Affirmed in Part and Reversed and Remanded in Part and Memorandum Opinion filed November 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00389-CV

IN THE INTEREST OF J.W.G., CHILD

On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2016-02093J

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

This is an appeal from a judgment terminating the parental rights of T.G. (Mother) and appointing the Department of Family and Protective Services (the Department) sole managing conservator of the child, J.W.G. (Jerry) following a jury trial. Mother and her father (Grandfather) raise several issues challenging the Final Decree of Termination.[1] We affirm in part and reverse and remand in part.

[1] Father did not appeal the termination of his parental rights.

BACKGROUND

In February 2015, the Department received a referral alleging neglectful supervision of one-month-old Jerry by Mother. It was reported Mother may be using methamphetamine and hanging out with known drug dealers. The Department was unable to make contact with Mother until May 2015. At that time, Mother agreed to participate in Family Based Safety Services (FBSS) and Jerry was placed with Grandfather pursuant to a parental child safety placement. The placement prohibited unsupervised contact between Mother or Father and Jerry. During the FBSS case, the Department received a referral of neglectful supervision. The referral alleged Grandfather was permitting Mother and Father to have unsupervised access to Jerry and that Mother and Father were using methamphetamine. In December 2015, another referral of neglectful supervision by Mother and Grandfather was received. Mother and Grandfather were reported to have engaged in an argument with Father in the presence of Jerry. Father threatened Grandfather during the argument. Father was arrested and incarcerated as a result of the incident.

On April 7, 2016, the Department filed a petition for termination of Mother's parental rights to Jerry. The Department also sought sole managing conservatorship. The Department was granted temporary custody of Jerry and he was placed with Father's mother (Grandmother). Grandfather intervened in the termination suit seeking "access, increased access, possession, and managing/possessory conservatorship (sole & joint)."

The case proceeded to a jury trial. The jury returned a verdict terminating Mother's parental rights and appointing the Department as the sole managing conservator of Jerry. This appeal followed.

ANALYSIS

Appellants raise five issues challenging the trial court's judgment: (1) the trial court erred in denying Mother's requested jury instructions requiring ten jurors to agree on the same ground for termination; (2) the trial court erred in denying Grandfather's requested jury question on joint managing conservatorship; (3) the trial court erred in denying Grandfather's requested jury question on possessory conservatorship; (4) the trial court erred in admitting evidence which was not produced in discovery, included hearsay, and was not authenticated; and (5) the trial judge violated Texas Rule of Evidence 605 by testifying as a witness.

A. Broad-Form Submission

Mother contends that it cannot be determined if ten jurors agreed on any one predicate ground for termination based on the charge submitted to the jury such that the charge is erroneous and violates Mother's due process rights. The Department responds that the trial court did not abuse its discretion in submitting the broad-form jury charge. We review alleged error in submitting the charge to the jury for abuse of discretion. *See Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses its discretion when it acts without reference to any guiding principle. *Id.*

The jury charge in the present case presented four predicate grounds for termination in the disjunctive and with a broad-form question regarding whether the parent-child relationship should be terminated. The jury charge included relevant "specific instructions" for the termination question as follows:

> For the parent-child relationship to be terminated in this case at least one, but not all, of the following grounds for termination must be proven by clear and convincing evidence for each child. While the jury need only find one of the following grounds for termination, at least ten jurors must agree that a parent committed at least one of the grounds

for termination regarding each child, and at least ten of the same jurors must agree that termination of that parent's rights is in each child's best interest.

(A) The parent knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; ***OR***

(B) The parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; ***OR***

(C) The parent failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in temporary managing conservatorship of [the Department] for not less than nine months as a result of the child's removal from the parent under Chapter 262 (Procedures in Suit by Governmental Entity) for the abuse or neglect of the child; ***OR***

(D) The parent used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and (1) failed to complete a court-ordered substance abuse treatment program; or (2) after completion of a court-ordered substance abuse treatment program continued to abuse a controlled substance,

AND

By clear and convincing evidence that:

Termination of the parental rights is in the best interest of the child.

