parental rights would advance the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *In re J. G. S.*, 574 S.W.3d at 127.

1. Children's Desires

At the time mother's parental rights were terminated, T.S. was twelve years old and E.S.S. was nine years old. The children entered DFPS's care in December 2020 and began living with their maternal grandparents in February 2021—about ten months before trial. Little evidence was presented at trial as to the children's desires. DFPS caseworker Jackson stated that the children were "bonded to their grandparents" and "want[ed] to be adopted." And they enjoyed being in their current placement with their grandparents. Child Advocates representative First also stated

that the children were "happy where they[] [were] at" and they were "bonding with their grandparents." Although First testified that he had "spoken with the children . . . about adoption,"[27] he also contradicted himself during his testimony, stating that he had not had a chance to speak to the children about being adopted by their maternal grandparents, but he thought that T.S. would agree to the adoption if First were to speak to him about it. Significantly, there was no evidence presented at trial that the implications of adoption had been explained to the children or that the children were told how adoption would affect their relationship with mother.

The November 2021 permanency report stated that from December 23, 2020 until February 8, 2021, the children lived in a "[f]oster [h]ome." They began living with their maternal grandparents on February 8, 2021. The children had "adjusted well" to their placement with their grandparents. *See In re L.M.N.*, No. 01-18-00413-CV, 2018 WL 5831672, at *20 (Tex. App.—Houston [1st Dist.] Nov. 8, 2018, pet. denied) (mem. op.) (considering evidence of children doing well after removal when discussing children's desires).

Yet, no evidence was presented at trial indicating that the children desired the termination of their relationship with mother.[28] *See In re M.A.A.*, 2021 WL 1134308,

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[27] First did not provide any details about what he had discussed with the children "about adoption."

[28] Although the Child Advocates report states that the children had "verbalized wanting to be adopted by and stay[] with their grandparents fulltime," this is not evidence that the children desired the termination of their relationship with mother,

at *21 (in holding evidence factually insufficient to support trial court's finding that termination was in children's best interest, noting, although "[n]one of the children . . . expressed their desires as to returning to mother's care, . . . no evidence was presented that [children] desired termination of [their] relationship with [parent]").

Mother testified that she had visits with the children every two weeks until June 2021. After a visit with the children was canceled, mother "never got another date to see [the children] again," but mother stated that she talked to the children daily using "Snapchat" or "Duo." *See In re C.T.E.*, 95 S.W.3d 462, 469 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (considering parent's efforts to set up visitation with children in holding evidence factually insufficient to support finding that termination of parental rights in children's best interest); *see also In re M.A.A.*, 2021 WL 1134308, at *35 (in holding evidence factually insufficient to support trial court's finding that termination was in child's best interest, noting efforts made by parent, without DFPS's help, to visit child). Mother stated that she was "very close" with the children, and the children often asked her if they could "come see" her and "come stay with her." Before the children entered DFPS's care, mother saw them "regularly as much as [she] could." *See Yonko v. Dep't of Family & Protective*

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especially when there was no evidence presented at trial that the implications of being "adopted" by their grandparents had been explained to the children or that the children were told how adoption would affect their relationship with mother.

Servs., 196 S.W.3d 236, 244–45 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (when evidence of parent's failures is not overwhelming, child's love for parent and bond between child and parent weighed against termination of parental rights).

The children's maternal grandmother also testified that mother "FaceTime[d]" the children while they had been living with their maternal grandparents, and mother spoke to the children "once a week" or "once every couple weeks." The children's grandparents had "tried to block" mother from calling the children, but because mother "ke[pt] getting new [cellular] [tele]phone numbers," she was able to talk to the children. The children enjoyed talking to mother, but according to the children's grandmother "there [was] some trauma afterwards" because they would not understand "what [mother was] saying." The children's maternal grandmother did not have a problem with mother talking to the children, as long as the contact was monitored. The September 2021 permanency hearing order "only . . . permitted" mother to have "virtual visits" with the children, but no evidence was presented at trial to explain that change. *See In re D.T.*, Nos. 07-19-00071-CV, 07-19-00072-CV, 2019 WL 3210601, at *8–9 (Tex. App.—Amarillo July 16, 2019, no pet.) (mem. op.) (noting limited evidence regarding trial court's suspension of visitation for parent in holding evidence factually insufficient to support termination of parental rights in children's best interest).

Evidence that mother and the children were bonded, and mother visited with the children during the termination-of-parental-rights case is an important consideration in determining the best interest of the children. *See In re A.J.A.R.*, No. 14-20-00084-CV, 2020 WL 4260343, at *7 (Tex. App.—Houston [14th Dist.] July 24, 2020, no pet.) (mem. op.) (bond between parent and child important consideration); *but see In re F.M.E.A.F.*, 572 S.W.3d 716, 732 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) ("A child's love for their parent is a very important consideration in determining the best interest of the children, although it cannot override or outweigh evidence of danger to the child." (internal quotations omitted)).

2. Current and Future Physical and Emotional Needs and Current and Future Physical and Emotional Danger

a. Condition of Home

The children need a safe and stable home. *See* TEX. FAM. CODE ANN. § 263.307(a) (prompt and permanent placement of child in safe environment presumed to be in child's best interest); *In re G.M.G.*, 444 S.W.3d 46, 60 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (parent who lacks ability to provide child with safe and stable home is unable to provide for child's emotional and physical needs). It is undisputed that the children were not living with mother at the time they entered DFPS's care. And there was no evidence presented at trial as to the condition of mother's home when the children entered DFPS's care.

Further, DFPS did not present any evidence that mother's home was unsatisfactory at the time of trial. DFPS caseworker Jackson provided no testimony as to the condition, safety, or stability of mother's home. In fact, she acknowledged that she did not know where mother lived. *See In re M.A.A.*, 2021 WL 1134308, at *36 (DFPS presented no evidence to show that father's living arrangement was unstable or unsafe); *In re R.I.D.*, 543 S.W.3d 422, 427–28 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (DFPS could not establish that "parent ha[d] demonstrated an inability to provide the child with a safe environment" where "[t]he record contain[ed] no evidence of [the parent's] living conditions" and "no evidence about [the parent's] conduct in his home"). Although the Child Advocates report stated that mother had not "proven" that she was able to provide a safe and stable placement for the children, the report did not contain any facts to support this statement, making it conclusory. *See In re K.M.J.*, No. 04-18-00727-CV, 2019 WL 1459565, at *7–8 (Tex. App.—San Antonio Apr. 3, 2019, pet. denied) (mem. op.) (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d 888, 894–95 (Tex. App.—Dallas 2008, no pet.) (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence); *see also Flanz v. Farias*, 662 S.W.2d 685, 688 (Tex. App.—Houston [14th Dist.] 1983, no writ) (concluding single statement without context provides insufficient evidence to support finding).

Mother testified that she had a stable place to live at the time of trial that was "long-term temporary." In three or four months, she would be "stable enough to get . . . [her] own house." DFPS presented no evidence to show that mother's current living arrangement was unstable or unsafe. *See In re M.A.A.*, 2021 WL 1134308, at *36.

There was also no evidence presented at trial as to the condition of the children's maternal grandparents' home, where the children had been living since February 2021. Although the children's maternal grandparents testified at trial, DFPS did not question the grandparents about the condition of their home or about its safety and stability. *See In re A.H.*, 414 S.W.3d 802, 807 (Tex. App.—San Antonio 2013, no pet.) (holding evidence insufficient to support best-interest finding where no information presented at trial about children's current caregivers or nature of environment caregivers provided children). And as to the children's current placement with their maternal grandparents, DFPS caseworker Jackson merely testified, without explanation or detail, that the grandparents' home was "safe and stable." *See In re M.A.J.*, 612 S.W.3d at 412 (conclusory testimony by DFPS caseworker that children's current placement was stable was insufficient to support trial court's finding that termination of parental rights in best interest of child); *In re D.N.*, No. 12-13-00373-CV, 2014 WL 3538550, at *3–5 (Tex. App.—Tyler July 9, 2014, no pet.) (mem. op.) (holding evidence insufficient to support termination of

parental rights and noting DFPS caseworker and children's attorney ad litem did not provide any facts to form basis of opinion). Conclusory opinion testimony, even if uncontradicted, does not amount to more than a scintilla of evidence; it is no evidence at all. *See In re A.H.*, 414 S.W.3d at 807; *see also City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (opinion is conclusory "if no basis for the opinion is offered[] or the basis offered provides no support"); *Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008) (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it" (internal quotations omitted)). A lack of evidence does not constitute clear and convincing evidence to meet DFPS's burden. *In re E.N.C.*, 384 S.W.3d at 808 (noting trial court's best-interest finding must be supported by clear and convincing evidence in record).

b. Children's Needs

DFPS caseworker Jackson testified that neither of the children had "special needs," and stated, without support or explanation, that the children's "needs [were] being met in [their] placement" with their maternal grandparents. *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also Arkoma Basin Expl.*, 249 S.W.3d at 389 (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it"

(internal quotations omitted)); *In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). When generically asked, "how are [the children] performing," Jackson responded, "They're doing well." But no context or time frame was provided in Jackson's testimony.

The November 2021 permanency report stated that T.S. was "in need of stability and a long-term placement," but it also stated that this could be achieved either through adoption or "relative conservatorship," without the termination of mother's parental rights, and the report described both options as "appropriate" for T.S. The permanency report also stated that T.S. could "benefit from [a] grief and loss support group, mental health case management, targeted/specific therapy[,] and . . . follow up with [his primary care physician] on self-harm." T.S. attended individual therapy bi-weekly. T.S. had not seen a medical doctor for a "checkup" while living with his maternal grandparents, but he had a dental examination in August 2021.

The permanency report listed the following recommendations for T.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [T.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care.

> Psychotherapy services provided by a professional therapist will assist [T.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the prospects of a successful adoption will be limited. Therefore, [b]asic level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [m]oderate level services.

See In re L.C.L., 599 S.W.3d 79, 88 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) ("[T]he existence of the [children's] disorders and disabilities [does not] constitute evidence of [the parent's] inability to provide for the children's emotional or physical needs."); *In re J.E.M.M.*, 532 S.W.3d at 887–88.

As to E.S.S., the November 2021 permanency report stated that E.S.S. was "in need of stability and a long-term placement." But it also stated that this could be achieved either through adoption or "relative conservatorship," without the termination of mother's parental rights, and the report described both options as "appropriate" for E.S.S. The report further noted that E.S.S. would "benefit from [a] grief and loss support group, mental health case management, [and] targeted/specific therapy." And he would "benefit from community supports such as [the] Boy Scouts [of America] or [the] Boys and Girls Club." E.S.S. attended individual therapy bi-weekly, but he had not seen a medical doctor for a "checkup" while living with his maternal grandparents. E.S.S. took medication for ADHD, and his last dental examination was in August 2021.

The permanency report listed the following recommendations for E.S.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [E.S.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care. Psychotherapy services provided by a professional therapist will assist [E.S.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the prospects of a successful adoption will be limited. Therefore, [m]oderate level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [s]pecialized level services.

In re L.C.L., 599 S.W.3d at 88 ("[T]he existence of the [children's] disorders and disabilities [does not] constitute evidence of [the parent's] inability to provide for the children's emotional or physical needs."); *In re J.E.M.M.*, 532 S.W.3d at 887–88.

The Child Advocates report also briefly discussed the needs of the children. It noted that E.S.S. took medication daily and wore prescription eyeglasses. E.S.S. also received accommodations in school. T.S. did not take medication and did not require accommodations in school.

Significantly, DFPS presented no evidence at trial that the children's maternal grandparents were able to meet, or were meeting, the above-described needs of the children, particularly the ones listed in the November 2021 permanency report.