The jury question stated "[i]n answering [the termination question], you are bound by the previous instructions[2] and definitions given." The jury answered "yes" to the question: "[s]hould the parent-child relationship between [Mother] and [Jerry] be terminated?"

[2] The instructions included the statement "[y]ou may render your verdict upon the vote of ten or more members of the jury. The same ten or more jurors must agree upon each and every answer(s) and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than the same ten jurors to each question."

The charge in a parental termination suit should be the same as in other civil cases. *E.B.*, 802 S.W.2d at 649. In all jury cases, the trial court shall, whenever feasible, submit the cause upon broad form questions. *See* Tex. R. Civ. P. 277. Mother contends that the predicate grounds submitted in the charge in the disjunctive does not allow a determination if ten jurors agreed to the same predicate ground.

Mother seeks to distinguish the leading case on this issue, *Texas Dept. of Human Services v. E.B.*, from the present case as *E.B.* involved termination under only subsections (D) and (E), which both involve endangerment. *Id.*, 802 S.W.2d at 648. Accordingly, Mother contends it was possible for the ten jurors in *E.B.* to agree that termination was appropriate on grounds of endangerment. However, although subsections (D) and (E) both focus on endangerment, they differ with regard to the source and proof of endangerment. *See In re A.S.*, 261 S.W.3d 76, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Accordingly, the charge in *E.B.* involved alternative grounds for termination submitted disjunctively, much like the charge in the present case. *See In re M.C.M.*, 57 S.W.3d 27, 31 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

According to the Texas Supreme Court, the controlling question in a parental termination case is whether the parent-child relationship should be terminated, not which specific predicate ground the jury relied on to affirmatively answer the question posed. *See E.B.*, 802 S.W.2d at 649. Further, the court rejected the argument that the charge, as presented to the jury, violated mother's due process rights. *See id.* Because the jury charge approved in *E.B.* is similar to that given in this case and *E.B.* has not been overruled, we conclude, as have several sister courts,[3] that *E.B.* is

[3] *Click v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00123-CV, 2010 WL 3927606, at *3 (Tex. App.—Austin Oct. 8, 2010, no pet.) (mem. op.) ("Because it remains true that the supreme court has not held that ten jurors must agree on a particular ground for termination, we again conclude that judgments based on broad-form submission of valid grounds for termination are acceptable."); *In re L.C.*, 145 S.W.3d 790, 795 (Tex. App.—Texarkana 2004, no

binding authority. Accordingly, we conclude the trial court did not abuse its discretion in presenting the jury a broad-form charge and the charge as presented did not violate Mother's due process rights. *See In re M.C.M.*, 57 S.W.3d at 31 (controlling issues properly submitted through broad-form submission); *Click v. Tex. Dep't of Family and Protective Servs.*, No. 03-10-00123-CV, 2010 WL 3927606, at *3 (Tex. App.—Austin Oct. 8, 2010, no pet.) (mem. op.) ("due process allows jurors to agree that at least one of the alleged grounds for termination has been proven without reaching an agreement as to any particular ground").

Alternatively, Mother contends the charge in the present case included an invalid predicate ground because there was insufficient evidence to terminate under subsection (O), an alternative ground presented in the termination question. Mother contends the presentation of an invalid predicate ground in the charge makes it impossible to determine if Mother's parental rights were terminated on a valid ground, relying on *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). Mother did not challenge the sufficiency of the evidence to support the predicate ground of subsection (O) in the trial court, nor does she on appeal. Mother also did not object to the submission of subsection (O). Indeed, Mother's proposed charge included the predicate ground of subsection (O). A complaint to the jury charge is waived unless the trial court is made aware of the complaint through an objection, timely and plainly, and a ruling is obtained. *See In re B.L.D.*, 113 S.W.3d 340, 349

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pet.) ("We, too, are bound by *E.B.*"); *In re J.M.M.*, 80 S.W.3d 232, 249 (Tex. App.—Fort Worth 2002, pet. denied), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d 256, 267, n. 39 (Tex. 2002) ("Without further guidance from the supreme court, it is difficult to see how [*Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000)] necessarily impacts the holding in *E.B.* that a broad-form submission of multiple grounds for termination comports with due process."); *In re K.S.*, 76 S.W.3d 36, 49 (Tex. App.—Amarillo 2002, no pet.) ("We are bound to follow *E.B.* unless the Texas Supreme Court overrules or vitiates it."); *In re M.C.M.*, 57 S.W.3d 27, 31, n. 2 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("*E.B.* has not been overruled, and this Court must follow it.")

(Tex. 2003); Tex. R. App. P. 33.1. We conclude Mother's challenge to the jury instruction based on the inclusion of an invalid predicate ground was waived. *See In re K.S.*, 76 S.W.3d 36, 48 (Tex. App.—Amarillo 2002, no pet.). We overrule appellants' first issue.

B. Admission of Evidence

Appellants' fourth issue challenges the admission of a video into evidence. Appellants contend the video should have been excluded because it was not produced in discovery, was not properly authenticated, and contained hearsay. We review a trial court's decision to admit evidence for an abuse of discretion. *See In re J.F.C.*, 96 S.W.3d 256, 285 (Tex. 2002).

For purposes of this appeal we presume that the trial court abused its discretion in admitting the video. Error in improperly admitting evidence is not reversible unless the error "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." Tex. R. App. P. 44.1(a); *In re E.A.K.*, 192 S.W.3d 133, 148 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). "Reversible error does not usually occur in connection with evidentiary rulings unless appellant demonstrates that the whole case turns on the particular evidence excluded or admitted." *Dudley v. Humana Hosp. Corp.*, 817 S.W.2d 124, (Tex. App.—Houston [14th Dist.] 1991, no writ). Error in the admission of evidence is harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection. *See In re E.A.K.*, 192 S.W.3d at 148.

Appellants' contentions on appeal regarding the harm caused by admission of the video relate primarily to the conservatorship findings. Appellants contend "[t]he 'dramatic' recording is 'the central issue of the case' and proves 'whether [Grandfather] can be protective and whether [Grandfather] is going to protect the

child from [Mother]." The Department contends the video was not harmful because it was cumulative of other evidence.

In the present case, the evidence presumed to have been erroneously admitted was a video[4] from a police body camera. The video depicted Grandfather outside Mother's apartment with two police officers. The video also depicted Father opening the door to Mother's apartment holding Jerry and Mother inside the apartment. The video contained statements by Grandfather indicating he was aware Jerry was in the apartment with both parents. At trial, the Department and ad litem relied on the video to argue Grandfather could not be protective of Jerry because the video evidenced a violation of Grandfather's agreement with the Department during FBSS to not allow unsupervised visitation by Mother or Father.

The record contains testimony from witnesses regarding unsupervised visits by Mother and Father with Jerry during the period Jerry was placed with Grandfather. Mother also testified generally regarding the incident depicted in the video. We recognize that the video was more striking than the witness testimony due to dramatic effect. However, appellants did not object to other evidence similar to that depicted in the video regarding Father's presence in the apartment and unsupervised visitation by the parents with Jerry. Accordingly, we conclude admission of the video into evidence was harmless. *See Mason v. Tex. Dep't of Family and Protective Servs.*, No. 03-11-00205-CV, 2012 WL 1810620, at *15 (Tex. App.—Austin May 17, 2012, no pet.) (mem. op.). We overrule appellants' fourth issue.

[4] The record indicates a second video was played to the jury from the second officer's body camera from the same incident. The record does not indicate that the second video was admitted as an exhibit at trial and no party complains about the failure to admit the second video as an exhibit on appeal. Accordingly, we review appellants' fourth issue based on the admission into evidence of the first video.