DFPS also presented no evidence that mother would be unable to meet the children's needs if they were placed in her care. *See In re M.A.J.*, 612 S.W.3d at 412 (holding evidence insufficient to support trial court's finding termination of parental rights in child's best interest where no evidence presented that child's needs would go unmet if returned to parent's care); *In re D.D.M.*, 2019 WL 2939259, at *6 (DFPS presented no evidence parent could not meet children's therapeutic needs); *In re E.W.*, 494 S.W.3d 287, 300–01 (Tex. App.—Texarkana 2015, no pet.). And there was no evidence presented at trial that the termination of mother's parental rights would improve the outlook for the children's needs. *See In re M.A.A.*, 2021 WL 1134308, at *36 (noting no evidence presented about parent's inability to meet child's needs or that termination of parental rights would improve outlook for child's needs); *In re J.E.M.M.*, 532 S.W.3d at 887–88; *see also In re L.C.L.*, 599 S.W.3d at 88 (no evidence presented at trial that parent failed to provide for children's physical and emotional needs or that she could not provide for their needs in future). Of particular note, the "[m]ental [h]ealth [a]ssessment[]" contained in the November 2021 permanency report stated that the children would "benefit from contact with members of [their] family to maintain a sense of family unity," which appears to be in direct opposition to a finding that termination of mother's parental rights was in the children's best interest. Also contrary to the children's need of having contact with family members and maintaining a sense of family unity is the evidence that

the maternal grandparents had "tried to block" mother from calling the children, and Child Advocates representative First's testimony that the children's maternal grandparents sought to adopt the children because they "want[ed] to be able to support the children . . . without [getting] any interference [from mother]."

c. Danger to Children

It is undisputed that the children did not enter DFPS care because of mother's conduct. *See In re M.A.A.*, 2021 WL 1134308, at *36–37, *39 (holding evidence factually insufficient to support trial court's finding termination of parental rights in child's best interest where parent was "non-offending parent" (internal quotations omitted)). DFPS presented no evidence at trial that mother abused the children, acted aggressively or violently toward the children, negligently supervised the children while they were in her care, or exposed the children to physical danger. *See id.* at *37 (no evidence parent ever physically harmed child); *In re A.J.A.R.*, 2020 WL 4260343, at *8–9 (holding evidence factually insufficient to support best-interest finding where there was no evidence parent caused injury to children); *In re M.A.J.*, 612 S.W.3d at 414 ("The record does not contain evidence that [the parent] acted aggressively or violently toward the children while they were in her care. And there is no evidence that [the parent] negligently supervised the children, abused the children, or exposed them to physical danger."); *In re B.C.H.*, No. 09-18-00437-CV, 2019 WL 1940758, at *14–15 (Tex. App.—Beaumont May 2,

2019, no pet.) (mem. op.) (holding evidence factually insufficient to support best-interest finding where "there was no risk of foreseeable harm if the court allowed [the parent] to retain her rights" (internal quotations omitted)); *see also In re E.N.C.*, 384 S.W.3d at 808 ("A lack of evidence does not constitute clear and convincing evidence."); *In re E. C. A.*, No. 01-17-00623-CV, 2017 WL 6759198, at *13 (Tex. App.—Houston [1st Dist.] Dec. 28, 2017, pet. denied) (mem. op.) (noting children had not been abused by parent); *In re J.P.*, No. 02-10-00448-CV, 2012 WL 579481, at *9 (Tex. App.—Fort Worth Feb. 23, 2012, no pet.) (mem. op.) (holding evidence factually insufficient to support finding termination of parental rights in child's best interest where grounds for terminating parent's rights did not involve allegations of physical or sexual abuse of child by parent); *In re R.W.*, No. 01-11-00023-CV, 2011 WL 2436541, at *13 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.).

Further, mother's FSP listed the "[p]rimary [p]ermanency [g]oal" for the children as "[f]amily [r]eunification." *See In re M.A.J.*, 612 S.W.3d at 414 (noting DFPS's initial permanency goal was family reunification for children and parent). This indicates that DFPS did not view mother as a danger or threat to the children's safety and well-being at the beginning of the termination-of-parental-rights case, and DFPS presented no evidence at trial to indicate that she had since become a danger or a threat to the children.

d. Narcotics Use

Although mother's FSP required her to refrain from narcotics use, submit to random narcotics-use testing, and complete a substance abuse assessment, there was no evidence presented at trial that mother had engaged in narcotics use in the past or in the present. According to the November 2021 permanency report, mother failed to "[s]how" for narcotics-use testing on February 23, 2021, March 23, 2021, May 13, 2021, May 26, 2021, June 15, 2021, July 12, 2021, July 26, 2021, July 28, 2021, August 4, 2021, August 12, 2021, August 31, 2021, and October 14, 2021. But, again, DFPS did not present any evidence that mother had ever engaged in narcotics use. There was also no evidence presented at trial that mother ever used narcotics in the presence of the children or while she was caring for them, that mother was impaired while caring for the children due to narcotics use, or that narcotics had been accessible to the children while they had been in mother's care. *See In re M.A.J.*, 612 S.W.3d at 414–15; *see also In re J.N.*, 301 S.W.3d 429, 434–35 (Tex. App.—Amarillo 2009, pet. denied) (although parent tested positive for narcotics use, holding evidence factually insufficient to support trial court's determination termination of parental rights in best interest of child); *Ruiz v. Tex. Dep't of Family & Protective Servs.*, 212 S.W.3d 804, 818 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding evidence insufficient to support trial court's finding that parent engaged in conduct which endangered child's physical or emotional well-being

where evidence of parent's narcotics use was "extremely limited" and no evidence showed parent used narcotics while caring for child or when she was in child's presence). A lack of evidence does not constitute clear and convincing evidence to meet DFPS's burden. *In re E.N.C.*, 384 S.W.3d at 808.

3. Parental Abilities, Plans for Children, and Stability of Proposed Placement

a. Mother

As noted above, it is undisputed that the children were not living with mother at the time they entered DFPS's care, and the children did not enter DFPS care because of mother's conduct. *See In re M.A.A.*, 2021 WL 1134308, at *36–37, *39 (holding evidence factually insufficient to support trial court's finding termination of parental rights in child's best interest where parent was "non-offending parent"). There was no evidence presented at trial as to the condition of mother's home when the children entered DFPS's care, and DFPS did not present any evidence that mother's home was unsatisfactory at the time of trial. *See In re M.A.J.*, 612 S.W.3d at 416 (noting there was no evidence presented at trial regarding condition of parent's home at time of trial). DFPS caseworker Jackson provided no testimony as to the condition, safety, or stability of mother's home. And she acknowledged that she did not know where mother lived. Although the Child Advocates report stated that mother had not "proven" that she was able to provide a safe and stable placement for the children, the report did not contain any facts to support this statement, making

it conclusory. *See Pollock*, 284 S.W.3d at 818 (opinion is conclusory "if no basis for the opinion is offered[] or the basis offered provides no support"); *see also In re M.A.A.*, 2021 WL 1134308, at *38 ("A single statement without context provides insufficient evidence to support a finding that termination of . . . parental rights was in [the child's] best interest."); *Flanz*, 662 S.W.2d at 688 (concluding single statement without context provides insufficient evidence to support finding). Mother testified that she had a stable place to live at the time of trial that was "long-term temporary." And in three or four months, she would be "stable enough to get . . . [her] own house."

There was also no evidence presented at trial that mother abused the children, acted aggressively or violently toward the children, negligently supervised the children while they were in her care, or exposed the children to physical danger or narcotics use. *See In re M.A.A.*, 2021 WL 1134308, at *37; (no evidence parent ever physically harmed child); *In re M.A.J.*, 612 S.W.3d at 414 ("The record does not contain evidence that [the parent] acted aggressively or violently toward the children while they were in her care. And there is no evidence that [the parent] negligently supervised the children, abused the children, or exposed them to physical danger."); *see also In re J.P.*, 2012 WL 579481, at *9 (holding evidence factually insufficient to support finding termination of parental rights in child's best interest where grounds for terminating parent's rights did not involve allegations of physical or

sexual abuse of child by parent). Further, DFPS presented no evidence at trial that mother engaged in narcotics use either before or after the children entered DFPS's care. *See In re M.A.J.*, 612 S.W.3d at 414–16, 18; *In re J.N.*, 301 S.W.3d at 434–35 (although parent tested positive for narcotics use, holding evidence factually insufficient to support trial court's determination termination of parental rights in best interest of child); *see also In re E.N.C.*, 384 S.W.3d at 808 (lack of evidence does not constitute clear and convincing evidence to meet DFPS's burden).

DFPS caseworker Jackson testified that the "[l]ast time [that she had checked]," mother was unemployed, and Jackson did not think that mother had provided "any level of support" to the children while they were living with their maternal grandparents. Although mother explained that she was not employed at the time of trial, she was "looking for employment." She was last employed in 2018, but she had done "odd jobs" since then like "handyman stuff," so she had been "self-employ[ed]."

Mother also testified that before the children entered DFPS's care, she saw them "regularly as much as [she] could." After the children entered DFPS's care, she had visits with the children every two weeks until June 2021. According to mother, her visits with the children stopped after a visit was canceled, and mother

"never got another date to see [the children] again."[29] But mother stated that she talked to the children daily using "Snapchat" or "Duo." Mother testified that she was "very close" with the children, and the children often asked her if they could "come see" her and "come stay with her." *See Yonko*, 196 S.W.3d at 244–45 (when evidence of parent's failures is not overwhelming, child's love for parent and bond between child and parent weighed against termination of parental rights).

The children's maternal grandmother also testified that mother "FaceTime[d]" the children while they had been living with their maternal grandparents, and mother spoke to the children "once a week" or "once every couple weeks." The children enjoyed talking to mother, but "there [was] some trauma afterwards" because they would not understand "what [mother was] saying." The children's grandmother did not have a problem with mother talking to the children, as long as the contact was monitored.

Mother testified that the children needed a stable environment and to be safe, but she also felt that the children deserved a chance to be reunited with her at some point because she was "very close to them." Mother wanted the children to "be with

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[29] The September 2021 permanency hearing order stated that mother was "only . . . permitted" to have "virtual visits" with the children. There was no evidence presented at trial to explain this change in visitation. *See In re D.T.*, Nos. 07-19-00071-CV, 07-19-00072-CV, 2019 WL 3210601, at *8–9 (Tex. App.—Amarillo July 16, 2019, no pet.) (mem. op.) (noting limited evidence regarding trial court's suspension of visitation for parent in holding evidence factually insufficient to support termination of parental rights in children's best interest).

[her]" and did not want her parental rights terminated. Although mother testified that she had some disabilities including ADHD, "eight fractured vertebras in [her] back," "shrinking" disks, and "no balance in [her] right shoulder down into [her] right hip," a parent's disability, without more, is not grounds for terminating the parent-child relationship. *See In re R.S.-T.*, 522 S.W.3d 92, 113 (Tex. App.—San Antonio 2017, no pet.). And DFPS did not present any evidence that mother's disabilities negatively impacted her parental abilities.

Finally, mother's FSP listed the "[p]rimary [p]ermanency [g]oal" for the children as "[f]amily [r]eunification" with mother. Although it appears that this goal changed during the pendency of the termination-of-parental-rights case, there was no evidence presented at trial to explain the reason for the change. And the initial goal of family reunification indicates that DFPS did not view mother as a danger or threat to the children's safety or well-being at the beginning of the termination-of-parental-rights case, and DFPS presented no evidence to indicate that she had since become a danger or a threat to the children.

b. Current Placement

Little evidence was presented at trial as to the children's current placement or the parenting abilities of the children's maternal grandparents. DFPS caseworker Jackson testified that the children had been living with their maternal grandparents since February 2021—about ten months before trial. The children's maternal

grandfather was a professor, but Jackson did not know what the children's maternal grandmother did for a living. According to Jackson, the children's grandparents were "open to adopting the children."

As noted above, Jackson testified, without explanation or detail, that the children's "needs [were] being met in [their] placement." *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also Arkoma Basin Expl.*, 249 S.W.3d at 389 (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it" (internal quotations omitted)); *In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). When generically asked, "how are [the children] performing," Jackson responded, "They're doing well." But Jackson did not provide context or a time frame related to her statement.

Jackson also testified that the children attended school while their grandparents worked, and the children were with their grandparents after school. Jackson offered a conclusory opinion that the grandparents' home was "safe and stable." *See In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d

at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence).

Child Advocates representative First also offered conclusory testimony as to the children's current placement, stating, without explanation or detail, that the children were "happy" in their current placement. The children's maternal grandparents were "protective of the children," and the children's current placement with their grandparents was "the best place for them at th[e] time." *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). According to First, the children's grandparents wanted to adopt the children so that they could "support the children the best way that they c[ould] without any interference [from mother]."

The Child Advocates report provided limited insight into the children's current placement with their maternal grandparents. The report stated, without explanation or detail, that the grandparents had provided "a safe and stable placement for the children." And the children had made unspecified "positive improvements" in their lives. *See In re C.C., III*, 253 S.W.3d at 894–95 (holding

vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). The children's grandparents wanted to adopt the children.

The children's maternal grandmother testified that the children had adjusted to living in her home and over the last "four or five months" the children had "settled in," "become more open," and began "doing well in school." The children's grandmother stated that she has had a relationship with the children since their birth, and she and the children's maternal grandfather were willing to adopt the children. The children's grandmother also testified that the children had lived with her previously for various periods of time because of "the instability of" mother, but the children's grandmother did not elaborate on those instances, provide detail as to the purported "instability" of mother, or give a particular time frame when that had occurred. Although the children's maternal grandfather was called as a witness at trial, he did not testify as to his, or the maternal grandmother's parental abilities, or provide any information about the children or the children's placement in his home.

Evidence was presented at trial that the children's maternal grandparents were willing to adopt the children, but DFPS presented no evidence that the grandparents would not be willing to provide the children with a safe environment in which to live even if mother's parental rights were not terminated. *See In re M.A.A.*, 2021 WL 1134308, at *39; *In re F.M.E.A.F.*, 572 S.W.3d at 732 (noting relative could provide safe environment for child regardless of whether parent's rights were terminated).

The November 2021 permanency report listed "relative adoption," as the "[p]rimary [p]ermanency [g]oal" for the children, but it also listed "relative conservatorship" as a "[c]oncurrent [p]ermanency [g]oal," if mother's parental rights were not terminated. Both outcomes were considered "appropriate" for the children.

4. Availability of Assistance and Excuse for Parent's Acts or Omissions

"In determining the best interest of the child[ren] in proceedings for termination of parental rights, the [fact finder] may properly consider" whether a parent complied with "the court-ordered service plan for reunification with the child[ren]." *In re I.L.G.*, 531 S.W.3d 346, 355 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Here, it is undisputed that mother did not complete the requirements of her FSP. But mother testified that she thought that it would cost her money to complete her FSP, and she "didn't have any money." She did not find out until August or September 2021 that DFPS "would . . . pa[y]" for the services required by the FSP. And by that time, she had already been told by DFPS that her parental rights to the children were going to be terminated. Failure of a parent to complete the requirements of her FSP is not determinative of the best-interest analysis. *See, e.g., In re L.C.L.*, 599 S.W.3d at 86–89 (holding evidence insufficient to support trial court's finding that termination of parental rights in children's best interest even though parent did not complete FSP's requirements); *In re J.E.M.M.*, 532 S.W.3d at 889; *In re E. C. A.*, 2017 WL 6759198, at *12–13.

Significantly, DFPS must support its allegations against a parent, including its allegation that termination of mother's parental rights was in the best interest of the children, by clear and convincing evidence; a preponderance of evidence or conjecture is not enough. *See In re E.N.C.*, 384 S.W.3d at 808–10; *In re M.A.A.*, 2021 WL 1134308, at *39; *see also In re A.W.*, 444 S.W.3d at 693 (presence of scant evidence relevant to each factor will generally not support finding that termination of parental rights was in child's best interest); *Toliver v. Tex. Dep't of Family & Protective Servs.*, 217 S.W.3d 85, 101 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (DFPS has burden to rebut presumption that best interest of children is served by keeping custody with natural parent). DFPS must meet this high evidentiary burden because the law presumes that the children's best interest is served by maintaining the parent-child relationship and protects the constitutional rights of the parent involved in a termination-of-parental-rights case. *In re M.A.A.*, 2021 WL 1134308, at *39; *In re E. C. A.*, 2017 WL 6759198, at *9, *13; *In re R.W.*, 2011 WL 2436541, at *12; *see also Santosky*, 455 U.S. at 753–54 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . ."). "[T]he best[-]interest standard does not permit termination [of

parental rights] merely because [the] child[ren] might be better off living elsewhere." *In re A.H.*, 414 S.W.3d at 807; *see also In re K.N.J.*, 583 S.W.3d at 827 ("The evidence must . . . permit a factfinder to reasonably form a firm conviction or belief that [the parent] should no longer be in the children's lives as their [parent], not merely that [the parent] should not have custody [of the children].").

Here, we note that the reporter's record from trial in this case is only fifty-seven pages total, including the cover, list of appearances, table of contents, exhibit index, announcements, closing arguments, trial court's pronouncement, and court reporter's certificate.[30] *See In re M.A.J.*, 612 S.W.3d at 417 n.24; *In re E.F.*, 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.); *see also In re D.L.W.W.*, 617 S.W.3d 64, 92 n.49 (Tex. App.—Houston [1st Dist.] 2020, no pet.). At best, that leaves forty-two pages for DFPS to establish, by clear and convincing evidence, not only the grounds for termination for mother's (and father's) parental rights, but also that it was in the best interest of the children to permanently sever their relationship with mother (and father). *See In re E.F.*, 591 S.W.3d at 142 n.4.

We are cognizant of the extraordinary burdens placed on all participants in a termination-of-parental-rights case, but the "[t]ermination of parental rights is

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30 We note that the reporter's record also includes an exhibit volume containing sixteen exhibits, but not every exhibit is relevant to the termination of mother's parental rights or to a determination that termination of mother's parental rights was in the best interest of the children.

traumatic, permanent, and irrevocable." *In re M.S.*, 115 S.W.3d 534, 539 (Tex. 2003). Given the weighty constitutional interests of the parent involved in such a proceeding, the interests of the children involved, and the effect that placement of the children will have on numerous lives, it is imperative, and consistent with the high evidentiary standard of proof applicable to these cases, that DFPS fully develop the evidence at trial. Only then can the appellate record be commensurate with the magnitude and finality of a termination decision. *See In re M.A.J.*, 612 S.W.3d at 417–18; *In re E.F.*, 591 S.W.3d at 142 n.4; *see also In re B.D.A.*, 546 S.W.3d 346, 393 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (Massengale, J., dissenting on rehearing) ("The law sets a high evidentiary bar for termination of parental rights. We do not alleviate the plight of Texas . . . children by lowering that bar and perpetuating diminished judicial expectations of the proof that must be presented by [DFPS].").

Viewing the evidence in a neutral light, we conclude that a reasonable fact finder could not have formed a firm belief or conviction that termination of parental rights of mother was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is factually insufficient to

support the trial court's finding that termination of the parental rights of mother was in the best interest of the children.[31] *See id.*

We sustain a portion of mother's third issue.

Termination of Father's Parental Rights

In his first, second, and third issues, father argues that the trial court erred in terminating his parental rights to the children because the evidence is legally and factually insufficient to support the trial court's findings that he engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being, he constructively abandoned the children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months, and termination of

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[31] Evidence supporting termination under the grounds listed in Texas Family Code section 161.001(b)(1) can be considered in support of a finding that termination was in the children's best interest. *See In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) (holding same evidence may be probative of both Texas Family Code section 161.001(b)(1) termination grounds and best interest). Thus, viewing the evidence in the light most favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that termination of mother's parental rights was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is legally sufficient to support the trial court's finding that termination of mother's parental rights was in the best interest of the children. *See id.*; *see also In re M.A.A.*, No. 01-20-00709-CV, 2021 WL 1134308, at *39 n.56 (Tex. App.—Houston [1st Dist.] Mar. 25, 2021, no pet.) (mem. op.); *In re A.A.H.*, Nos. 01-19-00612-CV, 01-19-00748-CV, 2020 WL 1056941, at *7 n.4 (Tex. App.—Houston [1st Dist.] Mar. 5, 2020, no pet.) (mem. op.) (because legally insufficient evidence requires rendition of judgment in favor of party raising challenge, we must address it).

his parental rights was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (b)(1)(N), (b)(2).

As stated above, in order to terminate the parent-child relationship, DFPS must establish, by clear and convincing evidence, one or more of the acts or omissions enumerated in Texas Family Code section 161.001(b)(1) and that termination of parental rights is in the best interest of the children. *See id.* § 161.001(b). Both elements must be established, and termination may not be based solely on the best interest of the children as determined by the trier of fact. *Id.*; *Boyd*, 727 S.W.2d at 533. "Only one predicate finding under section 161.001[(b)](1) is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest." *In re A.V.*, 113 S.W.3d at 362.

A. Endangering Conduct

In his first issue, father argues that the evidence is legally and factually insufficient to support the trial court's finding that he engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being because "termination may not ordinarily be based on a single transaction," "[i]mprisonment will not, standing alone, constitute engaging in conduct which endanger[ed] the emotional or physical well-being of" the children, an "act[] done in the distant past, without showing a present or future danger to [the children], cannot be sufficient to terminate parental rights," father's

criminal case was still "pending" at the time of trial, DFPS presented no evidence that father's "alleged [narcotics] use . . . r[ose] to the level that it endangered [the] children," and DFPS did not show "a voluntary course of conduct [by father] that endangered the children's well-being." (Internal quotations omitted.)

A trial court may terminate the parent-child relationship if it finds by clear and convincing evidence that the parent has "engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct which endanger[ed] the physical or emotional well-being of the child[ren]." TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (b)(2). Within this context, endangerment encompasses "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment." *Boyd*, 727 S.W.2d at 533. Instead, "endanger" means to expose the children to loss or injury or to jeopardize their emotional or physical health. *Id.* (internal quotations omitted); *see also Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 616 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

We must look at a parent's conduct standing alone, including his actions and omissions. *In re J.W.*, 152 S.W.3d 200, 205 (Tex. App.—Dallas 2004, pet. denied). It is not necessary to establish that a parent intended to endanger the children. *See In re M.C.*, 917 S.W.2d 268, 270 (Tex. 1996); *In re L.M.N.*, 2018 WL 5831672, at *14. But termination of parental rights requires "more than a single act or omission;

a voluntary, deliberate, and conscious course of conduct by the parent is required." *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.); *see also In re L.M.N.*, 2018 WL 5831672, at *14; *In re J.W.*, 152 S.W.3d at 205. The specific danger to the children's well-being may be inferred from parental misconduct, even if the conduct is not directed at the children and the children suffer no actual injury. *See Boyd*, 727 S.W.2d at 533; *In re L.M.N.*, 2018 WL 5831672, at *14; *Walker*, 312 S.W.3d at 616; *In re R.W.*, 129 S.W.3d 732, 738 (Tex. App.—Fort Worth 2004, pet. denied). Courts may consider parental conduct that did not occur in the children's presence, including conduct that occurred after the children were removed by DFPS. *In re L.M.N.*, 2018 WL 5831672, at *14; *In re A.A.M.*, 464 S.W.3d 421, 426 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Walker*, 312 S.W.3d at 617.

A parent's narcotics use can qualify as a voluntary, deliberate, and conscious course of conduct that endangers the children's well-being. *In re C.V.L.*, 591 S.W.3d 734, 751 (Tex. App.—Dallas 2019, pet. denied); *In re S.R.*, 452 S.W.3d 351, 361–62 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). And continued narcotics use after the children's removal is conduct that jeopardizes a parent's parental rights and may be considered as establishing an endangering course of conduct. *In re C.V.L.*, 591 S.W.3d at 751; *In re S.R.*, 452 S.W.3d at 361–62; *see also Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 253 (considering conduct jeopardizing parental rights as part of course of conduct

endangering well-being of child). When "a parent engages in [narcotics] use during the pendency of a [termination-of-parental-rights case], when he knows he is at risk of losing his children, the evidence is legally sufficient to support a finding of endangerment." *In re D.D.M.*, 2019 WL 2939259, at *4; *see also In re R.S.*, No. 01-20-00126-CV, 2020 WL 4289978, at *7 (Tex. App.—Houston [1st Dist.] July 28, 2020, no pet.) (mem. op.) ("Parental [narcotics] use remains endangering conduct even if the child was not in the parent's custody when the [narcotics] use occurred."); *In re A.M.*, 495 S.W.3d 573, 580 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("Because the evidence showed that the [parent] engaged in illegal [narcotics] use during the pendency of the termination suit, when he knew he was at risk of losing his children, we hold that the evidence is legally sufficient to support a finding of endangerment.").