C. Trial Judge's Witness Testimony

In their fifth issue, appellants contend the trial judge abused his discretion in testifying as a witness. Appellants point to three instances where they contend the trial judge improperly testified before the jury. The Department contends the statements were judicial in nature and did not constitute witness testimony.

Rule 605 of the Texas Rules of Evidence states "[t]he presiding judge may not testify as a witness at trial. A party need not object to preserve the issue." Tex. R. Evid. 605. We evaluate "whether the judge's statement of fact is essential to the exercise of some judicial function or is the functional equivalent of witness testimony." *In re C.C.K.*, No. 02-12-00347-CV, 2013 WL 452163, at *33 (Tex. App.—Fort Worth Feb. 7, 2013, no pet.) (mem. op.).

The first instance in which appellants contend the trial judge testified involves the following exchange:

Q Now, isn't your big fear that [Jerry] might go to foster care?

A Yeah, that is a fear of mine.

Q Now, right now CPS has primary custody. They're the managing conservator?

A That's right.

Q But that's not you. You're not the managing conservator?

A No. CPS.

Q CPS has the right to determine where [Jerry] lives?

A That's right.

Q You don't have that, right?

A That's right.

Q And CPS can remove [Jerry] from you and place where they --

A Yes.

Q -- want.

A Yes.

THE COURT: Subject to Court approval. Make sure you put that, subject to Court's acquiescence.

Appellants contend the judge's comment indicated the court's favor in appointing the Department managing conservator of Jerry. Appellants further contend the comment defused their argument that the Grandfather would be a preferred managing conservator to the Department which had not been trustworthy or reliable. A trial court has discretion over the conduct of a trial and the authority to express itself in exercising this broad discretion. *See Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 240–41 (Tex. 2001). The judge's comments in this instance are aimed at clarifying the law. We conclude the judge's comment was an exercise of judicial function and not the functional equivalence of witness testimony.

Next, appellants contend the following was testimony by the trial judge during Grandfather's cross-examination of Grandmother:

Q Let me show you Petitioner's 48, this is a booklet of all sorts of photos of [Jerry]?

A Yes.

Q That's a very nice photo -- I mean, album.

A Uh-huh.

Q Did you do this?

A It's probably pictures that I took.

Q No, I mean this album. Who put this album together?

MR. MILLARD: Your Honor, that's irrelevant. I did it. That's irrelevant.

MR. POOCK: Judge --

THE COURT: It's irrelevant who put it together.

Appellants contend they were trying to establish that Grandmother did not put together the photo album to rebut evidence that she was a great caretaker for Jerry.

Appellant contends the trial judge's statement contradicts this argument. However, the trial judge's statement was not the "functional equivalent of witness testimony." *See In re C.C.K.*, 2013 WL 452163, at *33. Rather, the trial judge's statement was a ruling on an evidentiary objection.

Finally, appellants contend that the following comments by the trial judge constitute witness testimony:

> Q (By Mr. Millard) Ma'am, you understand that before you can adopt, there will be a detailed home study done on you?
>
> MR. POOCK: Personal knowledge, Your Honor.
>
> THE COURT: If you know, ma'am.
>
> A I've gone through a foster to adopt licensing program, and they said that the adoption is a lot like the --
>
> MR. POOCK: This is hearsay, Your Honor.
>
> A Is a lot like the foster.
>
> THE COURT: Sustained.
>
> Q (By Mr. Millard) More importantly, you understand that the adoption never occurs unless the ad litem and Court approve it?
>
> MR. POOCK: Personal knowledge and speculation. She doesn't know the legal –
>
> THE COURT: Do you know that the case is still monitored by the Court?
>
> THE WITNESS: Yeah.

Appellants contend the trial judge's statement indicated to the jury he would monitor the case such that the Department's reliability did not matter. We disagree. The trial judge's comment does not "convey factual information not in evidence." Rather, the statement is made in performance of his judicial function determining whether the witness had personal knowledge so a ruling on the objection could be made.

We conclude the complained of comments served a judicial function and do not constitute the trial judge testifying as a witness. We overrule appellants' fifth

issue.

D. Conservatorship Jury Questions

The second and third issues challenge jury questions requested by Grandfather on joint conservatorship and possessory conservatorship. The trial court refused all of Grandfather's requested jury questions on conservatorship.

Grandfather contends the trial court erred in denying his requested jury questions related to joint and possessory conservatorship. The Department responds that Grandfather's pleadings were insufficient to raise the issue of joint or possessory conservatorship such that the trial court's refusal was proper. As to the requested instruction on possessory conservatorship, the Department contends Grandfather's objection at trial was untimely and therefore waived. Finally, the Department contends Grandfather lacked standing to intervene in the suit and should be denied all relief on appeal.

1. Standing

While the record on appeal does not indicate that the Department challenged Grandfather's standing to intervene in the suit before the trial court, the Department challenges his standing on appeal. Constitutional standing is a requirement of subject matter jurisdiction; it cannot be waived and may be raised by a party or a court at any time, including on appeal. *See In re K.S.*, 492 S.W.3d 419, 423 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The Department does not challenge Grandfather's constitutional standing, nor could it successfully do so. *See id.* at 423.

Instead, the Department challenges Grandfather's ability to maintain this suit under the Family Code. *See id.* (explaining distinction between constitutional requirement that plaintiff have standing, which implicates court's jurisdiction and may be raised for the first time on appeal, and statutory restrictions on who may

bring suit, which affect plaintiff's right to relief rather than court's jurisdiction). Generally, standing to intervene is commensurate with standing to file an original lawsuit. *See In re N.L.D.*, 412 S.W.3d 810, 815 (Tex. App.—Texarkana 2013, no pet.). Statutory standing to file an original suit affecting the parent-child relationship is governed by sections 102.003 and 102.004 of the Family Code. *See id.*; Tex. Fam. Code Ann. §§ 102.003, 102.004. The Department contends Grandfather's remedy was to file an independent suit within 90 days of the decree of termination under section 102.006 of the Family Code. *See* Tex. Fam. Code Ann. § 102.006(a).

Because this argument does not implicate the trial court's jurisdiction, but rather concerns whether Grandfather met the statutory requirements for maintaining suit, it may not be raised for the first time on appeal. *See In re K.S.*, 492 S.W.3d at 423; *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000). Yet even if the argument had been preserved, it would fail. Section 102.006, relied on by the Department, applies after parental rights have been terminated. The present case involves Grandfather's intervention into a suit to terminate parental rights brought by the Department. Accordingly, Grandfather's statutory standing to intervene is governed by sections 102.003 and 102.004. *See In re G.H.*, No. 02-14-00261-CV, 2015 WL 3827703, at *3 (Tex. App.—Fort Worth June 18, 2015, no pet.) (mem. op.); *In re N.L.D.*, 412 S.W.3d at 218.

Grandfather's petition in intervention stated he was "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Grandfather's petition in intervention pled a proper basis for statutory standing under section 102.003(a)(9). *See* Tex. Fam. Code Ann. § 102.003(a)(9). "[P]leading a proper basis for standing is sufficient to show standing, unless a party challenges standing and submits evidence showing the non-existence of a fact

necessary for standing." *In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Based on the record before our court, no party challenged Grandfather's standing to intervene in the trial court. Additionally, the Department does not challenge Grandfather's pleadings regarding statutory standing in this court. Rather, the Department contends Grandfather lacked standing because section 102.006 required him to file suit 90 days after the termination decree was final. However, Grandfather's pleading is sufficient to show statutory standing under section 102.003(a)(9). *See* Tex. Fam. Code Ann. § 102.003(a)(9); *In re K.D.H.*, 426 S.W.3d at 884. Nothing more was required.