The Child Advocates report stated that father tested negative for narcotics use on May 26, 2021. The November 2021 permanency report also stated that father tested negative for narcotics use on May 26, 2021. But the November 2021 permanency report stated that father tested positive for amphetamine and methamphetamine use on May 13, 2021. And father failed to "[s]how" for narcotics-use testing on February 23, 2021, March 23, 2021, June 15, 2021, July 12, 2021, July 28, 2021, August 12, 2021, August 31, 2021, and October 14, 2021. A parent's refusal to submit to narcotics-use testing may be treated by the trial court as

if he had tested positive for narcotics use. *See In re I.W.*, No. 14-15-00910-CV, 2016 WL 1533972, at *6 (Tex. App.—Houston [14th Dist.] Apr. 14, 2016, no pet.) (mem. op.); *see also In re C.A.B.*, 289 S.W.3d 874, 885 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (fact finder could infer parent's failure to submit to court-ordered narcotics-use testing indicated she was avoiding testing because she was using narcotics). From this evidence the trial court could have reasonably inferred that father engaged in narcotics use during the pendency of the termination-of-parental-rights case. *See In re D.D.M.*, 2019 WL 2939259, at *4–5; *In re A.M.*, 495 S.W.3d at 580 ("Because the evidence showed that the [parent] engaged in illegal [narcotics] use during the pendency of the termination suit, when he knew he was at risk of losing his children, we hold that the evidence is legally sufficient to support a finding of endangerment.").

Thus, viewing the evidence in the light most favorable to the trial court's finding, we conclude that the trial court could have formed a firm belief or conviction that father engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). We hold that the evidence is legally sufficient to support the trial court's finding that father engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being. *See id.*; *see also In re C.V.L.*, 591 S.W.3d at

750–51 (because evidence showed parent tested positive twice for narcotics use during pendency of termination-of-parental-rights case, holding evidence legally sufficient to support trial court's endangerment finding); *In re D.D.M.*, 2019 WL 2939259, at *4–5 (when "a parent engages in [narcotics] use during the pendency of a [termination-of-parental-rights-case], when he knows he is at risk of losing his children, the evidence is legally sufficient to support a finding of endangerment.").

However, viewing the evidence in a neutral light, we conclude that a reasonable fact finder *could not* have formed a firm belief or conviction, based on father's narcotics use, that father engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E); *see also In re C.V.L.*, 591 S.W.3d at 751–52 ("[A] finding of endangerment based on [narcotics] use alone is not automatic.").

DFPS did not present evidence at trial that father used narcotics in the children's presence, left the children in the care of narcotics users or in a home where narcotics were present, was ever arrested or incarcerated for an offense related to narcotics use or possession, abused narcotics, was impaired while caring for the children due to narcotics use, or that narcotics had been accessible to the children while they were in father's care. *See In re C.V.L.*, 591 S.W.3d at 752 (noting, in determining that evidence was factually insufficient to support trial court's finding

of endangerment based on parent's narcotics use, that DFPS was required to show continuing course of conduct to satisfy requirements of Texas Family Code section 161.001(b)(1)(E)); *see also In re S.K.G.*, No. 13-21-00145-CV, 2021 WL 4897865, at *6–7 (Tex. App.—Corpus Christi–Edinburg Oct. 21, 2021, no pet.) (mem. op.) (holding evidence insufficient to support trial court's finding parent engaged in endangering conduct, where "there was no evidence [presented] that [the parent] suffered from a [narcotics] abuse problem," only evidence that parent did not follow FSP related to narcotics-use testing); *Ruiz*, 212 S.W.3d at 818 (holding evidence insufficient to support trial court's finding that parent engaged in conduct which endangered child's physical or emotional well-being where evidence of parent's narcotics use was "extremely limited" and no evidence showed parent used narcotics while caring for child or when she was in child's presence). Instead, in this case, father tested positive for narcotics use on one occasion during the pendency of the termination-of-parental-rights case. *See In re J.A.*, No. 05-19-01333-CV, 2020 WL 2029248, at *5–6 (Tex. App.—Dallas Apr. 28, 2020, pet. denied) (mem. op.) (evidence parent tested positive for marijuana use three times during pendency of termination case could not serve as "a basis for a factually sufficient finding"); *In re C.A.B.*, 289 S.W.3d at 884 ("[A] single incident of [narcotics] use while the child is not in the parent's custody does not support an inference of endangerment."); *In re A.S.*, 261 S.W.3d 76, 86–87 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)

(holding evidence factually insufficient to support trial court's finding that parent consciously engaged in course of conduct that endangered her child's well-being where parent used marijuana on one occasion). Although father failed to "[s]how" for narcotics-use testing on certain dates,[32] we cannot say that there was factually sufficient evidence to support a finding that father's narcotics use constituted a voluntary, deliberate, and conscious course of conduct by him that endangered the children's physical and emotional well-being. *See In re C.V.L.*, 591 S.W.3d at 752; *In re D.W.*, Nos. 01-13-00880-CV, 01-13-00883-CV, 01-13-00884-CV, 2014 WL 1494290, at *5–7 (Tex. App.—Houston [1st Dist.] Apr. 11, 2014, pet. denied) (mem. op.); *Ruiz*, 212 S.W.3d at 818; *see also In re J.T.G.*, 121 S.W.3d at 125 (termination of parental rights requires "more than a single act or omission; a voluntary, deliberate, and conscious course of conduct by the parent is required").

DFPS asserts that the evidence presented at trial shows a "consistent pattern of neglectful behaviors" by father toward the children, namely "lock[ing] [the children] out of the house" and father being "criminally charged with [the offense

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[32] According to the November 2021 permanency report as to one of his "[n]o show[s]," father explained that he was only required to participate in a narcotics-use test if DFPS contacted him by 9:00 a.m. on the day the narcotics-use test was to occur. And if he did not receive a telephone call by that time, then there was no way that "he w[ould] . . . know the call came in" because he would no longer be "waiting for the call." Father's FSP confirmed that father was to "be contacted by the [DFPS] caseworker or [a DFPS] representative" if he was "to submit to a [narcotics-use] test by 9:00 am on the day of [the test]. He w[ould] [then] have until 4:00 pm to submit to the random [narcotics-use] test."

of] child abandonment" as a result. We disagree with DFPS's assertion that it presented evidence at trial of a "consistent pattern of neglectful behaviors" by father.

As to the incident that resulted in the children entering DFPS's care, DFPS caseworker Jackson testified that "[t]he children were locked outside of the home and . . . [f]ather refused to open the door and let them in." And father was charged with the offense of "child endangerment" related to that incident. Jackson stated that father's criminal case related to the incident was still pending at the time of trial, and father had not been convicted of the offense of "child endangerment."

The Child Advocates report stated that DFPS "received a referral stating that [l]aw [e]nforcement [officers] were called to [father's] home" because "[t]here were concerns that [E.S.S] was locked out of the home all day." T.S. was at a friend's house and returned home when law enforcement officers arrived. While law enforcement officers were at the home, father purportedly refused to unlock the door to allow the children to get anything from inside the home.[33]

In contrast, as to why the children entered DFPS's care, mother testified that father was "on the other side of the block" and the children were "playing." T.S. "locked" E.S.S. out of the house. E.S.S. then "went to a neighbor's [house] and said

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[33] The Child Advocates report also noted that the children were not wearing jackets on the day they entered DFPS's care. Yet the high temperature in Houston on December 22, 2020 was seventy-two degrees Fahrenheit. *See J. Weingarten, Inc.*, 530 S.W.2d at 656 ("We are permitted to take judicial [notice] of a weather report for a particular day.").

he was hungry," and the neighbor "called for a welfare check." When father got to the house, law enforcement officers "wanted to see if there was food inside the house," but father did not let officers go inside the house. Father was arrested, and DFPS "took the [children]."

We cannot say that this single incident constitutes evidence of a voluntary, deliberate, and conscious course of conduct by father that endangered the children's physical and emotional well-being.[34] *See In re A.R.G.*, No. 04-19-00749-CV, 2020 WL 1277739, at *4 (Tex. App.—San Antonio Mar. 18, 2020, no pet.) (mem. op.); *In re A.S.*, 261 S.W.3d at 87 ("[T]his single incident does not demonstrate the type of conduct contemplated by the statute."); *cf. Ybarra v. Tex. Dep't of Human Servs.*, 869 S.W.2d 574, 578 (Tex. App.—Corpus Christi–Edinburg 1993, no writ) (holding evidence factually insufficient to support trial court's endangerment finding even though DFPS found children alone on day it intervened); *Doria v. Tex. Dep't of Human Res.*, 747 S.W.2d 953, 958–59 (Tex. App.—Corpus Christi–Edinburg 1988, no writ) (in holding evidence factually insufficient to support trial court's

[34] DFPS points to father's assertion of his Fifth Amendment privilege against self-incrimination when he was asked at trial what was his "understanding [as to] how the [children] came into [DFPS's] care" and argues that the trial court could have drawn an adverse inference against father because he asserted his Fifth Amendment privilege. *See* U.S. CONST. amend. V. But this still does not change the fact that DFPS failed to show evidence of a voluntary, deliberate, and conscious course of conduct by father that endangered the children's physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E).

endangerment finding, explaining "although the record reflects [the parent] left [the children] alone on the day they were removed by [law enforcement officers], the evidence is less than clear and convincing concerning whether [the parent] ever left the children alone in the past"). Further, as to father's pending criminal case, even if father is taken into custody at some point following an adjudication in his pending criminal case, absent other evidence of endangering conduct, mere imprisonment will not constitute conduct which endangers the emotional or physical well-being of the children. *See In re A.S.*, 261 S.W.3d at 88.

DFPS also argues that father engaged in conduct that endangered the children's physical and emotional well-being because he failed to visit the children while they were in DFPS's care and he "never sent anything to [the children]" during the pendency of the termination-of-parental-rights case.

But father did not visit the children while they were in DFPS's care because of the bond conditions imposed in his pending criminal case.[35] DFPS caseworker Jackson testified that during the pendency of the termination-of-parental-rights case, father was released from custody on bond related to his pending criminal case and was subject to certain bond conditions, including one that required him not to have contact with one of the children. According to Jackson, father had not violated the

[35] The Child Advocates report states that father was subject to "a no contact order" related to the children.

conditions of his release on bond, and he had not "illegally attempted to contact the children or interfered with them in any way."

Father similarly testified that he had not violated any court order regarding "visitation or access to [the] children" that had been put in place related to his "criminal case." And he would follow any court order about "visitation and access to [the] children." Father tried to speak to the children's maternal grandparents during the pendency of the termination-of-parental-rights case, but they did not want to speak to him because "of [a] fear of [DFPS] doing something to them."

Father's failure to contact the children or visit the children, who were living together, when doing so would violate a condition of his release on bond and risk revocation of the bond, cannot constitute a voluntary, deliberate, and conscious course of conduct by father that endangered the children's physical and emotional well-being. *Cf. In re J.A.V.*, 632 S.W.3d 121, 132–33 (Tex. App.—El Paso 2021, no pet.) ("[DFPS] cannot establish on this record that [the parents'] failure to visit with [the] [c]hild during the beginning stages of the COVID-19 pandemic lockdown constituted legally and factually sufficient evidence of endangerment based on the El Paso county's shelter-in-place order that physically restricted travel and prevented [the parents] from accessing virtual visit technology at local libraries.").