2. Joint Conservatorship

During the charge conference, Grandfather objected "to no question on joint managing conservatorship." Grandfather submitted the following proposed jury questions as to joint conservatorship:

> **Question 1:**
>
> Who should be appointed managing conservator of the child?
>
> You may answer by naming one person sole managing conservator or by naming ***two persons*** joint managing conservators.
>
> Answer in writing the name of the person who should be appointed sole managing conservator or by writing the names of the ***two persons*** who should be appointed joint managing conservators.
>
> **Question 2:**
>
> If, in answer to Question 1, you named ***two persons*** joint managing conservators of the child, then answer Question 2 and Question 3. Otherwise, do not answer Question 2 and Question 3.
>
> Which joint managing conservator should have the exclusive right to designate the primary residence of the child?
>
> Answer by writing the name of the joint managing conservator.
>
> **Question 3:**
>
> Should the joint managing conservator you named in Question 2 above

be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?

Answer by writing "Without regarding to geographic location" or "With a geographic restriction."

Question 4:

If you answered Question 3 "With a geographic location," answer Question 4. Otherwise, do not answer Question 4.

State the geographic area within which the joint managing conservator must designate the child's primary residence.

The requested questions on joint managing conservatorship follow the pattern jury charge. *See* Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Family & Probate PJC 216.1A (2016).

A trial court shall submit the questions, instructions, and definitions raised by the written pleadings and the evidence. Tex. R. Civ. P. 278; *In re T.S.*, No. 14-05-00348-CV, 2006 WL 1642218, at *6 (Tex. App.—Houston [14th Dist.] June 15, 2006, no pet.) (mem. op.). If some evidence is presented to support the submission of the requested question, the trial court commits reversible error if it fails to submit the question. *4901 Main, Inc. v. TAS Automotive, Inc.*, 187 S.W.3d 627, 631 (Tex. App.—Houston [14th Dist.] 2006, no pet.). "A trial court may refuse to submit an issue only if no evidence exists to warrant its submission." *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). We review error as to jury questions for an abuse of discretion. *In re T.S.*, 2006 WL 1642218, at *6.

Written Pleadings Raised Joint Conservatorship

The Department contends Grandfather's pleadings did not raise the issue of joint conservatorship. Grandfather objected to the jury questions not including a question on joint conservatorship and tendered a question on joint managing conservatorship to the court. The trial judge stated "[t]he way you've pled the joint managing -- the request in your pleadings had in your prayer, it had, in parenthesis,

sole and joint, but it's not specific enough as to give the Court knowledge." Accordingly, the trial court denied the request and denied Grandfather's request to re-plead. The trial judge signed and marked the requested questions "refused."

Grandfather contends his petition in intervention supported the requested question on joint conservatorship. Grandfather's petition in intervention prayed for "access, increased access, possession, and managing/possessory conservatorship (sole & joint)." A pleading should contain "a short statement of the cause of action sufficient to give fair notice of the claim involved." Tex. R. Civ. P. 47(a). In the absence of special exceptions, a pleading should be construed liberally in favor of the pleader. *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). A court should uphold the pleading as to a claim that may be reasonably inferred from what is specifically stated. *Id*. Here, the pleadings were sufficient to put the Department on notice that Grandfather was intervening for conservatorship of Jerry – either managing or possessory and sole[5] or joint.

Evidence Supported a Jury Question on Joint Conservatorship

The Department also contends that joint conservatorship is not permitted under section 161.207. *See* Tex. Fam. Code Ann. § 161.207. We disagree. "If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Family and Protective Services, or a licensed child-placing agency as managing conservator of the child." Tex. Fam. Code Ann. § 161.207(a). The Texas Family Code chapter providing for involuntary termination of parental rights does not mention joint or sole managing conservatorship; it simply provides for the appointment of a managing conservator following termination. *See id.*

[5] A jury question was submitted to the jury on sole managing conservatorship in which the jury could choose between the Department and Grandfather.

§ 161.001-.211; *In re T.S.*, 2006 WL 1642218, at *5. Accordingly, we turn to Chapter 153 of the Texas Family Code to determine when joint managing conservatorship may be granted. *In re T.S.*, 2006 WL 1642218, at *5.

In suits affecting the parent-child relationship, the court may appoint a sole or joint managing conservators, unless there is credible evidence of a history of child abuse or neglect. *See* Tex. Fam. Code Ann. §§ 153.004, 153.005(a). Joint managing conservators share parental rights and duties. *In re T.S.*, 2006 WL 1642218, at *5. "A nonparent, [the Department], or a licensed child-placing agency appointed as a joint managing conservator may serve in that capacity with either another nonparent or with a parent of the child." Tex. Fam. Code Ann. § 153.372(a). Section 153.372 permits the Department to serve as joint managing conservator with another nonparent, such as Grandfather. Additionally, courts have appointed joint managing conservators in the judgment terminating parental rights. *See In re C.A.B.*, 289 S.W.3d 874, 878 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (affirming trial court judgment terminating parental rights and appointing grandparents joint managing conservators); *In re R.A., Jr.*, No. 07-08-0084-CV, 2009 WL 77853 (Tex. App.—Amarillo Jan. 13, 2009, no pet.) (mem. op.) (wherein court affirmed trial court order appointing Department and foster parents joint managing conservators).

In determining issues of conservatorship and possession, the best interest of the child is the primary consideration. Tex. Fam. Code Ann. § 153.002. In reviewing whether there was some evidence that would support a jury question on joint conservatorship, we look to what evidence is considered in supporting a best interest finding.[6] Courts may consider the following non-exclusive factors in reviewing the sufficiency of the evidence to support the best-interest finding: the desires of the

[6] We note that the trial judge found sufficient evidence to submit a question as to Grandfather's serving as sole managing conservator.

child; the physical and emotional needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

In the present case, evidence of Jerry's best interest was offered relevant to the needs of Jerry, Grandfather's parental abilities, Grandfather's plans for the child, and the stability of Grandfather's home. Additionally, in response to the Department's suggestion that appointing Grandfather as conservator would not be appropriate based on past actions, Grandfather asked a Department caseworker whether the Department could monitor Grandfather if they were appointed joint managing conservators. We conclude some evidence was offered to support the submission of a question on joint conservatorship to the jury.

Because joint conservatorship was raised by the pleadings and evidence, the trial court abused its discretion in refusing to submit a question on joint conservatorship to the jury. If a trial court errs in refusing to submit a jury question, we do not reverse absent harm. *Heritage Gulf Coast Properties, Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 655 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also* Tex. R. App. P. 44.1(a). The omission of an instruction is reversible error if the omission probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a). In determining harm, we consider the entire record, including the pleadings, evidence, and charge. *4901 Main, Inc.*, 187 S.W.3d at 631.

It is harmful error to refuse a jury question on a valid theory of recovery raised

by the pleadings and evidence when the question is timely raised and requested as part of the charge. *See Exxon Corp. v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992). Here, Grandfather pled and submitted evidence regarding conservatorship, including joint conservatorship. Additionally, in a parental-termination suit "the court may appoint a sole managing conservator or may appoint joint managing conservators." Tex. Fam. Code Ann. § 153.005. In this case, the trial court's refusal of Grandfather's requested instructions on joint managing conservatorship prevented the factfinder from considering this viable claim. Accordingly, we conclude the trial court abused its discretion in refusing Grandfather's requested jury questions on joint conservatorship and that the abuse of discretion was harmful. We sustain appellants' second issue.[7]

CONCLUSION

We affirm the portion of the trial court's judgment terminating Mother's parental rights to Jerry. We reverse the portion of the trial court's judgment which names the Department sole managing conservator of Jerry and remand this case for a new trial on conservatorship. *See* Tex. R. App. P. 44.1(b). We affirm the remainder of the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Busby, and Donovan.

[7] Having sustained appellants' second issue regarding the requested jury instructions on joint conservatorship, we do not address appellants' third issue regarding the requested jury instructions on possessory conservatorship. *See* Tex. R. App. P. 47.1.