Viewing the evidence in a neutral light, we conclude that a reasonable fact finder could not have formed a firm belief or conviction that father engaged, or

knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E). Accordingly, we hold that the evidence is factually insufficient to support the trial court's finding that father engaged, or knowingly placed the children with persons who engaged, in conduct that endangered the children's physical and emotional well-being. *See id.*

We sustain a portion of father's first issue.

Although we have sustained a portion of father's first issue, father, in his appellant's brief, concedes that there is legally and factually sufficient evidence to support the trial court's finding that he failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the return of the children. *See id.* § 161.001(b)(1)(O). Only one predicate finding under Texas Family Code section 161.001(b)(1) is necessary to support a trial court's judgment terminating parental rights, and here, father is not challenging the trial court's finding under Texas Family Code section 161.001(b)(1)(O). *See In re A.V.*, 113 S.W.3d at 362. Because of father's concession, we need not address father's second issue[36] in which he asserts that the evidence is legally and factually insufficient to support the trial court's finding that he constructively abandoned the

[36] Father labels this issue as his third issue in the "Issues Presented" section of his appellant's brief.

children, who had been placed in the permanent or temporary managing conservatorship of DFPS for not less than six months. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N); *see also* TEX. R. APP. P. 47.1.

B. Best Interest of Children

In his third issue,[37] father argues that the evidence is legally and factually insufficient to support the trial court's finding that termination of his parental rights was in the best interest of the children because DFPS did not satisfy the "heightened burden to prove by clear and convincing evidence that [father] should no longer have any relationship with his children whatsoever," the children's need for permanency could be achieved without the termination of father's parental rights, father loved the children and was willing to provide for them if his rights were not terminated, DFPS presented no evidence that father's home was unsafe or unstable or that father could not meet the children's needs, DFPS presented no evidence that father ever acted aggressively or violently toward the children, and DFPS presented no evidence of the children's maternal grandparents' parental abilities, the grandparents' plans for the children, or the condition of the grandparents' home. (Emphasis omitted).

We reiterate that the best-interest analysis evaluates the best interest of the children. *See In re M.A.A.*, 2021 WL 1134308, at *20; *In re D.S.*, 333 S.W.3d at

[37] Father labels this issue as his fourth issue in the "Issues Presented" section of his appellant's brief.

384. It is presumed that the prompt and permanent placement of the children in a safe environment is in their best interest. *See* TEX. FAM. CODE ANN. § 263.307(a); *In re D.S.*, 333 S.W.3d at 383.

Yet, we remain mindful that there is also a strong presumption that the children's best interest is served by maintaining the parent-child relationship, and we must strictly scrutinize termination proceedings in favor of the parent. *See In re M.A.A.*, 2021 WL 1134308, at *20; *In re N.L.D.*, 412 S.W.3d at 822. And because of the strong presumption in favor of maintaining the parent-child relationship and the due process implications of terminating a parent's rights to his minor children without clear and convincing evidence, "the best interest standard does not permit termination merely because [the] child[ren] might be better off living elsewhere." *In re J. G. S.*, 574 S.W.3d at 121–22 (internal quotations omitted); *see also In re W.C.*, 98 S.W.3d at 758. Termination of parental rights should not be used as a mechanism to merely reallocate children to better and more prosperous parents. *In re J. G. S.*, 574 S.W.3d at 121–22; *In re W.C.*, 98 S.W.3d at 758; *see also In re E.N.C.*, 384 S.W.3d at 809; *In re C.R.*, 263 S.W.3d at 375.

Moreover, termination is not warranted "without the most solid and substantial reasons." *Wiley*, 543 S.W.2d at 352 (internal quotations omitted); *see also In re N.L.D.*, 412 S.W.3d at 822. And in termination-of-parental-rights cases, DFPS's burden is not simply to prove that a parent should not have custody of his

children; DFPS must meet the heightened burden to prove, by clear and convincing evidence, that the parent should no longer have any relationship with his children whatsoever. *See In re M.A.J.*, 612 S.W.3d at 409–10; *In re K.N.J.*, 583 S.W.3d at 827; *see also In re J.A.J.*, 243 S.W.3d at 616–17 (distinguishing proof required for conservatorship decisions versus termination decisions).

In determining whether termination of father's parental rights was in the best interest of the children, we consider the same best-interest factors discussed previously in relation to the termination of mother's parental rights to the children. *See* TEX. FAM. CODE ANN. § 263.307; *In re A.C.*, 560 S.W.3d at 631 n.29; *Holley*, 544 S.W.2d at 371–72; *In re C.A.G.*, 2012 WL 2922544, at *6 & n.4; *In re L.M.*, 104 S.W.3d at 647. Although the absence of evidence about some of the factors does not preclude a fact finder from reasonably forming a strong conviction or belief that termination is in the children's best interest, a lack of evidence on one factor cannot be used as if it were clear and convincing evidence supporting termination of parental rights. *See In re E.N.C.*, 384 S.W.3d at 808; *In re C.H.*, 89 S.W.3d at 27; *In re J. G. S.*, 574 S.W.3d at 122. In some cases, undisputed evidence of only one factor may be sufficient to support a finding that termination is in the children's best interest, while in other cases, there could be "more complex facts in which paltry evidence relevant to each consideration mentioned in *Holley* would not suffice" to support termination. *In re C.H.*, 89 S.W.3d at 27; *see also In re J. G. S.*, 574 S.W.3d

at 122. The presence of scant evidence relevant to each factor will generally not support a finding that termination of parental rights was in the children's best interest. *In re M.A.J.*, 612 S.W.3d at 410; *In re R.H.*, 2019 WL 6767804, at *4; *In re A.W.*, 444 S.W.3d at 693.

Our focus is on whether the termination of father's parental rights would advance the children's best interest. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *In re J. G. S.*, 574 S.W.3d at 127.

1. Children's Desires

At the time father's parental rights were terminated, T.S. was twelve years old and E.S.S. was nine years old. The children entered DFPS's care in December 2020 and began living with their maternal grandparents in February 2021—about ten months before trial. Little evidence was presented at trial as to the children's desires. DFPS caseworker Jackson stated that the children were "bonded to their grandparents" and "want[ed] to be adopted." And they enjoyed being in their current placement with their grandparents. Child Advocates representative First also stated that the children were "happy where they[] [were] at" and they were "bonding with their grandparents." Although First testified that he had "spoken with the children . . . about adoption,"[38] he also contradicted himself during his testimony,

[38] First did not provide any details about what he had discussed with the children "about adoption."

stating that he had not had a chance to speak to the children about being adopted by their maternal grandparents, but he thought that T.S. would agree to the adoption if First were to speak to him about it. Significantly, there was no evidence presented at trial that the implications of adoption had been explained to the children or that the children were told how adoption would affect their relationship with father.

The November 2021 permanency report stated that from December 23, 2020 until February 8, 2021, the children lived in a "[f]oster [h]ome." They began living with their maternal grandparents on February 8, 2021. The children had "adjusted well" to their placement with their grandparents. *See In re L.M.N.*, 2018 WL 5831672, at *20 (considering evidence of children doing well after removal when discussing children's desires).

Yet, no evidence was presented indicating that the children desired the termination of their relationship with father.[39] *See In re M.A.A.*, 2021 WL 1134308, at *21 (in holding evidence factually insufficient to support trial court's finding that termination was in children's best interest, noting, although "[n]one of the children . . . expressed their desires as to returning to mother's care, . . . no evidence

[39] Although the Child Advocates report states that the children had "verbalized wanting to be adopted by and stay[] with their grandparents fulltime," this is not evidence that the children desired the termination of their relationship with father, especially when there was no evidence presented at trial that the implications of being "adopted" by their grandparents had been explained to the children or that the children were told how adoption would affect their relationship with father.

was presented that [children] desired termination of [their] relationship with [parent]").

Before they entered DFPS's care, the children had been living with father. Father testified that the children had been "well taken care of their entire lives," and he loved them. *See Yonko*, 196 S.W.3d at 244–45 (when evidence of parent's failures is not overwhelming, child's love for parent and bond between child and parent weighed against termination of parental rights); *see also In re A.J.A.R.*, 2020 WL 4260343, at *7 (bond between parent and child important consideration). Father was unable to visit the children during the pendency of the termination-of-parental-rights case because a court order setting the conditions of his release on bond had been put into place affecting his "visitation or access to [the] children." Father tried to speak to the children's maternal grandparents during the pendency of the termination-of-parental-rights case, but they did not want to speak to him because "of [a] fear of [DFPS] doing something to them."

Notably, DFPS did not present any evidence at trial that father's relationship with the children was inappropriate or that the children would be adversely affected by contact with father. *See In re G.M.M.*, No. 01-20-00159-CV, 2020 WL 5048140, at *15–17 (Tex. App.—Houston [1st Dist.] Aug. 27, 2020, no pet.) (mem. op.) (holding evidence factually insufficient to support best-interest finding and noting lack of evidence that parent's relationship with child was inappropriate or that child

was adversely affected by contact with parent). Although in its appellee's brief DFPS chastises father for not visiting the children during the pendency of the termination-of-parental-rights case, DFPS neglects to consider that father was prohibited from doing so given the conditions of his release on bond in his pending criminal case. Further, to the extent that father would have been permitted to see one of the children under the conditions of his bond, DFPS presented no evidence that it attempted to facilitate any visits between that particular child and father. *See In re M.A.A.*, 2021 WL 1134308, at *35 (in holding evidence factually insufficient to support trial court's finding that termination was in child's best interest, noting DFPS never attempted to facilitate any visitation between parent and child).

2. Current and Future Physical and Emotional Needs and Current and Future Physical and Emotional Danger

a. Condition of Home

The children need a safe and stable home. *See* TEX. FAM. CODE ANN. § 263.307(a) (prompt and permanent placement of child in safe environment presumed to be in child's best interest); *In re G.M.G.*, 444 S.W.3d at 60 (parent who lacks ability to provide child with safe and stable home is unable to provide for child's emotional and physical needs). Although the children were living with father at the time that they entered DFPS's care, DFPS presented no evidence at trial as to the condition of father's home before the children entered DFPS's care or evidence that father's home was unsatisfactory at the time of trial. *See In re M.A.A.*, 2021 WL

1134308, at *36 (DFPS presented no evidence to show that father's living arrangement was unstable or unsafe); *In re R.I.D.*, 543 S.W.3d at 427–28 (DFPS could not establish that "parent ha[d] demonstrated an inability to provide the child with a safe environment" where "[t]he record contain[ed] no evidence of [the parent's] living conditions" and "no evidence about [the parent's] conduct in his home"). DFPS caseworker Jackson acknowledged that she did not know where father lived, and mother, when asked, testified that she could not comment on the stability of father's home and lifestyle because she did not "know his situation." Although the Child Advocates report stated that father had not "proven" that he was able to provide a safe and stable placement for the children, the report did not contain any facts to support this statement, making it conclusory. *See In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence); *see also In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *Flanz*, 662 S.W.2d at 688 (concluding single statement without context provides insufficient evidence to support finding).

As noted above, there was also no evidence presented at trial as to the condition of the children's maternal grandparents' home, where the children had been living since February 2021. Although the children's maternal grandparents testified at trial, DFPS did not question the grandparents about the condition of their

home or about its safety and stability. *See In re A.H.*, 414 S.W.3d at 807 (holding evidence insufficient to support best-interest finding where no information presented at trial about children's current caregivers or nature of environment caregivers provided children). And as to the children's current placement with their maternal grandparents, DFPS caseworker Jackson merely testified, without explanation or detail, that the grandparents' home was "safe and stable." *See In re M.A.J.*, 612 S.W.3d at 412 (conclusory testimony by DFPS caseworker that children's current placement was stable was insufficient to support trial court's finding that termination of parental rights in best interest of child); *In re D.N.*, 2014 WL 3538550, at *3–5 (holding evidence insufficient to support termination of parental rights and noting DFPS caseworker and children's attorney ad litem did not provide any facts to form basis of opinion). Conclusory opinion testimony, even if uncontradicted, does not amount to more than a scintilla of evidence; it is no evidence at all. *See In re A.H.*, 414 S.W.3d at 807; *see also Pollock*, 284 S.W.3d at 818 (opinion is conclusory "if no basis for the opinion is offered[] or the basis offered provides no support"); *Arkoma Basin Expl.*, 249 S.W.3d at 389 (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it" (internal quotations omitted)). And a lack of evidence does not constitute clear and convincing evidence to meet DFPS's burden. *In re E.N.C.*, 384 S.W.3d at 808

(noting trial court's best-interest finding must be supported by clear and convincing evidence in record).

b. Children's Needs

DFPS caseworker Jackson testified that neither of the children had "special needs," and stated, without support or explanation, that the children's "needs [were] being met in [their] placement" with their maternal grandparents. *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also Arkoma Basin Expl.*, 249 S.W.3d at 389 (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it" (internal quotations omitted)); *In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). When generically asked, "how are [the children] performing," Jackson responded, "They're doing well." But no context or time frame was provided in Jackson's testimony.

The November 2021 permanency report stated that T.S. was "in need of stability and a long-term placement," but it also stated that this could be achieved either through adoption or "relative conservatorship," without the termination of father's parental rights, and the report described both options as "appropriate" for

T.S. The permanency report also stated that T.S. could "benefit from [a] grief and loss support group, mental health case management, targeted/specific therapy[,] and . . . follow up with [his primary care physician] on self-harm." T.S. attended individual therapy bi-weekly. T.S. had not seen a medical doctor for a "checkup" while living with his maternal grandparents, but he had a dental examination in August 2021.

The permanency report listed the following recommendations for T.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [T.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care. Psychotherapy services provided by a professional therapist will assist [T.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the prospects of a successful adoption will be limited. Therefore, [b]asic level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [m]oderate level services.

See In re L.C.L., 599 S.W.3d at 88 ("[T]he existence of the [children's] disorders and disabilities [does not] constitute evidence of [the parent's] inability to provide for the children's emotional or physical needs."); *In re J.E.M.M.*, 532 S.W.3d at 887–88.

As to E.S.S., the November 2021 permanency report stated that E.S.S. was "in need of stability and a long-term placement." But it also stated that this could be achieved either through adoption or "relative conservatorship," without the termination of father's parental rights, and the report described both options as "appropriate" for E.S.S. The report further noted that E.S.S. would "benefit from [a] grief and loss support group, mental health case management, [and] targeted/specific therapy." And he would "benefit from community supports such as [the] Boy Scouts [of America] or [the] Boys and Girls Club." E.S.S. attended individual therapy bi-weekly, but he had not seen a medical doctor for a "checkup" while living with his maternal grandparents. E.S.S. took medication for ADHD, and his last dental examination was in August 2021.

The permanency report listed the following recommendations for E.S.S. after his "[m]ental [h]ealth [a]ssessment[]" in September 2021:

> [E.S.S.] requires guidance and supervision to ensure his safety and sense of security. [He] may also benefit from contact with members of his family to maintain a sense of family unity, as deemed appropriate by respective treatment providers and caseworkers involved in his care. Psychotherapy services provided by a professional therapist will assist [E.S.S.] to develop coping skills necessary if he can be reasonably expected to successfully manage psychosocial stressors present in his life. Significant assistance, treatment services, and structure will be required to enable him to make and maintain adequate personal, social, and academic adjustment. Without the benefit of these services, the prospects of a successful adoption will be limited. Therefore, [m]oderate level services appear indicated in his case. However, if an increase in mood-related or behavioral symptoms are observed, this might provide rationale for [s]pecialized level services.

See In re L.C.L., 599 S.W.3d at 88 ("[T]he existence of the [children's] disorders and disabilities [does not] constitute evidence of [the parent's] inability to provide for the children's emotional or physical needs."); *In re J.E.M.M.*, 532 S.W.3d at 887–88.

The Child Advocates report also briefly discussed the needs of the children. It noted that E.S.S. took medication daily and wore prescription eyeglasses. E.S.S. also received accommodations in school. T.S. did not take medication and did not require accommodations in school.

Significantly, DFPS presented no evidence at trial that the children's maternal grandparents were able to meet, or were meeting, the above-described needs of the children, particularly the ones listed in the November 2021 permanency report. DFPS also presented no evidence that father would be unable to meet the children's needs if they were placed in his care. *See In re M.A.J.*, 612 S.W.3d at 412 (holding evidence insufficient to support trial court's finding termination of parental rights in child's best interest where no evidence presented that child's needs would go unmet if returned to parent's care); *In re D.D.M.*, 2019 WL 2939259, at *6 (DFPS presented no evidence parent could not meet children's therapeutic needs); *In re E.W.*, 494 S.W.3d at 300–01. Father testified that the children had been "well taken care of their entire lives," and father stated that he stopped working at the beginning of the COVID-19 pandemic because he "needed to take care of the [children]" as "they

couldn't go to school." Father was willing to pay child support if his parental rights were not terminated.

Further, DFPS did not present evidence at trial that the termination of father's parental rights would improve the outlook for the children's needs. *See In re M.A.A.*, 2021 WL 1134308, at *36 (noting no evidence presented about parent's inability to meet child's needs or that termination of parental rights would improve outlook for child's needs); *In re J.E.M.M.*, 532 S.W.3d at 887–88; *see also In re B.C.H.*, 2019 WL 1940758, at *14–15 (holding evidence factually insufficient to support best-interest finding where "there was no risk of foreseeable harm if the court allowed [the parent] to retain her rights" (internal quotations omitted)). And the "[m]ental [h]ealth [a]ssessment[]" contained in the November 2021 permanency report stated that the children would "benefit from contact with members of [their] family to maintain a sense of family unity," which appears to be in direct opposition to a finding that the termination of father's parental rights was in the children's best interest. Also, Child Advocates representative First's testimony that the children's maternal grandparents sought to adopt the children because they "want[ed] to be able to support the children . . . without [getting] any interference [from father]," appears contrary to the children's need of having contact with family members and maintaining a sense of family unity.

c. Danger to Children

DFPS presented no evidence at trial that father abused the children, acted aggressively or violently toward the children, or exposed the children to physical danger. *See In re M.A.A.*, 2021 WL 1134308, at *37 (no evidence parent ever physically harmed child); *In re A.J.A.R.*, 2020 WL 4260343, at *8–9 (holding evidence factually insufficient to support best-interest finding where there was no evidence parent caused injury to children); *In re M.A.J.*, 612 S.W.3d at 414 (record did not contain evidence that parent acted aggressively or violently toward children, abused children, or exposed children to physical danger); *In re B.C.H.*, 2019 WL 1940758, at *14–15 (holding evidence factually insufficient to support best-interest finding where "there was no risk of foreseeable harm if the court allowed [the parent] to retain her rights" (internal quotations omitted)); *see also In re E.N.C.*, 384 S.W.3d at 808 ("A lack of evidence does not constitute clear and convincing evidence."); *In re E. C. A.*, 2017 WL 6759198, at *13 (noting children had not been abused by parent); *In re J.P.*, 2012 WL 579481, at *9 (holding evidence factually insufficient to support finding termination of parental rights in child's best interest where grounds for terminating parent's rights did not involve allegations of physical or sexual abuse of child by parent); *In re R.W.*, 2011 WL 2436541, at *13.

Further, father's FSP listed the "[p]rimary [p]ermanency [g]oal" for the children as "[f]amily [r]eunification." *See In re M.A.J.*, 612 S.W.3d at 414 (noting

DFPS's initial permanency goal was family reunification for children and parent). This indicates that DFPS did not view father as a danger or threat to the children's safety and well-being at the beginning of the termination-of-parental-rights case, and DFPS presented no evidence at trial to indicate that he had since become a danger or a threat to the children.

DFPS again points to the incident that resulted in the children entering DFPS's care as evidence that father is a danger to the children. As to that incident, DFPS caseworker Jackson testified that "[t]he children were locked outside of the home, and . . . [f]ather refused to open the door and let them in." And father was charged with the offense of "child endangerment" related to that incident. Jackson stated that father's criminal case related to the incident was still pending, and father had not been convicted of the offense of "child endangerment."

The Child Advocates report stated that DFPS "received a referral stating that [l]aw [e]nforcement [officers] were called to [father's] home" because "[t]here were concerns that [E.S.S] was locked out of the home all day." T.S. was at a friend's house and returned home when law enforcement officers arrived. While law enforcement officers were at the home, father purportedly refused to unlock the door to allow the children to get anything from inside the home.[40]

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[40] The Child Advocates report also noted that the children were not wearing jackets on the day they entered DFPS's care. Yet the high temperature in Houston on December 22, 2020 was seventy-two degrees Fahrenheit. *See J. Weingarten, Inc.*,

In contrast, according to mother, on the day the children entered DFPS's care, father was "on the other side of the block" and the children were "playing." T.S. "locked" E.S.S. out of the house. E.S.S. then "went to a neighbor's [house] and said he was hungry," and the neighbor "called for a welfare check." When father got to the house, law enforcement officers "wanted to see if there was food inside the home," but father did not let officers go inside the house. Father was arrested, and DFPS "took the [children]."

As discussed above, this single incident does not constitute a voluntary, deliberate, and conscious course of conduct by father that endangered the children's physical and emotional well-being. *Cf. Ybarra*, 869 S.W.2d at 578 (holding evidence factually insufficient to support trial court's endangerment finding even though DFPS found children alone on day it intervened); *Doria*, 747 S.W.2d at 958–59 (in holding evidence factually insufficient to support trial court's endangerment finding, explaining "although the record reflects [the parent] left [the children] alone on the day they were removed by [law enforcement officers], the evidence is less than clear and convincing concerning whether [the parent] ever left the children alone in the past"). And DFPS presented no evidence that the children were physically or emotionally harmed related to the incident. Father testified that prior

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530 S.W.2d at 656 ("We are permitted to take judicial [notice] of a weather report for a particular day.").

to the children entering DFPS's care, they had been "well taken care of their entire lives." DFPS did not present any evidence to contradict father's testimony.

As to father's pending criminal case, we note that criminal activity which exposes a parent to the potential for incarceration is relevant to the trial court's best-interest determination. *See In re M.A.A.*, 2021 WL 1134308, at *26. And, in a civil case, including a termination-of-parental-rights case, a fact finder may draw an adverse inference against a party who pleads the Fifth Amendment. *See id.*; *In re Z.C.J.L.*, Nos. 14-13-00115-CV, 14-13-00147-CV, 2013 WL 3477569, at *10 (Tex. App.—Houston [14th Dist.] July 9, 2013, no pet.) (mem. op.); *see also In re S.A.P.*, 459 S.W.3d 134, 146 (Tex. App.—El Paso 2015, no pet.) ("This rule has been applied in suits for parental termination.").

Here, however, DFPS presented little evidence as to the criminal offense that father allegedly committed.[41] Other than testimony from DFPS caseworker Jackson that father was charged with the offense of "child endangerment," DFPS failed to provide any details as to the nature or degree of the offense with which father was charged. *See* TEX. PENAL CODE ANN. § 22.041 (offense of abandoning or endangering child may constitute state-jail-felony offense, third-degree felony offense, or second-degree felony offense depending on circumstances of alleged

[41] As to the incident giving rise to father's charge for the offense of "child endangerment," the evidence presented at trial was disputed as to the circumstances surrounding the incident.

offense and under which section of statute defendant is charged). There was also no evidence presented at trial that father had a history of engaging in criminal activities, or that he had previously been convicted of any criminal offense. The fact that father had a pending criminal case at the time of trial does not, by itself, automatically make him a danger to the children. *See In re A.S.*, 261 S.W.3d 76, 84–89 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (in holding evidence legally and factually insufficient to support termination of parental rights for endangerment, noting parent had not been convicted of any crime at time of trial); *In re D.T.*, 34 S.W.3d 625, 637–42 (Tex. App.—Fort Worth 2000, pet. denied) (holding evidence factually insufficient to support trial court's findings parent endangered her child physically or emotionally and termination of parental rights in best interest of child even where parent had pending criminal charges in other states); *see also In re R.S.*, No. 02-18-00127-CV, 2018 WL 4183117, at *16 (Tex. App.—Fort Worth Aug. 31, 2018, no pet.) (mem. op.) (holding evidence factually insufficient to support trial court's finding termination of parental rights in child's best interest even though parent had pending criminal case and "nothing had been resolved on how long [the parent] might be incarcerated"). And imprisonment of a parent, standing alone, does not constitute conduct that endangers the children's physical and emotional well-being. *See In re A.S.*, 261 S.W.3d at 88.

d. Narcotics Use

Father's FSP required him to refrain from narcotics use, submit to random narcotics-use testing, and complete a substance abuse assessment. Father completed his substance abuse assessment and participated in some narcotics-use testing during the pendency of this case.

The Child Advocates report stated that father tested negative for narcotics use on May 26, 2021. And the November 2021 permanency report also stated that father tested negative for narcotics use on May 26, 2021. But the November 2021 permanency report stated that father tested positive for amphetamine and methamphetamine use on May 13, 2021. *Cf. In re C.A.B.*, 289 S.W.3d at 884 ("[A] single incident of [narcotics] use while the child is not in the parent's custody does not support an inference of endangerment."); *In re A.S.*, 261 S.W.3d at 86–87 (holding evidence factually insufficient to support trial court's finding that parent consciously engaged in course of conduct that endangered her child's well-being where parent used marijuana on one occasion). And father failed to "[s]how" for narcotics-use testing on February 23, 2021, March 23, 2021, June 15, 2021, July 12, 2021, July 28, 2021, August 12, 2021, August 31, 2021, and October 14, 2021.[42]

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[42] As to one of his "[n]o show[s]," father explained that he was only required to participate in a narcotics-use test if DFPS contacted him by 9:00 a.m. on the day the narcotics-use test was to occur. And if he did not receive a telephone call by that time, then there was no way that "he w[ould] know the call came in" because he would no longer be "waiting for the call." Father's FSP confirmed that father was

But DFPS did not present evidence that father used narcotics in the children's presence, left the children in the care of narcotics users or in a home where narcotics were present, was ever arrested or incarcerated for an offense related to narcotics use or possession, abused narcotics, was impaired while caring for the children due to narcotics use, or that narcotics had been accessible to the children while they were in father's care. *See In re M.A.J.*, 612 S.W.3d at 414–15; *see also In re S.K.G.*, 2021 WL 4897865, at *6–7 (holding evidence insufficient to support trial court's finding parent engaged in endangering conduct, where "there was no evidence [presented] that [the parent] suffered from a [narcotics] abuse problem," only evidence that parent did not follow FSP related to narcotics-use testing); *In re J.N.*, 301 S.W.3d at 434–35 (although parent tested positive for narcotics use, holding evidence factually insufficient to support trial court's determination termination of parental rights in best interest of child); *Ruiz*, 212 S.W.3d at 818 (holding evidence insufficient to support trial court's finding that parent engaged in conduct which endangered child's physical or emotional well-being where evidence of parent's narcotics use was "extremely limited" and no evidence showed parent used narcotics while caring for child or when she was in child's presence).

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to "be contacted by the [DFPS] caseworker or [a DFPS] representative" if he was "to submit to a [narcotics-use] test by 9:00 am on the day of [the test]. He w[ould] [then] have until 4:00 pm to submit to the random [narcotics-use] test."

3. Parental Abilities, Plans for Children, and Stability of Proposed Placement

a. Father

DFPS presented no evidence of father's parental abilities or lack thereof. The children were living with father when they entered DFPS's care, and father testified that they were "well taken care of." There was no evidence presented at trial as to the condition of father's home when the children entered DFPS's care, and DFPS did not present any evidence that father's home was unsatisfactory at the time of trial. *See In re M.A.J.*, 612 S.W.3d at 416 (noting there was no evidence presented at trial regarding condition of parent's home at time of trial). DFPS caseworker Jackson acknowledged that she did not know where father lived. Although the Child Advocates report stated that father had not "proven" that he was able to provide a safe and stable placement for the children, the report did not contain any facts to support this statement, making it conclusory. *See Pollock*, 284 S.W.3d at 818 (opinion is conclusory "if no basis for the opinion is offered[] or the basis offered provides no support"); *see also In re M.A.A.*, 2021 WL 1134308, at *38 ("A single statement without context provides insufficient evidence to support a finding that termination of . . . parental rights was in [the child's] best interest."); *Flanz*, 662 S.W.2d at 688 (concluding single statement without context provides insufficient evidence to support finding).

There was also no evidence presented at trial that father abused the children, acted aggressively or violently toward the children, or exposed the children to physical danger. *See In re M.A.A.*, 2021 WL 1134308, at *37; (no evidence parent ever physically harmed child); *In re M.A.J.*, 612 S.W.3d at 414 ("The record does not contain evidence that [the parent] acted aggressively or violently toward the children while they were in her care. And there is no evidence that [the parent] . . . abused the children[] or exposed them to physical danger."); *see also In re J.P.*, 2012 WL 579481, at *9 (holding evidence factually insufficient to support finding termination of parental rights in child's best interest where grounds for terminating parent's rights did not involve allegations of physical or sexual abuse of child by parent). And DFPS presented no evidence at trial that father engaged in narcotics use while the children were in his care. *See In re M.A.J.*, 612 S.W.3d at 414–16, 418; *In re J.N.*, 301 S.W.3d at 434–35 (although parent tested positive for narcotics use, holding evidence factually insufficient to support trial court's determination termination of parental rights in best interest of child); *see also In re E.N.C.*, 384 S.W.3d at 808 (lack of evidence does not constitute clear and convincing evidence to meet DFPS's burden).

DFPS caseworker Jackson testified that she did not know if father was employed or whether father had "provided anything" to support the children while they had been in DFPS's care. Father testified that he was unemployed and had not

had a job since the children had entered DFPS's care. Father explained that he stopped working at the beginning of the COVID-19 pandemic because he "needed to take care of the [children] because they couldn't go to school." Father had "two job opportunities" since the children entered DFPS's care, but he did not get hired after a "background check" was completed. After his criminal case is resolved, father plans to obtain employment. Father noted that he had been supporting himself by receiving income through "unemployment until a few months" before trial and his family had been helping him.

Father also stated that the children had been "well taken care of their entire lives," and he loved them. He believed that the children were "okay" in their maternal grandparents' home, but it would not be in the children's best interest for his parental rights to be terminated. Father was willing to pay child support if his parental rights to the children were not terminated. Father tried to speak to the children's maternal grandparents during the pendency of the termination-of-parental-rights case, but they did not want to speak to him because "of [a] fear of [DFPS] doing something to them."

Finally, we note that father's FSP listed the "[p]rimary [p]ermanency [g]oal" for the children as "[f]amily [r]eunification" with father. It appears that this goal changed during the pendency of the termination-of-parental-rights case, but there was no evidence presented at trial to explain the reason for the change. And this

indicates that DFPS did not view father as a danger or threat to the children's safety or well-being at the beginning of the termination-of-parental-rights case, and DFPS presented no evidence at trial to indicate that he had since become a danger or a threat to the children.

Although father did not complete all of the requirements of his FSP, he testified that he completed his psychological evaluation, substance abuse assessment, and parenting classes. It is undisputed that father only stopped working on the requirements of his FSP after DFPS told him, six months before trial, that it was "going to give" the children's maternal grandparents permanent managing conservatorship over the children no matter what father did. After that, father "felt like [there] was no point in completing his [FSP] [because] he didn't have a chance" to have the children returned to his care. When DFPS caseworker Jackson was asked whether "[f]ather [was] working services until [DFPS] informed him that the grandparents would get [permanent managing conservatorship]," Jackson responded, "Correct."

b. Current Placement

Little evidence was presented at trial as to the children's current placement or the parenting abilities of the children's maternal grandparents. DFPS caseworker Jackson testified that the children had been living with their maternal grandparents since February 2021—about ten months before trial. The children's maternal

grandfather was a professor, but Jackson did not know what the children's maternal grandmother did for a living. According to Jackson, the children's grandparents were "open to adopting the children."

Jackson testified, without explanation or detail, that the children's "needs [were] being met in [their] placement." *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also Arkoma Basin Expl.*, 249 S.W.3d at 389 (witness cannot "simply state a conclusion without any explanation" or ask trier of fact to "take [her] word for it" (internal quotations omitted)); *In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). When generically asked, "how are [the children] performing," Jackson responded, "They're doing well." But Jackson did not provide context or a time frame related to her statement. Jackson also testified that the children attended school while their grandparents worked, and the children were with their grandparents after school. Jackson offered a conclusory opinion that the grandparents' home was "safe and stable." *See In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not

probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence).

Child Advocates representative First also offered conclusory testimony as to the children's current placement, stating, without explanation or detail, that the children were "happy" in their current placement. The children's maternal grandparents were "protective of the children," and the children's current placement with their grandparents was "the best place for them at th[e] time." *See In re M.A.J.*, 612 S.W.3d at 413 (DFPS caseworker's statement that children's current placement was meeting their needs constituted "nothing more than a conclusory opinion"); *see also In re K.M.J.*, 2019 WL 1459565, at *7–8 (testimony offered without any factual support was conclusory and not probative); *In re C.C., III*, 253 S.W.3d at 894–95 (holding vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). According to First, the children's grandparents wanted to adopt the children so that they could "support the children the best way that they c[ould] without any interference [from father]."

The Child Advocates report provided limited insight into the children's current placement with their maternal grandparents. The report stated, without explanation or detail, that the grandparents had provided "a safe and stable placement for the children." And the children had made unspecified "positive improvements" in their lives. *See In re C.C., III*, 253 S.W.3d at 894–95 (holding

vague assertions and conclusions without factual bases do not constitute clear and convincing evidence). The children's grandparents wanted to adopt the children.

The children's maternal grandmother testified that the children had adjusted to living in her home and over the last "four or five months" the children had "settled in," "become more open," and began "doing well in school." The children's grandmother stated that she has had a relationship with the children since their birth, and she and the children's maternal grandfather were willing to adopt the children. The children's grandmother also testified that the children had lived with her previously for various periods of time because of "the instability of" father, but the children's grandmother did not elaborate on those instances, provide detail as to the purported "instability" of father, or give a particular time frame when that had occurred. Although the children's maternal grandfather was called as a witness at trial, he did not testify as to his, or the maternal grandmother's parenting abilities, or provide any information about the children or the children's placement in his home.

Evidence was presented at trial that the children's maternal grandparents were willing to adopt the children, but DFPS presented no evidence that the grandparents would not be willing to provide the children with a safe environment in which to live even if father's parental rights were not terminated. *See In re M.A.A.*, 2021 WL 1134308, at *39; *In re F.M.E.A.F.*, 572 S.W.3d at 732 (noting relative could provide safe environment for child regardless of whether parent's rights were terminated).

The November 2021 permanency report listed "relative adoption" as the "[p]rimary [p]ermanency [g]oal" for the children, but it also listed "relative conservatorship" as a "[c]oncurrent [p]ermanency [g]oal," if father's parental rights were not terminated. Both outcomes were considered "appropriate" for the children.

4. Availability of Assistance and Excuse for Parent's Acts or Omissions

"In determining the best interest of the child[ren] in proceedings for termination of parental rights, the [fact finder] may properly consider" whether a parent complied with "the court-ordered service plan for reunification with the child[ren]." *In re I.L.G.*, 531 S.W.3d at 355. Father, to comply with his FSP, completed his psychological evaluation, substance abuse assessment, and parenting classes. DFPS caseworker Jackson also noted that father submitted to some narcotics-use testing. Notably, it is undisputed that father only stopped working on the requirements of his FSP after DFPS told him, six months before trial, that it was "going to give" the children's maternal grandparents permanent managing conservatorship over the children no matter what father did. After that, father "felt like [there] was no point in completing his [FSP because] he didn't have a chance" to have the children returned to his care. When DFPS caseworker Jackson was asked whether "[f]ather [was] working services until [DFPS] informed him that the grandparents would get" permanent managing conservatorship of the children, Jackson responded, "Correct." Failure of a parent to complete the requirements of

his FSP is not determinative of the best-interest analysis. *See, e.g.*, *In re L.C.L.*, 599 S.W.3d at 86–89 (holding evidence insufficient to support trial court's finding that termination of parental rights in children's best interest even though parent did not complete FSP's requirements); *In re J.E.M.M.*, 532 S.W.3d at 889; *In re E. C. A.*, 2017 WL 6759198, at *12–13.

We reiterate that DFPS must support its allegations against a parent, including its allegation that termination of father's parental rights was in the best interest of the children, by clear and convincing evidence; a preponderance of evidence or conjecture is not enough. *See In re E.N.C.*, 384 S.W.3d at 808–10; *In re M.A.A.*, 2021 WL 1134308, at *39; *see also In re A.W.*, 444 S.W.3d at 693 (presence of scant evidence relevant to each factor will generally not support finding that termination of parental rights was in child's best interest); *Toliver*, 217 S.W.3d at 101 (DFPS had burden to rebut presumption that best interest of child was served by keeping custody with natural parent). DFPS must meet this high evidentiary burden because the law presumes that the children's best interest is served by maintaining the parent-child relationship and protects the constitutional rights of the parent involved in a termination-of-parental-rights case. *In re M.A.A.*, 2021 WL 1134308, at *39; *In re E. C. A.*, 2017 WL 6759198, at *9, *13; *In re R.W.*, 2011 WL 2436541, at *12; *see also Santosky*, 455 U.S. at 753–54 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate

simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections . . . .”). “[T]he best[-]interest standard does not permit termination [of parental rights] merely because [the] child[ren] might be better off living elsewhere.” *In re A.H.*, 414 S.W.3d at 807; *see also In re K.N.J.*, 583 S.W.3d at 827 (“The evidence must . . . permit a factfinder to reasonably form a firm conviction or belief that [the parent] should no longer be in the children’s lives as their [parent], not merely that [the parent] should not have custody [of the children].”).

As noted above, the reporter’s record from trial in this case is only fifty-seven pages total, including the cover, list of appearances, table of contents, exhibit index, announcements, closing arguments, trial court’s pronouncement, and court reporter’s certificate.[43] *See In re M.A.J.*, 612 S.W.3d at 417 n.24; *In re E.F.*, 591 S.W.3d at 142 n.4; *see also In re D.L.W.W.*, 617 S.W.3d at 92 n.49. At best, that leaves forty-two pages for DFPS to establish, by clear and convincing evidence, not only the grounds for termination for father’s (and mother’s) parental rights, but also

[43] The reporter’s record also includes an exhibit volume containing sixteen exhibits, but not every exhibit is relevant to the termination of father’s parental rights or to a determination that termination of father’s parental rights was in the best interest of the children.

that it was in the best interest of the children to permanently sever their relationship with father (and mother). *See In re E.F.*, 591 S.W.3d at 142 n.4.

We are cognizant of the extraordinary burdens placed on all participants in a termination-of-parental-rights case, but the "[t]ermination of parental rights is traumatic, permanent, and irrevocable." *In re M.S.*, 115 S.W.3d at 539. Given the weighty constitutional interests of the parent involved in such a proceeding, the interests of the children involved, and the effect that placement of the children will have on numerous lives, it is imperative, and consistent with the high evidentiary standard of proof applicable to these cases, that DFPS fully develop the evidence at trial. Only then can the appellate record be commensurate with the magnitude and finality of a termination decision. *See In re M.A.J.*, 612 S.W.3d at 417–18; *In re E.F.*, 591 S.W.3d at 142 n.4; *see also In re B.D.A.*, 546 S.W.3d at 393 (Massengale, J., dissenting on rehearing) ("The law sets a high evidentiary bar for termination of parental rights. We do not alleviate the plight of Texas . . . children by lowering that bar and perpetuating diminished judicial expectations of the proof that must be presented by [DFPS].").

Viewing the evidence in a neutral light, we conclude that a reasonable fact finder could not have formed a firm belief or conviction that termination of parental rights of father was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is factually insufficient to

support the trial court's finding that termination of the parental rights of father was in the best interest of the children.[44] *See id.*

We sustain a portion of father's third issue.

Sole Managing Conservator

In her fourth issue, mother argues that the trial court erred in appointing DFPS as the children's sole managing conservator because "the evidence does not support either the termination findings or the best-interest finding."[45]

We review conservatorship decisions for an abuse of discretion. *In re J.A.J.*, 243 S.W.3d at 616; *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). A trial court abuses its discretion if its decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d at 616; *In re J.J.G.*, 540 S.W.3d at 55. Thus,

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[44] Evidence supporting termination under the grounds listed in Texas Family Code section 161.001(b)(1) can be considered in support of a finding that termination was in the children's best interest. *See In re C.H.*, 89 S.W.3d at 28 (holding same evidence may be probative of both Texas Family Code section 161.001(b)(1) termination grounds and best interest). Thus, viewing the evidence in the light most favorable to the trial court's finding, as we must when conducting a legal-sufficiency review, we conclude that the trial court could have formed a firm belief or conviction that termination of father's parental rights was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 161.001(b)(2). Accordingly, we hold that the evidence is legally sufficient to support the trial court's finding that termination of father's parental rights was in the best interest of the children. *See id.*; *see also In re M.A.A.*, 2021 WL 1134308, at *39 n.56; *In re A.A.H.*, 2020 WL 1056941, at *7 n.4 (because legally insufficient evidence requires rendition of judgment in favor of party raising challenge, we must address it).

[45] Father did not challenge on appeal the trial court's appointment of DFPS as the children's sole managing conservator.

in reviewing a trial court's conservatorship decision for an abuse of discretion, we examine whether the court acted without reference to any guiding rules or principles. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *In re J.J.G.*, 540 S.W.3d at 55. A trial court does not abuse its discretion when it bases its decision on conflicting evidence or so long as some evidence of substantive and probative character supports its decision. *In re J.J.G.*, 540 S.W.3d at 55.

The primary consideration in determining issues of conservatorship is always the children's best interest. *See* TEX. FAM. CODE ANN. § 153.002. "A managing conservator must be a parent, a competent adult, [DFPS], or a licensed child-placing agency." *See id.* § 153.005(b); *see also In re J.A.J.*, 243 S.W.3d at 614. Texas Family Code section 153.131 creates a rebuttable presumption that the appointment of a parent as managing conservator is in the best interest of the children unless the trial court finds that the appointment of the parent "would not be in the best interest of the child[ren] because the appointment would significantly impair the child[ren's] physical health or emotional development." *See* TEX. FAM. CODE ANN. § 153.131(a), (b).

The trial court may appoint DFPS as the managing conservator of the children without termination of parental rights if it finds by a preponderance of the evidence that:

> (1) appointment of a parent as managing conservator would not be in the best interest of the child[ren] because the appointment would

> significantly impair the child[ren's] physical health or emotional development; and
>
> (2) it would not be in the best interest of the child[ren] to appoint a relative of the child[ren] or another person as managing conservator.

Id. § 263.404(a); *see also id.* § 161.205 (providing that, if trial court does not order termination of parental rights, court shall either "deny the petition" or "render any order in the best interest of the child[ren]"); *In re C.L.J.S.*, No. 01-18-00512-CV, 2018 WL 6219615, at *3–4 (Tex. App.—Houston [1st Dist.] Nov. 29, 2018, no pet.) (mem. op.); *In re J.J.G.*, 540 S.W.3d at 57 (Texas Family Code section 263.404 governs trial court's appointment of DFPS as child's managing conservator without termination of parental rights). In making the determination, the trial court must consider the following factors: (1) that the children will reach eighteen years old in not less than three years; (2) that the children are twelve years old or older and have expressed a strong desire against termination of parental rights or has continuously expressed a strong desire against being adopted; and (3) the needs and desires of the children. TEX. FAM. CODE ANN. § 263.404(b).

Unlike the findings necessary to support termination of parental rights, which require clear and convincing evidence, a finding that appointment of a parent as managing conservator would significantly impair the children's physical health or emotional development is governed by a preponderance-of-the-evidence standard. *See In re J.A.J.*, 243 S.W.3d at 616; *see also* TEX. FAM. CODE ANN. § 105.005

("Except as otherwise provided by this title, the court's findings shall be based on a preponderance of the evidence."). In determining whether the evidence supports a trial court's determination that the appointment of a parent as managing conservator would not be in the best interest of the children because it would significantly impair the children's physical health or emotional development, courts can consider evidence of the parent's specific acts and omissions in the past, including a parent's use of narcotics, a parent's criminal history, a parent's failure to provide stability in the home, and a parent's failure to visit or communicate with the children, as well as other parental misconduct. *See Danet v. Bhan*, 436 S.W.3d 793, 797 (Tex. 2014); *In re C.L.J.S.*, 2018 WL 6219615, at *4. These 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 a managing conservator would impair the children'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.*, 2018 WL 6219615, at *4.

Mother spends only six sentences in her appellant's brief arguing that the trial court erred in appointing DFPS as the children's sole managing conservator. The entirety of mother's argument on this issue can be summed up in this sentence: Because "the evidence d[id] not support either the [trial court's] termination findings or . . . best[-]interest finding," "it follows that the trial court abused its discretion" in appointing DFPS as the children's sole managing conservator. Mother does not

address the applicable preponderance-of-the-evidence standard or provide any discussion, analysis, or argument as to how or why the evidence does not support the trial court's determination that the appointment of a parent as managing conservator would not be in the best interest of the children because it would significantly impair the children's physical health or emotional development. Mother's appellant's brief is devoid of any citation to appropriate authority to support her complaint.

Texas Rule of Appellate Procedure 38.1(i) requires that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i); *see also M&E Endeavors LLC v. Air Voice Wireless LLC*, Nos. 01-18-00852-CV, 01-19-00180-CV, 2020 WL 5047902, at *7 (Tex. App.—Houston [1st Dist.] Aug. 17, 2020, no pet.) (mem. op.) ("The briefing requirements are mandatory . . . ."). "This is not done by merely uttering brief conclusory statements, unsupported by [appropriate] legal citations." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *see also Barham v. Turner Constr. Co. of Tex.*, 803 S.W.2d 731, 740 (Tex. App.—Dallas 1990, writ denied) (appellant bears burden of discussing his assertions of error). The failure to provide substantive analysis of an issue or cite appropriate authority waives a complaint on appeal. *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57,

75 (Tex. App.—San Antonio 2011, no pet.); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.); *Cervantes-Peterson*, 221 S.W.3d at 255.

We hold that mother has waived her complaint that the trial court erred in appointing DFPS as the children's sole managing conservator due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i); *Richardson v. Marsack*, No. 05-18-00087-CV, 2018 WL 4474762, at *1 (Tex. App.—Dallas Sept. 19, 2018, no pet.) (mem. op.) ("Our appellate rules have specific requirements for briefing," including requiring "appellants to state concisely their complaints, to provide succinct, clear, and accurate arguments for why their complaints have merit in law and fact, to cite legal authority that is applicable to their complaints, and to cite appropriate references in the record."); *see also In re J.S.B.*, Nos. 01-17-00480-CV, 01-17-00481-CV, 01-17-00484-CV, 2017 WL 6520437, at *22 n.44 (Tex. App.—Houston [1st Dist.] Dec. 21, 2017, pet. denied) (mem. op.) (holding parent waived her complaint trial court did not appoint her as children's possessory conservator due to inadequate briefing).

Conclusion

We reverse the portions of the trial court's order terminating the parental rights of mother and father and remand the case to the trial court for a new trial. *See* TEX. R. APP. P. 28.4(c); *In re J.O.A.*, 283 S.W.3d at 347. We affirm the portion of the trial court's order appointing DFPS as the children's sole managing conservator. *See In re J.A.J.*, 243 S.W.3d at 612–13.

Julie Countiss
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.